

No. _____

IN THE
Supreme Court of the United States

KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS;
MONTGOMERY COUNTY BOARD OF EDUCATION; SHEBRA
L. EVANS, MONIQUE FELDER, LYNNE HARRIS, GRACE
RIVERA-OVEN, KARLA SILVESTRE, REBECCA
SMONDROWSKI, BRENDA WOLFF, and JULIE YANG,
individually & in their official capacities as Members
of the Montgomery County Board of Education,

Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After Petitioner Kimberly Polk completed her first year of substitute teaching for Maryland’s Montgomery County Public Schools (“MCPS”), Respondents required her to confirm that she would comply with MCPS’s Guidelines for Student Gender Identity. But Polk’s deeply held Christian beliefs prevented her from complying with the Guidelines’ requirements (1) compelling her to use “preferred” pronouns inconsistent with a student’s biological sex, and (2) prohibiting her from telling parents that the school was helping their children transition genders. So she declined to confirm her compliance with the policy, MCPS denied Polk’s requested accommodation, and she was unable to continue teaching.

A divided Fourth Circuit held that *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), excused the acknowledged burden on Polk’s free exercise of religion and speech. Judge Wilkinson “vigorously” dissented. This dispute presents two questions for the Court’s review:

1. When public schools try to force teachers, over their religious objections, to use pronouns inconsistent with a student’s biological sex and to hide from parents information about their child’s gender expression at school, does *Smith* apply and foreclose heightened scrutiny under the Free Exercise Clause?

2. Do public schools violate the Free Speech Clause when they compel objecting teachers to adhere to such a school policy?

PARTIES TO THE PROCEEDING

The Petitioner is Kimberly Ann Polk.

The named Respondents are Montgomery County (Maryland) Public Schools (“MCPS”); Montgomery County (Maryland) Board of Education (“MCBE”); and MCBE Board Members Shebra L. Evans, Monique Felder, Lynne Harris, Grace Rivera-Oven, Karla Silvestre, Rebecca Smondrowski, Brenda Wolff, and Julie Yang. Due to elections that occurred after this action began, Rita Montoya, Laura Stewart, and Natalie Zimmerman have replaced Shebra Evans, Monique Felder, and Lynne Harris as MCBE members.

LIST OF ALL PROCEEDINGS

The related proceedings are as follows:

Polk v. Montgomery Cnty. Pub. Schs., 166 F.4th 400 (4th Cir. 2026) (reproduced at App.1a–52a).

Polk v. Montgomery Cnty. Pub. Schs., No. DLB-24-1487 (D. Md. Jan. 17, 2025) (reproduced at App.53a–105a).

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STATEMENT OF JURISDICTION

The Fourth Circuit issued its opinion on January 28, 2026. App.2a. Chief Justice Roberts extended the time to file a petition to June 27, 2026. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND REGULATIONS

The First Amendment provides that “Congress shall make no law ... prohibiting the free exercise [of religion]; or abridging the freedom of speech”

The Fourteenth Amendment, § 1, provides that “[n]o state shall ... deprive any person of life, liberty, or property, without due process of law”

The MCPS Gender Identity Guidelines provide, in relevant part, “School staff members should address students by the name and pronoun corresponding to the gender identity that is consistently asserted at school.” Joint Appendix, *Polk v. Montgomery County Public Schools*, No. 25-1136 (4th Cir. Mar. 26, 2025) (“JA”) at JA67. “All students have a right to privacy.” App.5a. “This includes the right to keep private one’s transgender status or gender nonconforming presentation at school.” *Ibid.*

“The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose students’ status to others, including parents/guardians ..., unless legally required to do so or unless students have authorized such disclosure.” *Ibid.*

“Unless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, MCPS school staff members should use the student’s legal name and pronoun that correspond to the student’s sex assigned at birth.” JA67.

INTRODUCTION

This case presents a question of profound and growing importance: whether the First Amendment allows a public school to compel its teachers to endorse one side of a noncurricular, controversial issue simply by labeling the compelled speech a job duty. The answer should be *no*. But the Fourth Circuit, over Judge Wilkinson’s vigorous dissent, held otherwise—breaking with two other courts that have addressed the issue.

This Court last term in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), held that the Constitution requires this same school district to (1) notify parents when teachers used books affirming transgenderism with their children, and (2) allow parents to opt their children out of such instruction. Kimberly Polk objects to being forced to hide even more vital information from parents—that their child is *actually* socially transitioning. She also objects to being forced to use wrong-sex pronouns to mislead children into believing they can change their God-given sex.

By rejecting Polk’s free exercise challenge, the Fourth Circuit flouted *Mahmoud*’s animating logic: at a minimum, *Smith* does not apply when the government imposes a burden on free exercise “of the same character” as the burden imposed in cases where the Court has held that even a neutral and generally applicable law must be subjected to strict scrutiny. *Mahmoud*, 606 U.S. at 564.

As *Mahmoud* held, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), is one such case. Applying the same logic, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), is another.

As the *Mahmoud* dissent agreed, *Barnette* forbids the government from compelling speech that requires citizens to “declare a belief” contrary to their own religious views.” 606 U.S. at 602 (Sotomayor, J., dissenting) (quoting *Barnette*, 319 U.S. at 631). And Respondents have tried to impose that “especially egregious” free exercise burden here. *Id.* at 548.

The Fourth Circuit also created a circuit split by holding that a plaintiff can defeat neutrality only by pleading overt religious hostility or animus. The Ninth Circuit has correctly held that a law’s obvious and predominant effect can be enough to show non-neutrality. (And if *Smith* applies and prevents Polk from obtaining relief for an acknowledged burden on her religious exercise, *Smith* should be reassessed.¹)

On free speech, the panel majority’s expansive reading of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), would tear a gaping “government speech” hole in the fabric of the First Amendment. In *Garcetti*, this Court rejected the suggestion that public “employers can restrict employees’ rights by creating excessively broad job descriptions.” *Id.* at 424–25. The Sixth Circuit and the Supreme Court of Virginia have rejected a reading of *Garcetti* that would force teachers to endorse government orthodoxy on gender

¹ The Supreme Court of Virginia’s 2023 decision in a case almost factually identical to this one offers a robust historical and legal framework through which this Court could reconsider *Smith* and the legal standard that should replace it. See *Vlaming v. West Point Sch. Bd.*, 895 S.E.2d 705, 718–29 (Va. 2023) (surveying Virginia’s state constitutional history, rejecting *Smith*’s view that religious freedoms “vanish simply because a purely secular law says so,” and adopting a history-based version of strict scrutiny instead).

identity, a noncurricular matter of profound moral and theological significance. The Eleventh and now the Fourth Circuits have gone the other way. And those rulings reflect a broader trend among the circuits to read *all* in-classroom teacher speech as government speech—a reading that runs headlong into *Kennedy v. Bremerton School District*, 597 U.S. 507, 531 (2022).

Gender identity policies like these threaten to drive traditional religious beliefs about sexuality out of our public schools. At last count, across the country, there were over 1,200 policies with these features affecting over 12 million K–12 students and thousands of teachers. *List of School District Transgender – Gender Nonconforming Student Policies*, Defending Educ., perma.cc/RC2L-TDBN (last updated May 4, 2026). In *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam), this Court confirmed that deceiving parents about a school’s attempt to socially transition their children likely violates the Constitution. Yet Respondents continue to coerce teachers to serve as instruments of that deception.

This petition presents questions of undeniable national importance. And it offers the Court an opportunity to resolve doctrinal disputes in the lower courts about the proper scope of this Court’s rulings in *Mahmoud*, *Kennedy*, *Smith*, *Barnette*, and *Garcetti*. The Court should grant the petition, resolve those disputes, and decide whether government officials can compel and censor teachers on matters of profound public and religious significance.

STATEMENT OF THE CASE

I. Factual Background

A. Polk's Religious Beliefs

Polk is a Christian, a mother, and an educator. She believes “God created individuals as either male or female and [that] she would act unethically if she affirmatively assisted children to present as other than their God-given sex.” JA24. “This would include lying to children by using pronouns for them that do not match their God-given, biological sex.” *Ibid.* She also believes “God gave parents the primary responsibility for the care and upbringing of their minor children and it would be unethical for her to hide from parents that their child is transitioning genders at school.” *Ibid.* Doing any of those things would violate her sincerely held religious beliefs. JA31.

While Polk cannot use preferred pronouns, she can “use the name for [a] child that the child and [the child's] parents wish[.]” for her to use. JA41. And because she believes “we were all created by God” and “have equal worth and dignity,” Polk treats all her students “with courtesy and respect.” JA38, JA41.

B. Polk's Teaching Experience at Montgomery County Public Schools

Respondents hired Polk as a substitute teacher in 2021. App.6a. Polk made sure to substitute the necessary days during the 2021–2022 school year to remain qualified for more regular work the next school year. App.6a–7a.

Polk’s teaching during the 2021–2022 school year was successful and uneventful. Calling on her experience as a mother, Polk made special effort to “be positive in all [her] encounters with children, to build them up, to help them realize that each of them is valuable, and to teach them to treat others as they would like to be treated.” JA40. She received “very positive feedback” for all her work. *Ibid.* As a result, she expected she would have “ample opportunities” to meet her aim to work “at least three full days per week” for the following school year. *Ibid.*

C. MCPS’s Gender Identity Guidelines

Those expectations were dashed in August 2022 when Polk logged on to the MCPS teacher portal for mandatory training for the new school year. JA40. The training included a segment on MCPS’s Guidelines for Student Gender Identity, which grant students “the right to keep private [their] transgender status or gender nonconforming presentation at school.” App.5a. The Guidelines require all staff to “address students by the name and pronoun corresponding to the gender identity that is consistently asserted at school.” App.4a. With parents, though, unless the student directs otherwise, staff must “use the student’s legal name and pronoun that correspond to the student’s sex assigned at birth.” App.57a.

D. MCPS’s Refusal to Accommodate

Unable to affirm that she would follow those Guidelines, Polk asked MCPS for an accommodation to allow her to use students’ preferred names instead of pronouns. JA24. Based on her substantial experience working with children, “referring to a transgender student only by preferred name while

referring to other students by both their name and pronouns would neither be noticed ... nor cause them to feel any ‘stigma.’” JA152. The MCPS official with whom Polk initially conferred discussed with her the parameters of a possible accommodation, subject to MCPS’s approval. JA24. Under the accommodation, Polk would not have been forced to use preferred pronouns and would not have been required to sign the affirmation provided she agreed to teach only in elementary schools and the preschool special-education program. JA24–25.

Polk agreed to that compromise solution. JA25. But MCPS rejected it, telling Polk she was required to comply fully with the Guidelines—which Polk could not do in good conscience. JA25, 42, 87. “As a result, Polk did not substitute teach in Montgomery County during the 2022–23 or 2023–24 school years,” App.8a, resulting “in a negative financial impact to [her] and her family,” JA25. Through counsel, MCPS later claimed it could not allow “one single employee to claim a religious accommodation” without unduly disrupting its “operations.” JA93. Thus, put “to the choice of losing [her] job or violating [her] religious beliefs,” JA43, after exhausting her EEOC remedy, Polk filed this lawsuit.

II. Proceedings Below

In May 2024, Polk filed a verified complaint in the district court, alleging as-applied free exercise, free speech, and Title VII violations, and seeking preliminary and permanent injunctions and monetary relief. JA31. She alleged that, over her religious objections, MCPS tried to compel her to refer to students using preferred pronouns and “to communi-

cate misleading messages to parents ... regarding an important, non-curricular decision affecting the health and welfare of their children.” JA21, 24, 30–31.

In January 2025, the district court dismissed Polk’s free exercise and free speech claims and denied her request for a preliminary injunction. App.54a, 102a–105a.

Polk appealed the denial of the preliminary injunction. Exercising its pendent appellate jurisdiction to review the underlying dismissals, a divided panel of the Fourth Circuit affirmed. App.3a–4a.

On free exercise, the court rejected the argument that *Smith* “is not the correct framework to apply here,” and held under *Smith* that the Guidelines are neutral and generally applicable and need not survive strict scrutiny. App.18a–19a, 21a–26a.

On free speech, the court applied *Garcetti* and held that “how a teacher addresses a particular student in a particular classroom—and whether a teacher communicates with a student’s parent—is merely a part of that teacher’s job description.” App.31a. As a result, that speech “is the speech of the Board,” App.33a (quoting district court opinion), and the First Amendment does not protect it. App.32a.

Judge Wilkinson “vigorously” disagreed with the majority’s free speech analysis. In his view, *Garcetti* does not apply to “compelled speech on noncurricular matters” because, unlike with curricular speech, “state control” over noncurricular speech is not “necessary for ensuring educational standards across classrooms.” App.50a (citing *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 373 (4th Cir. 1998)

(en banc) (Luttig, J., concurring); *Vlaming v. West Point Sch. Bd.*, 895 S.E.2d 705, 741–43 (Va. 2023); and *Wood v. Florida Dep’t of Educ.*, 142 F.4th 1286, 1299–1300 (11th Cir. 2025) (Jordan, J., dissenting)). If the majority’s reasoning were correct, there would be “no limit to the words the state [could] put in teachers’ mouths.” App.48a. And states would be free to “mandate that teachers voice opinions contrary to their own without any First Amendment protection whatsoever.” *Ibid.*

To avoid that result, Judge Wilkinson would have applied “the *Pickering* balancing test [courts] have used for over half a century.” App.50a. And because Polk was “not threatening to use biological pronouns or to harass transgender students,” he believed that the result of *Pickering*’s “interest balancing is as obvious as if MCPS were playing seesaw with a lead block.” App.46a–47a. Thus, Judge Wilkinson would have enjoined the Guidelines as applied to Polk as “a gross assault upon the First Amendment.” App.52a.

In response to Judge Wilkinson’s dissent, the panel majority reasoned it was enough that Polk had challenged “the validity of the Guidelines as they pertain to her conduct inside the classroom.” App.37a. And “no one [had] forced [her] to become a substitute teacher in Montgomery County.” *Ibid.*

REASONS FOR GRANTING THE WRIT

This case raises the issue presented to but not decided by this Court in *Mirabelli*: whether a public-school district, as a condition of public employment, can constitutionally (1) compel teachers to use a student’s preferred pronouns and (2) prohibit teachers from telling parents that their child is undergoing a social gender transition at school. See 607 U.S. at 496 (granting the application and vacating the stay but only “with respect to the parents”).

A divided Fourth Circuit panel answered in the affirmative, “leav[ing] teachers completely vulnerable to becoming the unwilling mouthpieces of government messaging.” App.39a (Wilkinson, J., dissenting). But this Court’s decisions in cases like *Mahmoud*, *Barnette*, *Kennedy*, and *Pickering* suggest strongly the answer is *no*. And while “transgender-rights advocates may now cheer” the decision below, they will find the panel majority’s “cure in truth a poison when states enact legally indistinguishable policies *preventing* teachers from using preferred pronouns in school.” App.39a (Wilkinson, J., dissenting).

Lower courts have reached conflicting results over the questions presented by policies like the one challenged in this case, demonstrating the need for this Court’s immediate intervention.

By granting certiorari in this case, the Court “could ensure that the issues raised by such policies receive the careful, disciplined consideration they merit.” *Mirabelli*, 607 U.S. at 504 (Kagan, J., dissenting). The petition should be granted.

I. The Fourth Circuit Ignored *Mahmoud's* Principal Reasoning and Broke from Other Circuits in Applying *Smith*

In *Mahmoud*, this Court held that *Smith* does not control when the burden the government has imposed on religious exercise has the “same character” as the burden imposed in *Yoder*. 606 U.S. at 564. As this Court there and Judge Wilkinson below both recognized, this case involves even more “egregious” direct coercion: compelled affirmation in violation of the speaker’s religious beliefs. *Id.* at 523; App.42a. Yet the Fourth Circuit rejected the teachings of *Mahmoud* involving this very same school district. Not only does this case implicate the same concerns as *Yoder* and *Mahmoud*, but the burden imposed on Polk is of the same character as the egregious burden imposed in *Barnette*. This Court should grant the petition to confirm that *Smith* does not shield the government from accountability when it compels anyone—even its employees—to personally endorse a belief that is contrary to their own religious views.

The decision below also implicates a circuit split even under *Smith*. It is common knowledge that those who hold to traditional religious beliefs about sexuality are most directly affected by transgender-affirming policies. The Fourth Circuit refused to give that fact any weight, instead ruling “as a matter of law”—and in conflict with the Ninth Circuit—that, to surmount *Smith's* neutrality prong, a party like Polk must plead facts showing an expressed, anti-religious animus by government officials when adopting the policy or that the challenged policy *exclusively* burdens the religious.

A. Applying *Mahmoud*'s Logic, *Smith* Does Not Apply to Free Exercise Burdens of the Same Character as Those in *Barnette*

In *Mahmoud*, this Court identified two bases for its holding that, when a free exercise burden “is of the same character as that imposed in *Yoder*,” courts “need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny.” 606 U.S. at 564. First, in *Yoder*, this Court rejected the argument that a *Smith*-like test should apply. *Ibid.* Second, in *Smith*, this Court “recognized *Yoder* as an exception” to its two-part test. *Ibid.*

What is true of *Yoder* applies equally to *Barnette*. First, in *Barnette*, this Court rejected the view that a *Smith*-like test should apply because the compulsory flag salute there was “an unquestioned general rule.” 319 U.S. at 635 (rejecting the view accepted in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)). The dissent argued—unsuccessfully—that “general non-discriminatory” rules should fall outside the Free Exercise Clause’s reach. *Id.* at 651 (Frankfurter, J., dissenting). Second, *Smith* recognized that *Barnette*, like *Yoder*, involved free exercise concerns to which its test did not apply. 494 U.S. at 881–82. Thus, *Smith* should not apply when the burden is of the “same character” as the “especially egregious” burden in *Barnette*. *Mahmoud*, 606 U.S. at 548, 564.

Minimizing *Mahmoud*, the panel majority below dismissed the applicability of *Mahmoud*'s rationale in a footnote and proceeded to apply *Smith*. App.18a–19a n.8. This Court should intervene to confirm that *Smith* does not apply when the burden imposed is of the same character as in *Barnette*.

1. Like the Rights in *Yoder*, the Right Protected in *Barnette* Is Part of Our Enduring American Tradition

Mahmoud observed that the parental right to direct the religious upbringing of children is based on an “enduring American tradition.” 606 U.S. at 522 (quoting *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 486 (2020), quoting *Yoder*). The right vindicated in *Barnette*—to be free from compelled religious expression—is equally fundamental: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” 319 U.S. at 642 (emphasis added).

Mahmoud singled out *Barnette* as an “early example” of the “limits on the government’s ability to interfere with a student’s religious upbringing in a public school setting.” 606 U.S. at 547–48; accord Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 63 n.253 (1990) (noting that, in *Barnette*, “votes essential to the majority filed concurring opinions based on the Free Exercise Clause”). Indeed, the core right belongs to all citizens and goes back to the founding. As Thomas Jefferson wrote in the enacting clause of his Virginia Bill for Establishing Religious Freedom, “all men shall be free to profess, and by argument to maintain, their opinion in matters of religion,” and “the same shall in no wise diminish, enlarge, or affect their civil capacities.” 12 Hening’s Statutes at Large 86 (1823).

“Official compulsion to affirm what is contrary to one’s religious beliefs is the antithesis of freedom of worship ...” *Barnette*, 319 U.S. at 646 (Murphy, J., concurring); accord *id.* at 631 (“[W]e are dealing with a compulsion of students to declare a belief.”). That explains why—when deciding *Smith* almost 50 years later—this Court recognized *Barnette*, like *Yoder*, as one of the “only decisions in which” this Court has “held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action.” 494 U.S. at 881–82.

Applying *Mahmoud*’s logic, then, this Court’s distinctive treatment of the right in *Barnette* means that “strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable” any time the “law imposes a burden of the same character as that in [*Barnette*].” *Mahmoud*, 606 U.S. at 565. “*Yoder* and *Barnette* embody a very different view of religious liberty, one that comports with the fundamental values of the American people.” *Id.* at 559.

2. This Case Shows Why *Smith* Should Not Apply to Cases Like *Barnette*

Despite this case involving the same school district as in *Mahmoud*, and despite this Court in *Mahmoud* criticizing the Fourth Circuit’s cavalier treatment of *Yoder*, the Fourth Circuit here disposed of *Mahmoud* in a footnote: “Polk is not a parent—she is a substitute teacher. And she has no standing to assert parental rights.” App.18a–19a n.8. But Polk’s situation is directly analogous to that in *Barnette*, and it implicates the same interests as those burdened in *Yoder* and *Mahmoud*.

The parallels with *Barnette* are clear. Polk has her own free exercise and free speech rights, and she is being forced by the school district—in violation of her religious beliefs—to personally endorse the government’s views on gender identity by mouthing wrong-sex pronouns and by hiding from parents that their children are transitioning genders in school. See *Opinions of the Justices to the Governor*, 363 N.E.2d 251, 254 (Mass. 1977) (“In our view, the rationale of the *Barnette* opinion applies as well to teachers as it does to students.”); *Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623, 625, 633–34 (2d Cir. 1972) (holding that a teacher’s “fundamental rights of expression and belief” include the right to stand silently during a classroom pledge of allegiance); *Hanover v. Northrup*, 325 F. Supp. 170, 172–73 (D. Conn. 1970) (similarly applying *Barnette* in a teacher pledge case).

Whether the school’s policy demands Polk to speak or keep silent against her beliefs, the violation is of the same character as forcing someone to recite the pledge against their religious beliefs. “The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all....” *Barnette*, 319 U.S. at 645 (Murphy, J., concurring). Like in *Barnette*, this case involves “an especially egregious kind of direct coercion: a requirement that [teachers] make an affirmation” about gender identity “contrary to their [own] religious beliefs.” *Mahmoud*, 606 U.S. at 548.

Nor can the parallels between this case and *Yoder* be so easily sidestepped. In *Mahmoud*, these same Respondents, *through their teachers*, were hiding information from parents that affected the parents’

deeply rooted free exercise and parental rights, such that the burden was of the same character as that in *Yoder*. 606 U.S. at 550. This case implicates those same interests to an even greater degree. Here, Respondents tried to force Polk to hide from parents that the school was actively helping children socially adopt a different gender—the ultimate harm parents feared could occur if their children were exposed to the books they objected to in *Mahmoud*. “Indeed, the intrusion on parents’ free exercise rights here—unconsented facilitation of a child’s gender transition—is greater than the introduction of LGBTQ storybooks [the Court] considered sufficient to trigger strict scrutiny in *Mahmoud*.” *Mirabelli*, 607 U.S. at 496. It is no wonder that Polk had no interest in becoming an “unwilling mouthpiece[]” of that severe intrusion on parental rights. App.39a (Wilkinson, J., dissenting).

Taken together, Respondents’ attempts to force Polk to (1) endorse their viewpoint about gender identity by using biologically incorrect pronouns, and (2) deceive parents by hiding from them that their children are transitioning at school, impose the same “especially egregious kind of direct coercion” that this Court in *Barnette* held “could not be squared with the First Amendment.” *Mahmoud*, 606 U.S. at 548. And this case presents an excellent vehicle to confirm that “strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable” any time the “law imposes a burden of the same character as that in *Yoder*” or the egregious free exercise burden imposed in *Barnette*. *Id.* at 565.

B. The Decision Below Splits with the Ninth Circuit over What Qualifies as a Neutral Policy Under *Smith*

The Fourth Circuit below acknowledged that this Court has cautioned that mere facial neutrality is not enough to prove that a policy burdening religious exercise is “neutral” under *Smith*. App.21a–22a. And it did not dispute that the policies that spelled Polk’s demise as a substitute teacher disproportionately affect religious beliefs and conduct. App.22a–24a. But it held that, “as a matter of law,” allegations of a law’s primary impact on the religious cannot suffice to put at issue the law’s neutrality. *Ibid*. Instead, for a law or policy to be non-neutral in the Fourth Circuit, there must be evidence (a) that it was “motivated by ... religious hostility,” and (b) that those who object are exclusively, rather than predominantly, religious. App.23a–24a. That misreads *Smith*, and it puts the Fourth Circuit in direct conflict with the Ninth.

The Ninth Circuit in *Bates v. Pakseresht*, 146 F.4th 772 (9th Cir. 2025), applied *Smith* correctly in a closely analogous situation. That court held that Oregon likely violated the Free Exercise Clause when it denied an application to adopt, submitted by a widowed mother who could not, in good conscience, agree in advance to help a child exhibit as transgender and could not agree to use biologically incorrect pronouns to refer to a child. *Id.* at 779–81.

Similar to the Fourth Circuit below, the Ninth Circuit explained that it could “imagine non-religious objections” to Oregon’s policy requiring adoptive parents to affirm a child’s gender identity. *Id.* at 794. And the court also was “willing to accept ... that

Oregon intended to act in the best interests of children, and not out of hostility or animus toward religion.” *Id.* at 795.

But unlike the court below, the Ninth Circuit concluded that a “facially neutral law need not *exclusively* burden religious persons to be regarded as non-neutral in operation.” *Ibid.* (emphasis added). And while some of the state’s materials singled out religious communities as contradicting its policy, “a finding that Oregon acted with an unconstitutional motive [was] not essential to [the court’s] analysis,” and the court made “no such determination.” *Id.* at 794–95. That’s because “while hostility toward religion is sufficient to show that a law is not neutral in operation, the Supreme Court has never suggested that overt hostility is required.” *Id.* at 795.

Instead, it was enough that “policies such as Oregon’s—which condition adoption certification on parents’ assent to specific conceptions of sexuality and gender identity—implicate uniquely religious matters that prove most problematic for parents who view these issues through a traditional religious lens.” *Ibid.* Oregon’s policy stood “most obviously in opposition to more traditional understandings of sexuality and gender.” *Id.* at 794. “And those more traditional understandings are often held by persons with religious viewpoints.” *Ibid.* As a result, the policy would “overwhelmingly block those prospective parents who hold traditional religious views on sexuality and gender.” *Ibid.* “Considering all the circumstances in the record as a whole,” the Court held that the policy was not neutral toward religion, thus triggering strict scrutiny. *Id.* at 794–95. In so holding, the Ninth Circuit ruled consistently with this

Court's recent admonition that lower courts may apply "commonsense inferences" about how state action will "impose on protected First Amendment rights." *First Choice Women's Res. Ctrs., Inc. v. Davenport*, 146 S. Ct. 1114, 1125 (2026).

The Fourth Circuit created a circuit split over whether common knowledge of a law's predominant effect on religious people can support a claim that the law is not neutral under *Smith*. Indeed, the factual similarities between this case and *Bates* are striking. In both, the challenged policy was admittedly facially neutral. In both, the plaintiffs asserted that the law predominantly burdened those who hold traditional religious beliefs. And, in both, the plaintiffs pointed to the same underlying conflict: a clash between their sincere religious beliefs about sexuality and the government's overzealous enforcement of a nondiscrimination requirement.

In those circumstances, the Ninth Circuit held that the common-sense knowledge that the provisions will "overwhelmingly block" people with traditional religious beliefs can defeat *Smith's* neutrality prong. *Bates*, 146 F.4th at 794. But, according to the Fourth Circuit, unless a plaintiff can come forward with specific evidence of hostility or animus, this known burden on free exercise is insufficient "as a matter of law." App.24a. This Court should grant this petition to resolve that circuit split.

II. The Fourth Circuit Deepened a Conflict over Whether Schools Violate the Free Speech Clause by Forcing Teachers to Mouth Noncurricular, Ideological Messages

In *Garcetti*, this Court cautioned that it would not tolerate public employers infringing the free speech rights of their employees based on “excessively broad job descriptions.” 547 U.S. at 424–25. But that is exactly the move the Fourth Circuit endorsed by expanding *Garcetti*’s “government speech” exception to cover everything a teacher says to a student or a student’s parent. App.31a–32a. As Judge Wilkinson wrote in dissent, that effectively gobbles up anything a teacher says in the classroom, “right down to the last syllable.” App.40a–42a. The Fourth Circuit now is in conflict with other circuits and the Virginia Supreme Court, deepening a fissure that only this Court can close.

A. Courts Have Reached Different Results over Whether Teachers’ Official Duties Include the Use of Preferred Pronouns

The lower courts are divided over whether *Garcetti* categorically bars public schoolteachers from challenging regulations that compel them to support one side of the national debate over transgenderism, including by using wrong-sex pronouns of the students’ choosing. The Virginia Supreme Court and the Sixth Circuit have both said *Garcetti* does not control. But the Fourth and Eleventh Circuits have applied *Garcetti* and held that such policies implicate only government speech, not teachers’ own protected speech.

1. The Fourth and Eleventh Circuits Allow Public Schools to Force Teachers to Conform Their Speech to the School's Position on Gender Identity

First, it is important to note what this case does *not* involve. Polk does not challenge that, consistent with the First Amendment, school boards may compel teachers to teach a board-selected curriculum that qualifies as government speech. As the panel majority acknowledged, though, that is not the type of speech involved here: the speech MCPS compelled Polk to express concerning gender identity “is not curricular.” App.32a n.12, 35a n.13. It is also undeniably a matter of “public concern.” *Janus v. American Fed’n of State, Cnty., and Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (listing “gender identity” as a “matter[] of profound” public concern).

The problem this case presents is that, in the panel majority’s view, everything a teacher says to students and parents becomes part of a teacher’s prescribed duties when she enters government employment, especially when the prescribed or proscribed speech is set out in a policy document. App.31a–37a. Echoing rationales long repudiated, the result for the Fourth Circuit is this: “Polk may object to the employer-mandated speech on religious grounds, but if she chooses to teach in public schools, she is a government employee and must perform the tasks she was paid to perform.” App.32a (citation modified). After all, the Fourth Circuit continued, “no one forced Polk to become a substitute teacher in Montgomery County,” and there are “other avenues available” for her to make a livelihood consistent with her religious exercise and expression. App.37a.

Reflecting Judge Wilkinson’s warning that the panel majority’s approach cuts both ways, App.39a, 48a, 52a (Wilkinson, J., dissenting), the Eleventh Circuit recently held that a school policy *prohibiting* teachers from using biologically incorrect titles and pronouns implicates only “government speech” when the teacher is speaking to students “in [the] classroom during class hours,” even while acknowledging that such speech is noncurricular. *Wood*, 142 F.4th at 1290–92 (citation modified).

Judge Jordan in dissent pointed out that this Court in *Kennedy* expressly rejected the view that a teacher on school grounds speaking in the presence of students always acts as a government speaker. *Id.* at 1298–99 (Jordan, J., dissenting). But that made no difference to the majority, which “distinguish[ed] *Kennedy* on its facts,” even though it could not “avoid its logic.” *Id.* at 1298 (Jordan, J., dissenting).

2. The Sixth Circuit and Supreme Court of Virginia Forbid Public Schools from Forcing Teachers to Endorse a School’s Position on Gender Identity

The Sixth Circuit, by contrast, has rejected the argument that a teacher’s pronoun usage falls outside the First Amendment. In *Meriwether v. Hartop*, that court held that a public university violated a teacher’s free speech rights when it disciplined him for refusing to use preferred pronouns. 992 F.3d 492, 504 (6th Cir. 2021). Applying an exception to preserve academic freedom, the court held that “professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.” *Id.* at 505.

While *Meriwether* involved a university professor, at least one lower court has correctly applied its logic to K–12 teachers. In *Geraghty v. Jackson Local School District Board of Education*, the district court noted *Meriwether*'s recognition that “titles and pronouns carry a message” of affirming a student's gender identity. 2024 WL 3758499, at *12 (N.D. Ohio Aug. 12, 2024) (quoting *Meriwether*, 992 F.3d at 507). Thus, the question presented wasn't whether using student names and pronouns generally was part of the plaintiff's “ordinary job duties.” *Id.* at *13. It was, more precisely, whether those job duties included conveying (or refusing to convey) the ideological messages about gender identity “those names and pronouns carried.” *Ibid.* The court found that they did not and thus held that *Garcetti* did not apply. *Ibid.*

Similarly, public schoolteachers in Virginia now have different free speech rights depending on whether they sue in federal or state court. In a case almost the mirror image of this one, the Virginia Supreme Court in *Vlaming v. West Point School Board* reinstated a high school teacher's claim that a school district improperly fired him because he could not, in good conscience, comply with a policy that required him to use biologically incorrect pronouns rather than avoid pronouns altogether. 895 S.E.2d at 739–40.

In reaching that conclusion, the court rejected the school district's resort to *Garcetti*, reasoning that “the punished speech in *Garcetti* was merely a prosecutor's legal opinion on a routine topic in criminal law that was rejected by his superiors,” whereas “the compelled speech in *Vlaming*'s case involve[d] an ideological topic that has engendered fierce public debate.” *Id.* at 741.

And the school could not avoid the prohibition on compelled speech “by simply declaring it Vlaming’s ‘official duty’ to courier the School Board’s ideological view of gender identity.” *Id.* at 742.² If that were enough, the state “could define away a teacher’s right against compelled speech by unilaterally deeming such speech a compulsory official duty.” *Id.* at 740. The court noted that *Garcetti* warns public employers against doing exactly that. *Id.* at 742.

Virginia and the Sixth Circuit have it right. To qualify as part of an employee’s official duties under *Garcetti*, the speech must be “commissioned or created” by the government such that it “owes its existence to [the] public employee’s professional responsibilities.” 547 U.S. at 421–22. None of that is true of preferred pronouns. Everyone uses pronouns every day in every aspect of their speech. There was nothing special about Polk’s job that made her pronoun usage unique, nor did Respondents ever tie their demand that she use certain pronouns to the curriculum she was assigned to teach.

Instead, Polk’s pronoun usage was more like “the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.” *Garcetti*, 547 U.S. at 422. Moreover, the preferred pronouns Respondents compel teachers to use are generated by students, and what is controlling is the students’ desire to keep

² The Virginia Supreme Court applied this Court’s cases because that court interprets the Virginia Constitution’s free speech protections to be coextensive with the federal Free Speech Clause. 895 S.E.2d at 737.

what is happening at school secret from their parents. Polk is being forced to embrace and speak *her students'* preferred messages about their gender identity—not because she is a government employee—simply because anyone who identifies as transgender would want the same treatment from *anyone* they might interact with on any given day. So *Garcetti* does not apply to the speech at issue here.

Justice Alito foresaw in *Morse v. Frederick* a danger that schools might restrict free speech by expanding their self-defined “educational mission” to “suppress speech on political and social issues based on disagreement with the viewpoint expressed.” 551 U.S. 393, 423 (2007) (Alito, J., concurring). That danger has reached full flower here. And the result “strikes at the very heart of the First Amendment.” *Ibid.* With over 1,200 public school districts having adopted such viewpoint-restrictive policies already, the Court should grant the petition to resolve this split of authority and to stop the further trampling of teachers’ free speech rights across the country.

B. These Different Results Reflect a Deeper Disagreement in the Lower Courts over Whether the First Amendment Protects Teachers’ Noncurricular Speech

Deciding whether a public schoolteacher’s pronoun usage falls within the scope of her official duties under *Garcetti* should take into account whether that speech is curricular or noncurricular. And that is especially true following *Kennedy*, given this Court’s holding there that it is not “dispositive” that a teacher’s speech takes place “within the office environment.” 597 U.S. at 530 (citation modified).

Before *Garcetti*, Judge Luttig wrote for himself and Judges Wilkins and Williams to express their view that “restrictions on teachers’ in-class *curricular* speech” should be analyzed differently from “restrictions on teachers’ in-class *noncurricular* speech.” *Boring*, 136 F.3d at 372 (Luttig, J., concurring). “In the latter context of teacher in-class noncurricular speech, the teacher assuredly enjoys some First Amendment protection,” Judge Luttig reasoned. *Id.* at 373. “In the former context of teacher in-class curricular speech, the teacher equally assuredly does not.” *Ibid.*

In the years following *Garcetti*, though, courts have almost uniformly refused to distinguish between curricular and noncurricular speech in defining a teacher’s official duties, with the result that teachers in those circuits *do not* enjoy even “some First Amendment protection” for their in-class, noncurricular speech. *Ibid.*

For example, in *Mayer v. Monroe County Community School Corporation*, the Seventh Circuit held that the First Amendment “does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that *depart from the curriculum* adopted by the school system.” 474 F.3d 477, 480 (7th Cir. 2007). And that included a teacher’s in-classroom account—in response to a student’s question—about a time she honked her car horn to show support for demonstrators holding a “Honk for Peace” sign. *Id.* at 478. The Seventh Circuit held that, because the teacher’s speech occurred during a “current-events lesson [that] was part of her assigned tasks in the classroom,” *Garcetti* applied. *Id.* at 480; accord *Brown*

v. *Chicago Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016) (describing *Mayer* as a case in which the court “concluded that a teacher’s in-classroom speech is not the speech of a ‘citizen’ for First Amendment purposes”).

The Ninth Circuit likewise ruled that *Garcetti* applies to all in-classroom speech in *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011). In that case, the court held that the district court’s finding that two large banners a teacher hung in his classroom “were not part of [his] curriculum” was “irrelevant ... to the question of whether [the teacher] spoke as a citizen or as an employee” under *Garcetti*. *Id.* at 967 n.13. His speech was “government speech,” and the school district “acted well within constitutional limits in ordering [him] not to speak in a manner it did not desire.” *Id.* at 970.

The Eleventh Circuit followed suit in *Wood*, with the panel majority rejecting Judge Jordan’s view in dissent that a teacher’s in-class, curricular speech should be treated differently from her in-class, noncurricular speech. 142 F.4th at 1292. Given *Kennedy*’s unique facts, the majority cast it aside as “thoroughly distinguishable” because the teacher there was not technically “on duty” when he prayed. *Ibid.* In dissent, Judge Jordan opined that the majority had tried to distinguish *Kennedy* “on its facts” but could not “avoid its logic.” *Id.* at 1298 (Jordan, J., dissenting). Even before *Kennedy*, most of the teacher-speech cases applying *Garcetti* dealt only with curricular speech, and the “majority’s embrace of the government speech doctrine,” even for purely noncurricular speech, was “insufficiently nuanced.” *Id.* at 1299–1300.

Contrary to these other circuits, the only post-*Garcetti* exception to courts' tendency to refuse to distinguish between curricular and noncurricular speech is Judge Sutton's opinion for the Sixth Circuit in *Evans-Marshall v. Board of Education of Tipp City Exempted Village School District*, 624 F.3d 332 (6th Cir. 2010). In that case, the Sixth Circuit held that a public schoolteacher did not have a First Amendment right to choose books and methods of instruction for use in her classroom because "the right to free speech protected by the First Amendment does not extend to the in-class *curricular* speech of teachers in primary and secondary schools made 'pursuant to' their official duties." *Id.* at 334 (emphasis added) (quoting *Garcetti*, 547 U.S. at 421). Throughout its opinion, the court repeatedly reiterated that the issue in the case was whether *Garcetti* controlled a case involving a teacher's "curricular speech," *id.* at 334, 339, 341–44, which suggests the result likely would have been different if the speech had been noncurricular. But that issue was not before the court, so the court did not resolve it.

By contrast, this case provides an excellent vehicle for this Court to resolve that issue because Polk's pronoun usage and her discussions with parents were not part of her assigned curriculum. And here, as in *Wood*, a judge dissented to make the case that a teacher's noncurricular speech should be analyzed under this Court's decision in *Pickering*, not automatically labeled as pure government speech under *Garcetti*.

As Judge Wilkinson wrote in dissent below, *Garcetti* “does not invite compelled speech on the outer perimeter of teachers’ core curricular functions.” App.50a (Wilkinson, J., dissenting). “Noncurricular matters, including whether to use preferred pronouns or a student’s last name, do not implicate the same need for state control as curricular ones.” *Ibid.* That’s because noncurricular speech “tends to address the more minor matters endemic to smooth classroom administration, where the need for compelled and viewpoint discriminatory speech is far less salient.” *Ibid.* For such speech, courts should apply “the *Pickering* balancing test [they] have used for over half a century—a test which *Garcetti* sought to clarify, not render obsolete.” *Ibid.* As the circuits that have addressed the issue post-*Garcetti* have shown, though, courts are unlikely to make that distinction unless and until this Court intervenes.

C. The Panel Majority Ignored That Respondents’ Policy Compels Speech for the Purpose of Thwarting Parental Rights

The panel majority misapplied *Garcetti*’s government speech exception in another critical respect. The *Garcetti* Court cautioned that any compelled government message must not be “unlawful or otherwise inappropriate.” 547 U.S. at 426; accord *Janus*, 585 U.S. at 908 (similarly conditioning government power to compel employee speech on that speech conveying a “lawful message”). And this Court recently declared in *Mirabelli* that the features of the MCPS Guidelines to which Polk objects likely violate parental rights. 607 U.S. at 496–97.

Indeed, they do. Parents are responsible for their child’s education and upbringing. The “interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). For a government to subvert these parental rights and take over their functions when it comes to a child’s mental health and gender confusion is neither lawful nor appropriate. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

Parents have the constitutional right to know what is happening sexually concerning their children at school. *Mirabelli*, 607 U.S. at 497; *Mahmoud*, 606 U.S. at 550; *Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 646 (4th Cir. 2023) (Niemeyer, J., dissenting).³ Policies that frustrate those parental rights and responsibilities are unlawful and, thus, fall outside *Garcetti*. This Court should grant the petition to confirm that it violates teachers’ free-speech rights to force them to carry out this improper purpose of the schools.

³ Judge Niemeyer was writing in dissent about this very MCPS policy, but he was the only judge on the panel that reached the merits, as the majority held that the parents who sued in that case lacked standing. Nevertheless, the majority went to some pains to remark that this “does not mean [the parents] objections are invalid,” *id.* at 626, and the parents made “compelling arguments” that the MCPS policy is unlawful, *id.* at 636.

D. This Case Raises the Question Reserved in *Janus*: Whether *Pickering* Balancing Applies to Compelled Speech

With *Garcetti*'s “government speech” exception inapplicable, *Pickering* balancing potentially applies. Judge Wilkinson’s dissent colorfully concluded that “the result of [that] interest balancing is as obvious as if MCPS were playing seesaw with a lead block.” App.47a. (Wilkinson, J., dissenting). And he is right.⁴

So while not dispositive—since Polk would prevail even under traditional *Pickering* balancing—this case still presents the issue reserved in *Janus*, namely, whether *Pickering* even applies when the government seeks to compel speech. In *Janus*, this Court observed that “the *Pickering* framework fits much less well” when the government compels speech:

When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different. ... [I]t is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.

⁴ The three interests on which the Fourth Circuit relied, App.27a–29a, are easily disposed of: there is no Title IX problem because Polk has agreed to use preferred names for all children, see *Meriwether*, 992 F.3d at 510–11, and concerns about safety and nurturing of children are principally committed to parents, who, as a matter of law, are presumed to act in their children’s best interests, *Troxel*, 530 U.S. at 72; *Parham*, 442 U.S. at 603–04; *Parents 1*, 78 F.4th at 646 (Niemeyer, J., dissenting).

585 U.S. at 908. This Court has “never applied *Pickering* in such a case.” *Ibid.* “If *Pickering* applies at all to compelled speech,” a question the Court did “not decide” in *Janus*, “it would certainly require adjustment” for compelled speech. *Ibid.* This case presents a good vehicle to resolve that issue. At a minimum, exacting scrutiny applies.⁵ *Id.* at 916.

III. This Case Is an Excellent Vehicle to Address Pressing Issues of Nationwide Importance

More than 1,200 school districts entrusted with over 12 million children have policies that make teachers complicit in the “purposeful[] interfere[nce] with parents’ access to critical information about their children’s gender identity choices and school personnel’s involvement in and influence on those choices.” *Lee v. Poudre Sch. Dist. R-1*, 146 S. Ct. 26 (2025) (statement of Alito, J., joined by Thomas and Gorsuch, JJ., respecting denial of certiorari).

The constitutionality of forcing teachers to accede to these policies that compel ideological speech—often, as here, in violation of a teacher’s deeply held religious beliefs—is a question of “great and growing national importance.” *Ibid.* (citation modified). And Polk is not benefitted by this Court’s lifting of the Ninth Circuit’s stay in *Mirabelli*. That decision only lifted the stay with respect to parents; it did not provide guidance for teachers. Indeed, even the teachers in California cannot avail themselves of

⁵ Exacting scrutiny also applies because the Guidelines apply to all teachers. *Janus*, 585 U.S. at 907 (explaining that *Pickering* was designed for cases involving one employee’s speech, not a “blanket requirement” that all employees support “speech with which they may not agree”).

relief they won in the district court in *Mirabelli* because the Ninth Circuit's stay is still in place with respect to them.

This case cleanly presents these questions. The ruling below definitively resolves Polk's constitutional claims, as the Fourth Circuit affirmed both the denial of preliminary injunctive relief and dismissal of her claims. App.37a–38a. The judges below considered a developed factual record, one with no disputes of material fact, and full briefing on these questions.

As Judge Wilkinson highlighted in his dissent, the Fourth Circuit's sharp disagreement was over the purely legal issues raised in this petition. Absent this Court's intervention, teachers conscripted into violations of religious conscience, parental rights, and false speech cannot even state a constitutional claim against such policies.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-1136

KIMBERLY ANN POLK,

Plaintiff – Appellant,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS;
MONTGOMERY COUNTY BOARD OF
EDUCATION; SHEBRA L. EVANS, in her individual
and official capacities as board members; MONIQUE
FELDER, in her individual and official capacities as
board members; LYNNE HARRIS, in her individual
and official capacities as board members; GRACE
RIVERA-OVEN, in her individual and official
capacities as board members; KARLA SILVESTRE, in
her individual and official capacities as board
members; REBECCA SMONDROWSKI, in her
individual and official capacities as board members;
BRENDA WOLFF, in her individual and official
capacities as board members; JULIE YANG, in her
individual and official capacities as board members,

Defendants – Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah L. Boardman, District Judge. (8:24-cv-01487-DLB)

Argued: October 23, 2025 Decided: January 28, 2026

Before WILKINSON, KING, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Thacker joined. Judge Wilkinson wrote a dissenting opinion.

ARGUED: Frederick W. Claybrook, Jr., CLAYBROOK LLC, Washington, D.C., for Appellant. Cassandra Ann Mitchell, WILMER CUTLER PICKERING HALE AND DORR LLP, New York, New York, for Appellee. **ON BRIEF:** Robert Flores, GAMMON & GRANGE, P.C., Vienna, Virginia; Steven W. Fitschen, James A. Davids, NATIONAL LEGAL FOUNDATION, Chesapeake, Virginia, for Appellant. Bruce M. Berman, Julia M. May, Megan O. Gardner, Washington, D.C., Alan Schoenfeld, Emily Barnet, WILMER CUTLER PICKERING HALE AND DORR LLP, New York, New York, for Appellees.

KING, Circuit Judge:

In this appeal from the District of Maryland, plaintiff Kimberly Ann Polk challenges the district court’s January 2025 denial of her motion for a preliminary injunction on, *inter alia*, two First Amendment claims she pursued against defendant Montgomery County Board of Education (the “Board”), which the court also dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Polk v. Montgomery Cnty. Pub. Schs.*, No. 8:24-cv-01487 (D. Md. Jan. 17, 2025), ECF Nos. 39 & 40 (respectively, the “Opinion” and “Order”).¹ Polk, who worked for a time as a substitute teacher for Montgomery County Public Schools, maintains that the Board’s duly-adopted Guidelines for Student Gender Identity (hereinafter, the “Guidelines”) — which required her to affirm that she would refer to students by their preferred pronouns, and to also affirm that she would not discuss any student’s gender identity with the student’s parents — contravene her First Amendment rights to the free exercise of religion and free speech. Predicated on those constitutional claims, Polk asserts that she is entitled to a preliminary injunction.

As explained herein, we agree with and adopt the district court’s analysis in all respects, as set forth in the Opinion, and we affirm. Specifically, exercising pendent appellate jurisdiction to assess the Rule 12(b)(6) dismissals in this appeal, we conclude that the

¹ We observe that, in addition to the Board, Polk sued seven members of the Board and Montgomery County Public Schools. To that end, the district court dismissed all defendants except the Board, but those dismissals are not before us in the present appeal.

court properly dismissed Polk’s First Amendment claims against the Board for failure to state a claim upon which relief can be granted. And in light of the court’s correct dismissals of those claims, Polk cannot demonstrate any likelihood of success on the merits, such that there can be no issuance of preliminary injunctive relief thereon.

I.

A.

1.

For background, the Board is the democratically elected policy-making body for Montgomery County Public Schools, which is one of the largest educational systems in the United States. The Board’s jurisdiction encompasses more than 160,000 students, more than 13,000 teachers, and approximately 3,000 substitute teachers. To that end, the Board is tasked with and responsible for overseeing the implementation of various school policies and procedures, which must otherwise be consistent with Maryland law.

Of relevance, the Board adopted the Guidelines prior to the 2019-20 school year. The Guidelines mandate that school staff members — including teachers and substitute teachers, like Polk — “address students by the name and pronoun corresponding to the gender identity that is consistently asserted at school.” *See* J.A. 67.² And the Guidelines establish the right of each student to keep gender identity private,

² Citations herein to “J.A. ___” refer to the contents of the Joint Appendix filed by the parties in this appeal.

including from the student's parents. In that regard, the Guidelines provide, *inter alia*, as follows:

Privacy and Disclosure of Information

- All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school.
- Information about a student's transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act.
- Schools will ensure that all medical information, including that relating to transgender students, is kept confidential in accordance with applicable state, local, and federal privacy laws.
- Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose a student's status to others, including parents/guardians and other school staff members, unless legally required to do so or unless students have authorized such disclosure.

Id. at 66-67 (citation modified).

Furthermore, in order to teach in Montgomery County Public Schools, the substitute teachers are

required to complete compliance training, which includes reviewing materials that explain the Guidelines. And beginning with the 2022-23 school year, the Board required all staff members — including the substitute teachers — to affirm that they understood the contents of, and would otherwise comply with, the Guidelines.

2.

According to her complaint, Polk applied to serve as a substitute teacher for the public schools of Montgomery County in early 2020, and she was interviewed for that position in April of 2021. *See Polk v. Montgomery Cnty. Pub. Schs.*, No. 8:24-cv-01487 (D. Md. May 21, 2024), ECF No. 1 (the “Complaint”). The Guidelines were then in effect. In an initial interview, Polk expressed a willingness to substitute teach anywhere in the County her services were needed. After she accepted a substitute teaching position later in 2021, Polk was onboarded in a manner consistent with regulations of Montgomery County Public Schools, which required Polk to review training materials relating to the Guidelines.

During the 2021-22 school year, Polk substituted ten times in eight separate elementary schools throughout Montgomery County, “receiv[ing] uniformly positive reviews and responses concerning her teaching.” *See Complaint* ¶ 26. Specifically, Polk substituted in roles that involved preschool, special education, kindergarten, and second through fourth grade classes. Having substituted ten times that year, Polk was eligible for retention as a substitute teacher without having to reapply for the 2022-23 school year.

On that score, Polk planned to substitute more frequently during the 2022-23 school year.

As a part of the retention process for the 2022-23 school year, however, Polk was required to review online videos concerning the Board's policies and procedures. One such video concerned the Guidelines. After Polk watched the video, she was "instructed . . . to sign electronically (by clicking a box) an affirmation that she had watched and understood the video and that she would fully adhere to the [G]uidelines." *See* Complaint ¶ 30. But Polk declined to do so on account of her "sincerely held religious beliefs," which are "based on her understanding of her Christian religion and the Holy Bible." *Id.* ¶ 31.³

In November 2022, Polk submitted a request for a religious accommodation to the compliance coordinator for Montgomery County Public Schools. Thereafter, Polk and the compliance coordinator discussed by telephone a "possible accommodation" that would be "subject to further . . . approval." *See* Complaint ¶ 33. During that conversation, the compliance coordinator purportedly "informed [Polk] that she would not have to use preferred pronouns," that Polk "would not be required to sign the affirmation," and that she "would be permitted to

³ Specifically, Polk believes that "she would act unethically if she affirmatively assisted children to present as other than their God-given sex," which "would include lying to children by using pronouns for them that do not match their God-given, biological sex." *See* Complaint ¶ 31a. Polk also believes that "God gave parents the primary responsibility for the care and upbringing of their minor children and it would be unethical for her to hide from parents that their child is transitioning genders at school." *Id.* ¶ 31b.

teach in the elementary schools and preschool special education program but not in the middle or high schools.” *Id.* ¶ 33a-d. The coordinator also discussed with Polk a possible accommodation by which “the school would provide her with someone else, like a school administrator, who would be able to provide her with support and to interact instead with [a] student” who “presented gender identity issues,” in light of her refusal to comply with and adhere to the Guidelines. *Id.* ¶ 33e.

Less than a month later, in December 2022, the compliance coordinator informed Polk that the requested accommodation had been rejected. As a result, Polk did not substitute teach in Montgomery County during the 2022-23 or 2023-24 school years.

B.

On May 21, 2024, Polk initiated this lawsuit in Maryland federal court. By her Complaint, Polk alleged three counts against the Board: (1) a claim in Count I under Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e-2(a)(1), for the Board’s failure to provide her with a religious accommodation (the “Title VII claim”); (2) a civil rights claim in Count II pursuant 42 U.S.C. § 1983, for the Board contravening her First Amendment right to free speech (the “Free Speech claim”); and (3) another civil rights claim in Count III under § 1983, for the Board violating her First Amendment right to the free exercise of religion (the “Free Exercise claim”). Furthermore, the Complaint sought monetary damages from the Board, along with declaratory and injunctive relief.

Shortly after filing her Complaint, on May 29, 2024, Polk moved for a mandatory preliminary

injunction on all claims asserted in the Complaint, pending a final resolution of the district court proceedings. Polk thereby sought — for the duration of the preliminary injunction and until permanent relief might be awarded — to “limit her substitute services to elementary school classrooms with no transitioning students attending them.” *See* J.A. 34. Relatedly, Polk sought to “obtain assistance from other [school] personnel promptly if she [had to] engage a transitioning student in a way that would violate her religious beliefs.” *Id.* By a responsive submission to Polk’s Complaint and her preliminary injunction motion, the Board opposed the injunctive relief that had been requested by Polk. The Board otherwise moved for dismissal of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted.

C.

By its Opinion and Order of January 2025, the district court granted the Board’s Rule 12(b)(6) motion to dismiss with respect to Polk’s Free Exercise and Free Speech claims, declined to dismiss her Title VII claim, and otherwise denied preliminary injunctive relief. As the Opinion reflects, the court considered the Rule 12(b)(6) motion first. And in that analysis, the court took up Polk’s claims in reverse order, starting with the Free Exercise claim, then turning to the Free Speech claim, and ending with the Title VII claim.

As to the Free Exercise claim of Count III, the Opinion initially explained that “Polk alleges the Guidelines burden her religious exercise by forcing her to act in violation of her Christian beliefs,” and she

“objects to the requirements that she address students by pronouns that do not correspond to the sex assigned to them at birth and that she hide from parents that their child is transitioning genders at school.” See Opinion 10 (citation modified). Applying the framework articulated by the Supreme Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the district court dismissed the Free Exercise claim, concluding that, although the Complaint alleged a burden on Polk’s religious exercise, the Guidelines are a “neutral and generally applicable” policy, which are subject to — and “easily pass” — rational basis review. *Id.* at 20-21.

Next, turning to the Free Speech claim of Count II, the Opinion explained that the Complaint alleges that the Board’s actions would unconstitutionally compel Polk to “use children’s preferred pronouns even if the pronouns do not correspond to the children’s assigned sex at birth,” as well as “discuss with parents their child’s desire to transition genders.” See Opinion 21. Against the backdrop of the Supreme Court’s 2006 decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the district court dismissed the Free Speech claim, on the ground that “the speech that Polk challenges is part of her official duties as a teacher,” such that it is “unprotected by the First Amendment.” *Id.* at 33.

Finally, with respect to the Title VII claim of Count I, the Opinion recognized that, although the Board conceded that “Polk has stated a failure-to-accommodate claim,” the Board was relying on an affirmative defense “that Polk’s proposed accommodation would cause it undue hardship.” See Opinion 34-35. Emphasizing “that undue hardship is

a fact-specific inquiry,” the district court resolved to deny a dismissal of the Title VII claim and instead allowed that claim to proceed to discovery. *Id.* at 37 (citation modified).

Only then — after ruling in its Rule 12(b)(6) analysis to dismiss the Free Exercise and Free Speech claims, but to otherwise deny a dismissal of the Title VII claim — did the district court consider Polk’s motion for a preliminary injunction. Consequently, the court cabined its preliminary injunction analysis to the Title VII claim only, which it characterized as Polk’s “sole remaining claim in the lawsuit.” *See* Opinion 38.

To that end, the Opinion denied Polk a preliminary injunction for her failure to show irreparable harm. According to the district court, “[t]he harm caused by the alleged Title VII violation is financial” and “[f]inancial harm generally does not suffice to establish irreparable harm.” *See* Opinion 39. Notably, however, the Opinion recognized that “[t]he irreparable harm that Polk relied on in support of her preliminary injunction motion was the alleged violation of her constitutional rights.” *Id.* But the Opinion reasoned that “now that her constitutional claims [of Counts II and III] have been dismissed, Polk cannot establish irreparable harm” to support an award of injunctive relief. *Id.*

The accompanying Order entered by the district court specified that Polk’s Free Exercise and Free Speech claims “are DISMISSED,” and that the Board’s motion to dismiss the Title VII claim “is DENIED.” *See* Order 1. The Order then summarily stated that

“Polk’s motion for a preliminary injunction is DENIED.” *Id.*

II.

In February 2025, Polk timely noted this interlocutory appeal from the district court’s Opinion and Order, invoking 28 U.S.C. § 1292(a)(1), which confers jurisdiction to the courts of appeals when, inter alia, an injunction has been denied.⁴ For its part, the Board’s appellate brief does not contain a “jurisdictional statement,” so we are entitled to assume that, on the issue of our jurisdiction, the Board is satisfied with Polk’s assessment thereof. *See* Fed. R. App. P. 28(b)(1) (providing that, “unless the appellee is dissatisfied with the appellant’s statement,” appellee’s brief may omit “the jurisdictional statement”).

A.

Despite the parties’ agreement on the purported basis of our jurisdiction in this appeal to address the merits of Polk’s Free Exercise and Free Speech claims, we are always obliged to independently satisfy ourselves of jurisdiction in order to exercise it. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998). And this situation presents an interesting jurisdictional question that the parties have failed to acknowledge.

⁴ 28 U.S.C. § 1292(a)(1) provides, in pertinent part, that “the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions[.]” *See* 28 U.S.C. § 1292(a)(1).

Specifically, the jurisdictional issue arises from Polk’s appellate contention that the district court erred in denying a preliminary injunction as to the Free Speech and Free Exercise claims, as alleged in Counts II and III of the Complaint. To be sure, although Polk invokes our jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), she does not fairly challenge the propriety of the court’s denial of a preliminary injunction as to her Title VII claim. Otherwise, the court limited its analysis in that respect to the Title VII claim only, having resolved to allow that claim to proceed to discovery, but to otherwise dismiss the Free Exercise and Free Speech claims pursuant to Rule 12(b)(6). *See* Opinion 38 (resolving that, with Title VII claim only, and absent Free Exercise and Free Speech claims, Polk could not show irreparable harm necessary for preliminary injunction).

With the foregoing in mind, it is clear that the district court has — if not explicitly — denied Polk the preliminary injunction being sought on the Free Speech and Free Exercise claims. But in the context of this § 1292(a)(1) appeal from the denial of a preliminary injunction on the Title VII claim only, we cannot accord Polk such relief unless we first assess the court’s Rule 12(b)(6) dismissal of the Free Speech and Free Exercise claims. Indeed, it would do no good for us to conclude that Polk is entitled to a preliminary injunction on the Free Exercise and Free Speech claims without first reinstating them.

That distills the jurisdictional question to just this: Do we possess jurisdiction to review the district court’s Rule 12(b)(6) merits-based dismissals of the Free Speech and Free Exercise claims, even though Count I — that is, the Title VII claim — remains viable

in the underlying litigation? We are satisfied to answer that question in the affirmative. Stated succinctly, we are content to exercise pendent appellate jurisdiction and review the court's Rule 12(b)(6) dismissals of the Free Exercise and Free Speech claims.

B.

To explain our exercise of pendent appellate jurisdiction, some table setting is warranted. Generally, under 28 U.S.C. § 1291, “[w]e lack jurisdiction to review a district court’s order unless it is a ‘final’ judgment, which means that the order has resolved all claims as to all parties.” *See McIver v. Bridgestone Ams., Inc.*, 42 F.4th 398, 406 n.6 (4th Cir. 2022) (citation modified). But here, where we possess jurisdiction pursuant to § 1292(a)(1) to review the denial of the preliminary injunction sought by Polk, we may otherwise exercise pendent appellate jurisdiction to also review the Rule 12(b)(6) dismissals of the Free Exercise and Free Speech claims, so long as those dismissals are “inextricably intertwined with” and “necessary to ensure meaningful review of” the district court’s denial of injunctive relief. *See Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006) (citing, inter alia, *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 42 (1995)).

In that regard, our Court has long recognized that pendent appellate jurisdiction is a “judicially-created, discretionary exception to the final judgment requirement.” *See Rux*, 461 F.3d at 475. That is, when an issue is already properly before a court of appeals, “[p]endent appellate jurisdiction permits appellate courts to ‘retain the discretion to review issues that

are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review.” See *Nero v. Mosby*, 890 F.3d 106, 123 (4th Cir. 2018) (citing *Rux*, 461 F.3d at 475). Though pendent appellate jurisdiction should only be exercised sparingly, our Court has recognized that it may be utilized in two distinct situations: “(1) when an issue is inextricably intertwined with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is necessary to ensure meaningful review of an immediately appealable issue.” See *Scott v. Fam. Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013) (citation modified); see also *Swint*, 514 U.S. at 49-50 (cautioning against “a rule loosely allowing pendent appellate jurisdiction”).⁵

⁵ As to the first situation identified above, separate issues are deemed to be “inextricably intertwined” when “the same specific question will underlie both the appealable and the non-appealable order, such that resolution of the question will necessarily resolve the appeals from both orders at once.” See *Indus. Servs. Grp., Inc. v. Dobson*, 68 F.4th 155, 167 (4th Cir. 2023) (citation modified); see also *Altman v. City of High Point, N.C.*, 330 F.3d 194, 207 n.10 (4th Cir. 2003) (determining that resolution of whether officers were entitled to qualified immunity was “inextricably intertwined” with whether municipality could be held liable because the immunity issue “fully resolve[d]” the municipality’s liability). We have thus exercised pendent appellate jurisdiction when an earlier, non-immediately appealable order “is inextricably linked to the outcome of the” appealable issue. See *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 615 (4th Cir. 2001).

Meanwhile, an issue is “necessary to ensure meaningful review if resolution of the appealable issue necessarily resolves the non-appealable issue or where review of the non-appealable

Although “[p]endent appellate jurisdiction is an exception of *limited* and *narrow application* driven by considerations of need, rather than of efficiency,” *see Rux*, 461 F.3d at 475 (emphasis added), we are satisfied that these circumstances compel the exercise of such discretionary jurisdiction. And that is so because the Opinion’s Rule 12(b)(6) dismissals of Polk’s Free Exercise and Free Speech claims are “inextricably intertwined with” and “necessary to ensure meaningful review of” the court’s denial of preliminary injunctive relief, to the extent that Polk sought — and is seeking — such relief on those constitutional claims. *Id.*; *Swint*, 514 U.S. at 42. Put differently, an award of preliminary injunctive relief in Polk’s favor — predicated, at her urging, on the now-dismissed Free Exercise and Free Speech claims — would necessitate reinstatement of either of those claims. *See, e.g., Arc of Cal. v. Douglas*, 757 F.3d 975, 992-94 (9th Cir. 2014) (exercising pendent appellate jurisdiction over dismissal under Rule 12(b)(6) where district court ordered dismissal “for the selfsame reason” that it denied preliminary injunction).

III.

Having established our jurisdictional footing, we turn now to an assessment of whether the district

issue is necessary to ensure meaningful review of the appealable one.” *See Scott*, 733 F.3d at 111 (citation modified). Our Court has utilized this alternative when the orders at issue have been “so interconnected” that they had to be reviewed concurrently. *See Elegant Massage, LLC v. State Farm Mut. Auto. Inc. Co.*, 95 F.4th 181, 188-89 (4th Cir. 2024) (exercising pendent appellate jurisdiction over non-appealable order because “threshold merits question” addressed therein was “integral” to ruling in appealable order).

court properly dismissed the Free Exercise and Free Speech claims pursuant to Rule 12(b)(6). In so doing, we assess de novo the dismissal of each claim, accepting the Complaint’s factual allegations as true and otherwise viewing them in the light most favorable to Polk. *See Barbour v. Garland*, 105 F.4th 579, 589 (4th Cir. 2024).⁶

Put simply, we are satisfied that the district court properly dismissed the Free Exercise and Free Speech claims under Rule 12(b)(6). And we agree with and adopt the court’s analysis in that respect. We thus affirm the court’s dismissal of the constitutional claims and conclude that Polk cannot be awarded a preliminary injunction thereon.⁷

⁶ Like the district court, we are satisfied to consider the Board’s Guidelines in assessing the propriety of a dismissal under Rule 12(b)(6), which was among the preliminary injunction evidence of both parties and which are otherwise “integral to and explicitly relied on in” the Complaint. *See Zak v. Chelsea Therapeutics Int’l, Ltd.*, 780 F.3d 597, 606-07 (4th Cir. 2015) (“Consideration of a document attached to a motion to dismiss ordinarily is permitted only when the document is integral to and explicitly relied on in the complaint, and when the plaintiffs do not challenge the document’s authenticity.” (citation modified)). We do not, however, consider other preliminary injunction evidence that falls outside the allowable scope of a Rule 12(b)(6) analysis.

⁷ We once again observe that, as to the Title VII claim alleged in Count I of the Complaint — that is, the only live claim left in this litigation — Polk does not appear to challenge the district court’s denial of injunctive relief on that claim, despite invoking our appellate jurisdiction under 28 U.S.C. § 1292(a)(1). Nor does the Board challenge the court’s refusal to dismiss that claim. As such, our analysis begins — and ends — with a Rule 12(b)(6) assessment of Polk’s Free Exercise and Free Speech claims.

A.

As the district court initially dismissed Polk’s Free Exercise claim of Count III, we begin our Rule 12(b)(6) analysis with her appellate contention that the Guidelines violate her First Amendment right to the free exercise of religion. It has long been recognized by the Supreme Court that “[t]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citation modified).

1.

Right out of the gate, Polk maintains that the Supreme Court’s *Smith* decision of 1990 — which established the neutral, generally applicable analytical framework applied by the district court — is not the correct framework to apply here. Specifically, Polk asserts that the *Smith* precedent “is a punch-drunk fighter, already counted out by a majority of the sitting Supreme Court justices.” *See Br. of Appellant 7*. But even if we were to agree with Polk that *Smith* is a “punch-drunk fighter,” we would be duty-bound to faithfully apply that precedent, unless and until the Supreme Court delivers the knockout blow. *See, e.g., United States v. McDowell*, 745 F.3d 115, 124 (4th Cir. 2014) (“[W]e may not disregard [Supreme Court precedent] unless and until the Supreme Court holds to the contrary.”).⁸

⁸ Contrary to Polk’s position concerning *Smith*, the Supreme Court recently had an opportunity to overrule that precedent but

2.

Having disposed of Polk’s threshold contention regarding *Smith*’s applicability, we turn to next the merits of her Free Exercise claim. To establish such a claim, the Supreme Court has recognized that a plaintiff must show that a government entity “has burdened [her] sincere religious practice pursuant to a policy that is not ‘neutral’ or ‘generally applicable.’” *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022) (quoting *Smith*, 494 U.S. at 879-81). If a plaintiff can make such a showing, we are obliged to “find a First Amendment violation unless the government can satisfy ‘strict scrutiny.’” *Id.*

Notably, however, if the policies are “neutral” and “generally applicable,” they are “subject only to rational basis review, ‘even where [they have] the incidental effect of burdening religious exercise.’” *See Canaan Christian Church v. Montgomery Cnty.*, 29

did not do so. *See Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025). Instead, it reaffirmed the proposition that, “[u]nder our precedents, the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable. *Id.* And the *Smith* precedent thus remains in full force “in most circumstances.” *Id.* Although the *Smith* decision may have been narrowed by *Mahmoud*, it was only narrowed in those instances “[w]hen the burden imposed is of the same character as that imposed in *Yoder*.” *Id.* That is, *Smith* does not apply when the state “substantially interfere[s] with the religious development’ of [a] parent’s children.” *Id.* at 565. (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). Notably, Polk is not a parent — she is a substitute teacher. And she has no standing to assert parental rights. Put succinctly, we agree that the *Smith* precedent supplies the framework for our Rule 12(b)(6) assessment of Polk’s Free Exercise claim.

F.4th 182, 198 (4th Cir. 2022) (quoting *Smith*, 494 U.S. at 879). Under rational basis review, a challenged policy will survive constitutional muster so long as it is “rationally related to a legitimate government purpose.” See *Bethel World Outreach Ministries v. Montgomery Cnty. Couns.*, 706 F.3d 548, 561 (4th Cir. 2013) (citation modified).

a.

With the foregoing in mind, Polk must — to succeed on her Free Exercise claim — first establish that the Guidelines burden her sincerely held religious beliefs. See *United States v. Lee*, 455 U.S. 252, 256-57 (1982). To that end, the Supreme Court has observed that pressure from a governmental policy to change or modify one’s actions, which would otherwise violate a person’s sincerely held religious beliefs, qualifies as a cognizable burden. See *Thomas v. Rev. Bd of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981).

In this light, we agree with the district court’s determination that the Complaint plausibly alleges a religious burden. To be sure, Polk believes that gender is rigid, based on her understanding of Christianity. And referring to her students by a gender that is not consistent with the student’s gender assigned at birth places a requirement on Polk, that she says is at odds with her faith. As explained in the Opinion, “[b]ecause Polk will not comply with the Guidelines, [the Board] will not employ her as a substitute teacher.” See Opinion 11. Accordingly, the Complaint has alleged a religious burden on Polk.

b.

Yet despite the foregoing, not all burdens are unconstitutional. *See Lee*, 455 U.S. at 259. As such, we must determine whether the Guidelines are “neutral.” On that score, our Court has recognized that a policy is neutral when it “has no object that infringes upon or restricts practices *because* of their religious motivation.” *See Alive Church of the Nazarene v. Prince William Cnty.*, 59 F.4th 92, 108 (4th Cir. 2023) (citation modified). The starting point of the neutrality inquiry is the text of the challenged law or policy itself. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). And “the minimum requirement of neutrality is that a law not discriminate on its face.” *Id.*

On the face of the Guidelines, there is no mention of anything about religion. It therefore makes good sense that the district court determined the Guidelines to be facially neutral. And Polk agrees with that ruling. *See* Br. of Appellant 11. We also agree and conclude that — on their face — the Guidelines are neutral.

c.

Importantly, such neutrality does not end our analysis of Polk’s Free Exercise claim. And that is so because even a facially neutral law or policy can act as a “covert suppression of particular religious beliefs.” *See Bowen v. Roy*, 476 U.S. 693, 703 (1986) (plurality). In other words, as we have explained, “when presented with a law that affects religious practice, even if indirectly, a court must look behind the law’s text to determine if it was enacted ‘because of’ and not ‘in spite of’ its effect on religion.” *See Alive Church of the Nazarene*, 59 F.4th at 108 (citation modified).

Consequently, the central question in reviewing a facially neutral law is to discern the motivation for its implementation, not merely its impact on a specific individual. *See Jesus Christ is the Answer Ministries v. Baltimore Cnty.*, 915 F.3d 256, 265 (4th Cir. 2019). If there are plausible allegations that a facially neutral law was implemented with the object of targeting a religious practice, then the law is not facially neutral. *See Church of Lukumi*, 508 U.S. at 533-36.

Upon reviewing the Complaint, we agree with the district court that Polk failed to allege any conduct or statement by the Board that evinces a “beneath-the-surface” hostility toward those holding particular religious views. Instead, Polk maintains that:

- “It is obvious from the face of the Guidelines and their accompanying intake form that they target parents and teachers who disagree with the idea that students should be encouraged to exhibit as other than their God-given sex”;
- “It is just as obvious that those teachers and parents holding traditional beliefs about sexuality of the major U.S. religions (Christianity, Judaism, and Islam) are in the forefront of those who disagree”; and
- “The Guidelines label parents with contrary religious beliefs as ‘unsupportive’ which results in the Board and its teachers refusing to inform religious parents that their child is exhibiting as the other sex.”

See Br. of Appellant 11 (citation modified). Distilled to its core, the thrust of Polk’s appellate position is that,

because persons who hold religious views are those most impacted by the Guidelines, they cannot be deemed “neutral.” But that logic turns the well-established neutrality analysis on its head. As the court explained, the Complaint “alleges no facts from which the Court could infer religious animus.” *See* Opinion 16. That a certain religious practice is incidentally burdened by the Guidelines is not sufficient. Rather, the Guidelines must be motivated by religious hostility.

To resuscitate her flawed contention regarding the allegedly suppressive purposes of the Guidelines, Polk relies on the Supreme Court’s 1993 decision in *Church of Lukumi* for the proposition that “the district court turned a blind eye to the real focus of the Guidelines.” *See* Br. of Appellant 11-12 (citing *Church of Lukumi*, 508 U.S. at 534). Yet when properly understood, that decision of the Court actually exposes the defect in Polk’s Free Exercise claim. In those proceedings, the plaintiffs demonstrated that an otherwise facially neutral ordinance was enacted to target religious practices, as evinced by the city council’s reliance on residents’s “concern that certain religions may propose to engage in practices which are inconsistent with public morals.” *See Church of Lukumi*, 508 U.S. at 535. Those plaintiffs did so through references to extensive contemporaneous statements made by various city council members referencing the Santeria religion. *Id.* at 541 (plurality). Finally, the *Church of Lukumi* plaintiffs had otherwise established that each ordinance was gerrymandered, such that “almost the only conduct subject to the ordinance is the religious exercise of Santeria church members.” *Id.* at 535 (citation modified).

Polk, on the other hand, has made no plausible allegations in the Complaint indicating that the Board’s adoption of the Guidelines was motivated by any religious hostility. Instead, Polk maintains that, because religious individuals will be impacted, the Guidelines are not neutral. But that contention skirts the nuance of the issue. That is, because Polk herself is a Christian who believes that there are only two sexes does not mean that all Christians believe the same thing, and that non-Christians inherently believe otherwise. Indeed, there are multiple secular reasons why other persons, regardless of their religious background or creed, could take issue with the Guidelines. In any event, the district court recognized why this contention fails as a matter of law:

Polk offers no facts from which the court could plausibly infer that the Board created the Guidelines to target teachers who adhere to traditional religious teachings on gender identity or that the Board was hostile towards any religion when it enacted the Guidelines. The Guidelines apply to everyone. Anyone who disagrees with them — for religious, secular, or other reasons — must nevertheless abide by them.

See Opinion 15 (citation modified). Put simply, that analysis by the court is correct.

d.

Moving on, we also agree with the district court’s well-reasoned ruling that the Guidelines are “generally applicable.” To that end, our Court has recognized that a governmental policy “is *not* generally applicable ‘if it invites the government to consider the

particular reasons for a person’s conduct by providing a mechanism for individualized exceptions.” *See Kim v. Bd. of Educ. of Howard Cnty.*, 93 F.4th 733, 748 (4th Cir. 2024) (emphasis added) (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 534-38 (2021)).

Polk makes two contentions in arguing that the Guidelines are not generally applicable. First, she says that the Board did not require all school staff members to “check the box” to acknowledge compliance with the Guidelines until the 2022-23 school year. Second, she maintains that, because the Board possesses unbridled discretion of “whether and how to discipline . . . [her] if she violated the Guidelines while teaching,” the Guidelines are not generally applicable. *See* Br. of Appellant 10. Both contentions fail.

Taking Polk’s arguments in turn, we initially recognize that it does not matter when the “check-box” requirement became mandatory. To be sure, the act of checking a box is an affirmation of understanding. But checking a box (or not) does not relieve a school staff member from their obligation to adhere to the Guidelines. Simply put, beginning in the 2022-23 school year, every school staff member (including Polk) was required to check the box in order to affirm their commitment to the Guidelines, without exception.

Polk’s second contention — that the unbridled discretion in how to impose punishments for a violation of the Guidelines shows a lack of general applicability — is easily rejected. The relevant inquiry in that respect is whether the Guidelines apply to all staff members equally. And as the district court correctly recognized in its Opinion,

[h]ere, no system of individual exemptions exists. The Board’s requirement that teachers comply with the Guidelines applies to every teacher; there is no mechanism for granting exemptions to it. That the Board may exercise discretion in how it implements the Guidelines with parents and how it disciplines teachers who violate the Guidelines does not alter the fact that all teachers must abide by them.

See Opinion 18. Yet again, the district court’s analysis here is correct.⁹

3.

Lastly, because the Guidelines are neutral and generally applicable, they need only survive rational basis review. And policies subject to rational basis review are “presumptively constitutional.” See *Alive Church of the Nazarene*, 59 F.4th at 112. As we have recognized, such an inquiry is not demanding: “Rational basis review ‘requires merely that the law at issue be rationally related to a legitimate government interest.’” See *Canaan Christian Church*, 29 F.4th at 199 (quoting *Bethel World Outreach Ministries*, 706 F.3d at 561). And at the Rule 12(b)(6) dismissal stage, the plaintiff must make sufficient allegations to show

⁹ Polk’s terse suggestion that the Guidelines are somehow not neutral because the Board retains discretion in how it punishes violations invites a stark departure from established precedent and ignores the reality of managing our Nation’s public schools. For example, a teacher who fails to comply with the Guidelines by intentionally using an incorrect pronoun should not receive the same punishment as a teacher who mistakenly uses one. Discretion in rendering punishment is simply a reality of school management.

that a specific policy lacks a rational basis. *See Kim*, 93 F.4th at 749; *Alive Church of the Nazarene*, 59 F.4th at 112 (“[T]he claimant bears the burden of showing that the law is not rationally related to any legitimate government interest.”).

Against this backdrop, we agree with the district court’s comprehensive ruling that “Polk has not alleged any facts that would defeat the presumption of [the Guidelines’] validity.” *See* Opinion 21. After the Opinion identified the Board’s purposes for the Guidelines, it walked through each one.¹⁰ And it thoroughly explained as follows:

The Board’s requirement that teachers address students by their preferred pronouns is rationally related to its obligations under Title IX, which prohibits discrimination against transgender students at school. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) (finding school board’s refusal to let transgender student use bathroom corresponding to his gender identity and update school records to reflect his gender identity violated Title IX). Likewise, the Board’s requirement that teachers keep students’ gender identities confidential, even from their parents, is rationally related to the

¹⁰ The underlying purposes of the Guidelines, as recognized by the district court, are: “(1) protecting student safety and preventing discrimination against students; (2) complying with its obligations under federal law, including Title IX . . . which prohibits discrimination based on gender identity; and (3) hiring staff who will nurture transgender and non-transgender students in equal measure.” *See* Opinion 19.

Board’s goal of supporting and protecting the safety of the students whose parents may object to their decision to transition. *See* [J.A. 66] (“In some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be complex and may involve familial conflict.”); *cf. Coal. For TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 887 (4th Cir. 2023) (finding school admissions policy supported by rational basis and explaining that “federal courts should not lightly interfere with the day-to-day operations of schools,’ given that ‘school officials are far more intimately involved with running schools’ than are judges” (quoting *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013))). Finally, the requirement that all teachers must abide by the Guidelines is rationally related to the Board’s goal of hiring staff who will treat and nurture every student equally. The Guidelines are rationally related to legitimate government purposes. Polk’s allegations do not defeat the Guidelines’ “strong presumption of validity.”

See Opinion 20 (citation modified).¹¹ In these circumstances, we agree with and readily adopt the

¹¹ Polk says that the Board’s identified interests are “defined overly broadly” and are “too amorphous to be afforded any weight.” *See* Br. of Appellant 33. And she argues that the Board does not have a legitimate governmental interest in either the pronoun or the confidentiality policies set forth in the Guidelines. But to reiterate once more, the Guidelines must only survive rational basis review, which they do.

court’s analysis. Stated succinctly, the Guidelines — which are neutral and generally applicable — satisfy the rational basis standard.

* * *

At bottom, the district court correctly dismissed Polk’s Free Exercise claim of Count III pursuant to Rule 12(b)(6). And we are satisfied to affirm that dismissal.

B.

Turning to Polk’s Free Speech claim in Count II, Polk argues that the Board violated her freedom of speech rights by compelling her to speak in a manner that violates her religious beliefs. That is, Polk contends that, in order to remain employed as a substitute teacher, the Guidelines require her to use a student’s preferred pronoun when that pronoun was not assigned to the child at birth. Polk also maintains that, in order to keep her job, the Guidelines prevented her from discussing with a student’s parents the student’s pronoun usage or desire to transition genders. We are constrained to reject each of Polk’s contentions and affirm the district court’s Rule 12(b)(6) dismissal of her Free Speech claim.

1.

For background, it is well established that “a state cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” *See Connick v. Meyers*, 461 U.S. 138, 142 (1983). Even so, “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” *See Garcetti v. Ceballos*, 547 U.S. 410, 418

(2006). In the context of public-school education, teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *see Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (citation modified), but “certain limitations are placed on the free speech rights of schoolteachers . . . due to the nature of their employment by government-operated schools,” *see Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 693 (4th Cir. 2007). And as the Supreme Court has made clear in its *Garcetti* decision of 2006, “[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” *See* 547 U.S. at 418.

Here, the district court correctly identified the three-pronged test that our Court utilizes to determine whether a public employee’s First Amendment free speech rights have been violated. *See* Opinion 21-22 (citing *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017)). The first prong asks “whether the employee ‘was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest.’” *See Crouse*, 848 F.3d at 583 (quoting *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998)). “This prong can be divided into two inquires: whether the speech was made as a citizen or pursuant to the employee’s duties, *Garcetti*, 547 U.S. at 421, and whether the content of the speech addressed ‘a matter of interest to the community’ rather than ‘complaints over internal office affairs.’” *See Crouse*, 848 F.3d at 583. (citation modified).

Notably, as our Court has heretofore observed, “if the challenged speech was made as a citizen and

addressed a matter of public concern” — then and only then — does the analysis move to the second prong: balancing “the interest of the employee in speaking freely with the interest of the government in providing efficient services.” *See Crouse*, 848 F.3d at 583 (quoting *Pickering*, 391 U.S. at 568). Finally, the third prong asks whether the employee’s speech caused the alleged adverse action by the employer (i.e., the Board). *Id.*

2.

Against this backdrop of controlling legal principles, we need not wade deep into the weeds because Polk’s Free Speech claim fails before she can break out of the gate. Specifically, we agree with the district court that the Guidelines’s mandate does not concern the speech of a private citizen, but establishes the official duties of a public-school teacher. More pointedly, how a teacher addresses a particular student in a particular classroom — and whether a teacher communicates with a student’s parent — is merely a part of that teacher’s job description. *See, e.g., Lee*, 484 F.3d at 695 (explaining that “our school systems are responsible for adequately and properly educating our youth”).

To be abundantly sure, the Guidelines do place official requirements on how teachers interact with students and communicate with their parents. And here, those requirements were a part of Polk’s official duties as a substitute teacher for Montgomery County’s public schools. As carefully explained by the district court in its Opinion,

[w]hen Polk uses pronouns to refer to students in the classroom setting, she is acting as a

teacher, not as a citizen. When Polk speaks to parents about their child’s behavior in school, she is acting as a teacher, not a citizen. Such speech is not protected by the First Amendment. Under *Garcetti*, the Board may require Polk to use student-preferred pronouns and may restrict what Polk says to parents about their child’s gender identity. Polk may object to the employer-mandated speech on religious grounds, but if she chooses to teach in public schools, she is a government employee and must perform “the tasks she was paid to perform.” *Garcetti*, 547 U.S. at 422. Conditioning Polk’s employment as a substitute teacher on her agreement to abide by the Guidelines does not violate her right to free speech.

See Opinion 24-25. We wholeheartedly agree with and adopt that analysis. *See Garcetti*, 547 U.S. at 421 (“When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

3.

Seeking to forestall the inevitable, Polk maintains that the Supreme Court’s 2006 *Garcetti* precedent does not apply here and that, as a result, the district court’s Rule 12(b)(6) dismissal of her Free Speech claim was erroneous.¹² But Polk’s smattering of

¹² Like the district court, we are satisfied to apply the *Garcetti* precedent instead of the *Pickering-Connick* framework, because the speech involved in this case is not curricular. The Guidelines

Garcetti-related contentions fails to move the needle even slightly in her direction.

Polk's first *Garcetti* contention is that, although the Board may express its own message in the Guidelines, "the Board is requiring that Polk accept and emulate not speech that the Board has commissioned or created, but the pronoun preferences of the students and the students' desire to keep what is happening at school secret from their parents." *See* Br. of Appellant 18 (citation modified). And Polk maintains that she "is being forced to embrace and speak the transgender message of students." *Id.* (citation modified).

That contention is baseless. Indeed, Polk is not challenging a student's right to choose their pronouns. And it is not the students who are forcing her to comply with the Guidelines. Rather, the Board created the Guidelines, and it "has chosen to require teachers to use the child's preferred pronouns," because "[t]he use of preferred pronouns when referring to children in the classroom is the speech of the Board." *See* Opinion 30 n.8. Pursuant to the Guidelines, then, all teachers are required to use the preferred pronouns of the students in classrooms. And if a student comes to school and wishes to be referred to as a specific gender, it does not follow that the

are administrative requirements placed on Polk by the Board. *See Lee*, 484 F.3d at 697 (applying *Pickering-Connick* to bulletin board material curricular in nature). But even if we applied the *Pickering-Connick* framework here, Polk would still lose for a simple reason — individual student pronoun preferences are simply not a matter of "public concern." *Id.* (recognizing that "because [the teacher's] speech was not a matter of public concern, he possessed no First Amendment protection").

student then compels a teacher’s speech. Instead, the teacher must adhere to a policy of the Board — i.e., the Guidelines.

Second, Polk maintains that the *Garcetti* precedent does not apply here because she “refuses to recite the speech demanded of her.” See Br. of Appellant 20. But the decision that Polk relies on to support that contention — that is, *Janus v. AFSCME*, 585 U.S. 878 (2018) — actually bolsters the Board’s argument that governmental entities can control speech made pursuant to an employee’s official duties. The *Janus* Court observed that “[o]f course, if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.” *Id.* at 908. And “[w]hen an employee engages in speech that is part of the employee’s job duties, the employee’s words are really the words of the employer. The employee is effectively the employer’s spokesperson.” *Id.* at 910. In such a light, Polk cannot argue that referring to children by their preferred pronouns and limiting communications between parents and teachers is unlawful. The Guidelines do not contravene Polk’s free exercise rights and are otherwise lawful. As such, we are constrained to reject Polk’s *Janus* argument regarding *Garcetti*.

Third, Polk asserts that the *Garcetti* precedent does not apply in this situation because the Guidelines “compel[] speech for an illegitimate purpose.” See Br. of Appellant 23. As Polk sees it, the Board — vis-à-vis the Guidelines — is doing nothing more than “taking a position on a highly contentious matter that is roiling our country, to the extent of making sure its position on the issue gets enforced even when its

teachers and parents think that doing so is against the children's best interest." *Id.* at 22.

But we readily decline Polk's invitation to run the public schools. Perhaps our distinguished fallen colleague Judge Widener said it best, writing as follows for our en banc Court over a quarter century ago:

In the case of a public school . . . it is far better public policy, absent a valid statutory directive on the subject, that the . . . curriculum be *entrusted to the local school authorities* who are in some sense responsible rather than to the school teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

See Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 371 (4th Cir. 1998) (en banc) (emphasis added). Be it choosing curriculum or placing administrative requirements on how teachers deliver that curriculum, those decisions are entrusted to the Board, not to judges. And it is the Board — not individual teachers — which is democratically responsive. If, as Polk says, teachers and parents disagree with the Guidelines, then democratic means exist to address their concerns.¹³

¹³ Polk also offers two additional contentions concerning *Garcetti*, but neither make any sense. For example, Polk contends that the *Garcetti* precedent is inapplicable because the speech required by the Guidelines "is not a part of a teacher's curricular or administrative duties." *See* Br. of Appellant 21. To be sure, Polk is correct that the speech at issue is not curricular. *See, e.g., Boring*, 136 F.3d at 367-68 (recognizing that play selected by

4.

We briefly respond to the premise of our dissenting colleague regarding Polk’s Free Speech Claim — specifically, that the Board is contravening the First Amendment by “demand[ing] that teachers speak a message supportive of transgenderism by requiring the use of students’ preferred pronouns,” and that such words are of “public concern.” *See post* 35, 39-40. The flaws in that view are twofold. First, our good friend overlooks the proposition that Polk is pursuing only an

teacher was curricular); *Lee*, 484 F.3d at 694 (concluding that religious posterboard material was curricular). And that fact is ultimately of importance. Critically, although the Guidelines do not relate to curricular issues, Polk contends that the Guidelines are not “administrative.” But the contention that they are not “administrative” is confounding. Classroom administration — i.e., addressing students and communicating about students to their parents — is a teacher’s job. With that being so, the district court did not err in describing the obvious: how Polk addresses her students in the classroom, and how Polk speaks to parents about a student’s conduct, flow directly from Polk’s employment by the Board. *See* Opinion 24. In other words, the Board can condition a teacher’s continued employment on such administrative requirements.

Otherwise, Polk maintains that, because the Guidelines compel speech “in an academic setting,” *Garcetti* is of no moment. *See* Br. of Appellant 25. It is true that the *Garcetti* Court expressly declined to decide whether it would extend to situations involving “scholarship or teaching.” *See* 547 U.S. at 425. And our Court has since declined to apply the *Garcetti* analysis to university faculty. *See Porter v. Bd. of Trs. of N.C. State Univ.*, 72 F.4th 573, 582 (4th Cir. 2023). But as to issues concerning elementary and secondary school teachers — where the challenged acts are administrative and unrelated to curriculum matters — the *Garcetti* precedent applies. Put simply, the Free Speech issue in this appeal relates to a disagreement about classroom management, not academic freedom.

as-applied challenge to the Guidelines, and not a facial challenge. That is, Polk contests the validity of the Guidelines as they pertain to her conduct inside the classroom. But importantly, how Polk addresses individual students within an early-elementary school classroom — as opposed to public statements outside school regarding the Guidelines — is not a matter of “public concern.” Second, the dissent ignores the fact that it was Polk who voluntarily signed up to teach in the elementary schools. And to be sure, no one forced Polk to become a substitute teacher in Montgomery County. Accepting her position as an elementary school substitute teacher subjected Polk to a substantial degree of control by the democratically-elected Board, including that she adhere to the Guidelines. Simply put, if Polk had wished to express her “more socially conservative positions,” *see post* 38, there were other avenues available. To rule otherwise would unnecessarily authorize the judiciary to “interfere with the effective operation” of the schools in Montgomery County. *See Janus*, 585 U.S. 908.

* * *

At bottom, we are of opinion that the district court properly dismissed Polk’s Free Exercise and Free Speech claims, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. And because those constitutional claims fail on the merits, Polk could not and cannot be entitled to an award of preliminary injunctive relief thereon. That is, Polk failed to demonstrate a “likelihood of success on the merits” as to those claims, which precludes an award of preliminary injunctive relief in her favor. *See Winter v. Nat. Res. Def. Couns. v. Winter*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must

establish that she is likely to succeed on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that an injunction is in the public interest.” (citation modified)); *see also Henderson for NLRB v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018) (recognizing that failure to establish any *Winter* factor is fatal to request for preliminary injunctive relief).

IV.

Pursuant to the foregoing, we affirm the dismissal of Counts II and III of Polk’s Complaint, for failure to state a claim upon which relief can be granted. As a result, there is no basis for injunctive relief on either of those First Amendment constitutional claims.

AFFIRMED

WILKINSON, Circuit Judge, dissenting:

I would hold that the plaintiff, Ms. Kimberly Polk, is likely to succeed on the merits of her free-speech claim. Montgomery County Public Schools (“MCPS”) gave Ms. Polk, a substitute teacher, an unjust ultimatum: use transgender students’ preferred pronouns in violation of her personal convictions or teach somewhere else. Because MCPS’s policy compels speech on a noncurricular matter, and because reasonable alternatives existed (*e.g.*, using only students’ last names), I would hold that the *Pickering* balancing test applies and favors Ms. Polk.

In holding instead that the Free Speech Clause does not provide even qualified protection to Ms. Polk’s speech, the majority leaves teachers completely vulnerable to becoming the unwilling mouthpieces of government messaging. Although transgender-rights advocates may now cheer the majority opinion, they will find today’s cure in truth a poison when states enact legally indistinguishable policies *preventing* teachers from using preferred pronouns in schools. And because nothing prevents school systems from pushing this newfound control much further than mere pronoun usage, I respectfully dissent.

I.

I agree with the majority that Ms. Polk’s Free Exercise Clause claim is unlikely to succeed on the merits. On this issue, the Supreme Court’s position in *Employment Division v. Smith*, 494 U.S. 872 (1990), controls. Although some Justices have expressed doubts about that decision’s “neutral and generally applicable” formula, the Court has not abrogated it. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 543

(2021) (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 545 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment). We, as circuit court judges, are bound to respect the precedential effect of *Smith* until the Court itself holds otherwise. That is, as they say, elementary.

II.

I depart, vigorously so, from the majority's free-speech analysis. This case is, without question, about *compelled* speech—a detail to which the majority gives short shrift. This is not a case where a school board is disciplining a teacher for using coarse or bigoted language. No, MCPS seeks to put words in Ms. Polk's mouth. It demands that teachers speak a message supportive of transgenderism by requiring the use of students' preferred pronouns, silence or reasonable alternatives be damned. J.A. 67.

In putting this court's imprimatur on MCPS's policy, the majority disregards our nation's core First Amendment tenets. The Founders held no illusions regarding the danger posed by too much governmental regulation of speech. As early as 1722, Benjamin Franklin, quoting wholesale from Cato's Letters No. 15, railed against the "wretched Countries" that so regulated speech: "[W]here a Man cannot call his Tongue his own, he can scarce call any Thing else his own. Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech." Silence Dogood No. 8 (1722), *reprinted in* 1 THE PAPERS OF BENJAMIN FRANKLIN, JANUARY 6, 1706 THROUGH DECEMBER 31, 1734, at 27–28 (Leonard W. Labaree ed. 1959) (quoting 1

THOMAS GORDON, CATO'S LETTERS 96 (London, 5th ed. 1748)).

MCPS insists that there is no abridgment of free speech here. Rather, it says Ms. Polk has chosen not to speak and not to address her students by their preferred pronouns. This makes no difference. Her silence—her refusal to use preferred pronouns—conveys a distinct point of view, which however distasteful to some, remains meaningful to her. Disapproval can be voiced by a quiet refusal to approve. Control of one's tongue is no less important when an individual's desired speech is really the lack thereof. Surely, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Indeed, "since *all* speech inherently involves choices of what to say and what to leave unsaid," freedom of speech necessarily encapsulates the decision to choose "what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11, 16 (1986) (plurality opinion)). Again, this reflects our Founders' wisdom. Thomas Jefferson decried "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors[] [as] sinful and tyrannical." A Bill for Establishing Religious Freedom, in 2 THE PAPERS OF THOMAS JEFFERSON 545 (J. Boyd ed. 1950); *see also Janus v. AFSCME, Council 31*, 585 U.S. 878, 905 & n.8 (2018).

It has become a lodestar of our “constitutional constellation” that “no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642 (striking down a state law compelling students to say the pledge of allegiance in schools). But this is what MCPS has done. It has stepped right into the classroom and told teachers right down to the last syllable what words to utter and what, in addressing a student, teachers may and may not say. Time and time again, the Supreme Court has extolled the especially egregious nature of compelled speech. In *Wooley v. Maynard*, the Court held that New Hampshire could not force citizens to display the message “Live Free or Die” on their vehicles’ license plates. 430 U.S. at 705. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, it held that Massachusetts could not alter a parade organizer’s speech by requiring the inclusion of an LGBT group. 515 U.S. at 557. And, most recently, in *303 Creative LLC v. Elenis*, the Court held that Colorado could not coerce a graphic designer into making custom wedding websites for same-sex couples. 600 U.S. 570 (2023).

All these cases illustrate that the state has little role in defining the contours of acceptable debate. The First Amendment “foreclose[s] public authority from assuming a guardianship of the public mind.” *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). MCPS has paid this point no heed. It has given opposing beliefs of transgender rights no quarter. It seeks to place the entire subject beyond even murmurous misgivings, not to mention open

debate. We must construe our free-speech doctrines “to invite dispute,” not shirk from it, especially when speech may seem undesirable or unpopular. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Ms. Polk’s views may indeed be unpopular, but we stand on a dangerous precipice when the government seeks to coopt an individual’s voice as a “billboard’ for the State’s ideological message.” *Wooley*, 430 U.S. at 715; *see also 303 Creative*, 600 U.S. at 586.

Just look at the instant case. MCPS has established a hierarchy of public opinion, valuing pro-transgender messages above more socially conservative positions—a paradigmatic example of viewpoint discrimination. But whether speech be “right” or “wrong,” we must reject a policy that exists for “no better reason than promoting an approved message or discouraging a disfavored one.” *Hurley*, 515 U.S. at 579. Indeed, “[f]orcing free . . . individuals to endorse ideas they find objectionable is always demeaning,” *Janus*, 585 U.S. at 893. By all means, voice objections to Ms. Polk’s point of view. Say she is insensitive to issues of transgender identity. But do not indulge affronts to speakers’ dignity simply because they, like Ms. Polk, stand in the minority. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (“[T]he fact that [homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect . . . those who wish to voice a different view.”); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 882–83 (1993). “[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 582 U.S. 218, 246 (2017) (quoting *United*

States v. Schwimmer, 279 U.S. 644, 655, (1929) (Holmes, J., dissenting)).

The majority places little stock in these principles of neutrality and noninterference. MCPS has required Ms. Polk, a minority-view holder in Montgomery County, to “disseminate” views she does not hold, thereby “enhanc[ing] the relative voice’ of [her] opponents.” *Pac. Gas*, 475 U.S. at 14 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)). The effects of this compelled, viewpoint-discriminatory speech must loom large when determining whether Ms. Polk, as a public employee, retains First Amendment protection.

III.

A.

While in most other contexts we would review compelled, viewpoint-discriminatory speech under strict scrutiny, *see, e.g., Wooley*, 430 U.S. at 716–17, Ms. Polk spoke as a public employee and thus has more limited First Amendment protection, *see Connick v. Myers*, 461 U.S. 138, 143–44 (1983). This caveat does not, however, render the Free Speech Clause inoperable in the workplace. Indeed, just as our compelled-speech doctrine safeguards public debate, the Supreme Court in *Pickering* ensured that teachers like Ms. Polk retain their right as citizens to “comment[] upon matters of public concern.” *Pickering v. Bd. of Educ. of Twp. High Sch.*, 391 U.S. 563, 568 (1968).

Determining whether an employee’s speech covers a “public concern” is a liberally construed test which asks whether the message touches upon an

issue of “political, social, or other . . . community” interest. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quoting *Connick*, 461 U.S. at 146). There can be no question that transgender rights represent a highly contentious and significant issue in our social and political zeitgeists. See *Darlingh v. Maddaleni*, 142 F.4th 558, 565 (7th Cir. 2025). If this issue is not one of public concern, I cannot think of an issue that would be. Few areas remain untouched by this heated debate. It reaches public accommodations, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); sports, e.g., *B.P.J. ex rel. Jackson v. W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024), cert. granted sub nom. *West Virginia v. B.P.J. ex rel. Jackson*, No. 2443, 2025 WL 1829164 (U.S. July 3, 2025) (mem.); health care, e.g., *United States v. Skrmetti*, 605 U.S. 495 (2025); books, e.g., *Mahmoud v. Taylor*, 606 U.S. 522 (2025); dress codes, e.g., *Texas v. EEOC*, 785 F. Supp. 3d 170 (N.D. Tex. 2025); employment, e.g., *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); passports, e.g., *Trump v. Orr*, No. 25A319, 2025 WL 3097824 (U.S. Nov. 6, 2025) (mem.); and military service, e.g., Exec. Order No. 14183—the list goes on. And many of these substantive issues are intertwined with a secondary, higher-level debate about state interference with parental rights. See, e.g., *Mahmoud*, 606 U.S. at 547.

B.

Because the speech in this case touches upon a matter of public concern, MCPS may prevail only if its interests outweigh Ms. Polk’s. This balancing test, established in *Pickering*, begins tilted in an employee’s favor where, as here, the speech “substantially” implicates a social or political interest.

Connick, 461 U.S. at 152. Likewise, the Supreme Court has suggested that the *Pickering* test may require modification in the context of compelled speech, in part to account for the higher level of scrutiny we normally apply to such coercive action. *Janus*, 585 U.S. at 908–09. But the exact formulation of the *Pickering* balancing test need not beleaguer us today. MCPS’s preferred-pronoun policy fails the least-demanding version, let alone the most strenuous one.

Ms. Polk’s interests in avoiding compelled speech on a topic of significant public dispute are weighty. Moreover, the speech at issue here also runs afoul of Ms. Polk’s sincerely held religious convictions. See J.A. 24. Religiously motivated speech holds a special place in our constitutional scheme. See *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“[G]overnment suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.”). Indeed, the First Amendment inextricably intertwines free exercise and free speech. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276–78 (1981); *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021).

On the other side of this equation, MCPS alleged interests in ensuring students’ safety and equality. Resp. Br. at 27–28, 50–51. But these laudable goals are not implicated by the actual circumstances at play here. Ms. Polk is not threatening to use biological pronouns or to harass transgender students. She has merely asked for reasonable accommodations that would allow students to *self*-identify however they choose while still respecting Ms. Polk’s convictions.

Many such alternatives exist, and Ms. Polk referenced some. The most obvious solution would be to permit Ms. Polk to call all students by their last name (*e.g.*, “Bueller, please answer question 43.”). In light of this easy “win-win” for teachers and school districts, *Meriwether*, 992 F.3d at 510–11, the result of the interest balancing is as obvious as if MCPS were playing seesaw with a lead block.

IV.

A.

The majority bypasses the entirety of *Pickering* balancing by engaging in an impermissibly broad reading of the “official duties” exception in *Garcetti v. Cebalos*, 547 U.S. 410, 421 (2006). It suggests that within the four walls of the classroom, and perhaps most of the school building, teachers never speak as private citizens and thus retain no speech protections whatsoever. *See Wood v. Fla. Dep’t of Educ.*, 142 F.4th 1286, 1290–91 (11th Cir. 2025). I see no way to reconcile this restrictive approach with the Supreme Court’s longstanding admonition that “teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). But the majority all but decrees that the First Amendment and its strictures on compelled speech now evaporate the second a teacher passes through these gates and meets a student.¹

¹ The majority notes that Ms. Polk voluntarily signed up to teach in the elementary schools, but so what? People regularly volunteer for employment in a great variety of settings without signing away each and every right they possess.

We have never held, however, that the proper *Garcetti* test is one of but-for causation, *i.e.*, whether the speech “owes its existence to a public employee’s professional responsibilities.” *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 989 (3d Cir. 2014) (rejecting this approach). Indeed, the Supreme Court has been clear that a public employee being “within the office environment” is not by itself “dispositive” under *Garcetti*. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530 (2022) (internal quotation marks omitted) (quoting *Garcetti*, 547 U.S. at 421). Rightfully so—if the presence of a student or location alone could remove all protection from a teacher’s speech, the constant refrain that public employees retain their First Amendment rights would ring hollow. The Constitution does not tolerate such illusions; free speech cannot “be so circumscribed that it exists in principle but not in fact.” *Tinker*, 393 U.S. at 513.

If the majority’s reasoning is correct, then there is no limit to the words the state can put in teachers’ mouths—teachers become, for all intents and purposes, the state’s anointed messengers. Are we now to allow states to mandate that teachers voice opinions contrary to their own without any First Amendment protection whatsoever? Can the state force an Israeli teacher to wear a pro-Palestine pin? Can the state force a Quaker math teacher to start class with a statement expressing her support for U.S. military strikes abroad? Can the state force an atheist teacher to recite the pledge of allegiance with the words “under God”? *But cf., e.g., Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 630–33 (2d Cir. 1972) (citing Barnette’s logic and holding under *Pickering* that a school could not compel teachers to say the pledge of

allegiance). Can the state force an independent teacher to profess to students her support for incumbent elected officials? Under the majority's view, the only logical conclusion is yes. The state need not even supply a rationale because *Garcetti* would supposedly place such speech outside the First Amendment's ambit.

The consequences of the majority's view could even bring *Garcetti* into tension with other public-employment precedents, particularly the Supreme Court's political-patronage cases. Before *Garcetti*, the Court made clear that public employers could not condition employment or disciplinary action on membership in or endorsement of a political party or platform. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74–77 (1990); William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 175–76 (2018) (citing Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 152–53 (2016)). *Garcetti* did not even hint at abrogating this doctrine. But it appears the majority would, provided the compelled patronage occurred in the classroom. This cannot be.

B.

None of this is to suggest that *Garcetti* plays no role in public primary and secondary schools. Indeed, boards of education traditionally have broad authority over curricular matters, and *Garcetti* rightly prevents primary and secondary teachers from endlessly second-guessing the government's decisions on what to teach. *See Boring v. Buncombe*

Cnty. Bd. of Educ., 136 F.3d 364, 370–71 (4th Cir. 1998) (en banc). I would not undo this carveout.

Garcetti, however, does not invite compelled speech on the outer perimeter of teachers’ core curricular functions. Noncurricular matters, including whether to use preferred pronouns or a student’s last name, do not implicate the same need for state control as curricular ones. In this vein, we have often singled out curricular speech as being subject to governmental authority. *See Boring*, 136 F.3d at 370–71; *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 & n.11 (4th Cir. 2007). Indeed, state control of curricular matters is necessary for ensuring educational standards across classrooms. Noncurricular speech, however, is different. *See Boring*, 136 F.3d at 373 (Luttig, J., concurring); *see also Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 741–43 (Va. 2023); *Wood*, 142 F.4th at 1299–1300 (Jordan, J., dissenting). It tends to address the more minor matters endemic to smooth classroom administration, where the need for compelled and viewpoint discriminatory speech is far less salient.

The majority acts as if any narrower interpretation of *Garcetti* would completely gut school systems’ authority, enabling a slippery slope into chaotic classroom disruption. Not so. Indeed, I would not so hinder the ability of school boards to ensure effective learning environments. *See Connick*, 461 U.S. at 151 (emphasizing the need to avoid disruptions to workplace efficiency). Rather, I would merely subject compelled speech on noncurricular matters to the *Pickering* balancing test we have used for over half a century—a test which *Garcetti* sought to clarify, not render obsolete.

That test is hardly unfavorable to the government. Under *Pickering*, if the government proffers substantial interests that outweigh those of the teacher, there is no reason why it could not implement a given policy. Indeed, the government has often come out on top of the balance. *See, e.g., Billioni v. Bryant*, 998 F.3d 572, 579 (4th Cir. 2021); *Borzilleri v. Mosby*, 874 F.3d 187, 194 (4th Cir. 2017); *Darlingh*, 142 F.4th at 565; *Heim v. Daniel*, 81 F.4th 212, 234 (2d Cir. 2023).

To reiterate, my qualm with the majority is simply that we cannot categorically write all in-class speech out of the First Amendment. *Garcetti* has its place, but chiefly with regard to core curricular functions. Speech at the noncurricular margins of a teacher’s job should remain subject to the same standards that we have always applied. This is no jurisprudential revolution.

V.

Ms. Polk’s case is one of many plaguing our nation’s educational system. Across all levels of education—elementary to college—LGBT rights, DEI, antisemitism, systemic racism, and innumerable other issues have made our schools hotbeds of vehement sociopolitical debate. Silencing voices and compelling affirmations to government-preferred messaging do nothing to temper the vitriol; on the contrary, such actions foster further hostility. Our democratic project relies on the assurance that “state-operated schools may not be enclaves of totalitarianism.” *Tinker*, 393 U.S. at 511. It relies on governments fostering viewpoint diversity in the schoolhouse. Students must learn to challenge and

debate topics in a respectful, civil manner, but this learning cannot occur if access to ideas, even government-disfavored ones, is not preserved.

I would enjoy MCPS's policy as applied to Ms. Polk. It is a gross assault upon the First Amendment. The resolution of the difficult issues surrounding transgender rights should not come at the expense of our constitutional heritage. Supporters of transgender rights may proclaim the majority opinion a great victory. But the frenzy of battle often renders the zealous warrior heedless of a fight's impending cost. Sadly, those costs will land heavily and impermissibly upon transgender individuals. The majority's decision will prevent a handful of teachers from using reasonable alternatives to preferred pronouns while permitting entire states to ban preferred-pronoun use altogether. *See, e.g.*, TEX. EDUC. CODE § 11.401; FLA. STAT. § 1000.071(3). There is no joy in a fleeting victory, one that will redound not only to the defendants' ultimate detriment, but to the detriment of all those who value free dialogue and unfettered learning within our cherished schools. With all respect to my friends in the majority, I dissent.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

KIMBERLY ANN POLK,	*	
Plaintiff,	*	
v.	*	Civ. No. DLB-24-
	*	1487
MONTGOMERY COUNTY PUBLIC SCHOOLS, <i>et al.</i>,	*	
Defendants.	*	

MEMORANDUM OPINION

Kimberly Ann Polk worked as a substitute teacher for Montgomery County Public Schools (“MCPS”) during the 2021–2022 school year. In the summer of 2022, all MCPS teachers, including Polk, were required to review an online instructional video on MCPS’s gender identity guidelines (“the Guidelines”). The Guidelines set forth MCPS policies on transgender and gender nonconforming students and provide for the creation of gender support plans for students. Under the Guidelines, teachers must refer to students by their preferred pronouns and may not discuss a student’s gender identity with the student’s parents without the student’s consent. At the end of the video, teachers were required to affirm they understood the Guidelines and their obligation to follow them. Polk refused to affirm because, in her view, the Guidelines require her to act and speak in a manner that conflicts with her Christian beliefs.

Because Polk refuses to abide by the Guidelines, she may not be a substitute teacher in MCPS.

Polk sued MCPS, the Montgomery County Board of Education (“the Board of Education” or “the Board”), the elected members of the Board of Education, and the interim Superintendent of the Board of Education. Polk claims that the defendants violated her First Amendment rights to free exercise of religion and free speech when MCPS ended their employment relationship because Polk would not comply with the Guidelines. Polk also claims the defendants violated her rights under Title VII of the Civil Rights Act because her employer refused to accommodate her religious beliefs.

Polk moves for a preliminary injunction that requires MCPS to place her in a classroom that has “no transitioning students.” ECF 4, at 1. The defendants oppose the preliminary injunction motion and move to dismiss Polk’s complaint for failure to state a claim. Both motions are fully briefed. For the following reasons, the Court grants the motion to dismiss the free exercise and free speech claims, denies the motion to dismiss the Title VII claim, and denies the motion for a preliminary injunction.

I. Background¹

A. MCPS and the Guidelines

MCPS is the public school district for Montgomery County, Maryland. ECF 1, ¶ 8. It is the

¹ These facts, accepted as true, are from Polk’s complaint, ECF 1, and the Guidelines, ECF 28-4, which are attached to the motion to dismiss, integral to the complaint, and authentic. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 164 (4th Cir.

largest school district in Maryland. *Id.* In 2023, it was the seventh largest employer in the state. *Id.*

Maryland law authorizes the Montgomery County Board of Education to adopt rules, regulations, and educational policies for MCPS, so long as those rules, regulations, and policies are consistent with state law. *Id.* ¶ 7; *see also* Md. Code Ann., Educ. § 4-108(3)–(4). Pursuant to that grant of authority, the Board of Education adopted gender identity guidelines for the 2019–2020 school year. ECF 1, ¶ 11. The Board has published substantively the same Guidelines for each school year thereafter. *Id.* The Guidelines apply to every student in the MCPS system. *Id.* ¶ 16.

The Guidelines permit schools to create “Gender Support Plans” for transgender and gender nonconforming students. *Id.* ¶ 13. The Guidelines provide that the principal or their designee, “in collaboration with the student and the student’s family (if the family is supportive of the student), should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school and is otherwise protected from gender-based discrimination at school.” *Id.*

The Guidelines instruct school staff members, including substitute teachers, to “address students by the name and pronoun corresponding to the gender

2016) (“[I]t is well established that a document attached to a motion to dismiss may be considered when evaluating a motion to dismiss if the document was ‘integral to the complaint and authentic.’” (quoting *Sec’y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007))).

identity that is consistently asserted at school.” *Id.* ¶ 14. The Guidelines also address a student’s right to keep their gender identity private, even from their parents. *Id.* The Guidelines provide:

Privacy And Disclosure Of Information

All students have a right to privacy. This includes the right to keep private one’s transgender status or gender nonconforming presentation at school.

Information about a student’s transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA).

Schools will ensure that all medical information, including that relating to transgender students, is kept confidential in accordance with applicable state, local, and federal privacy laws. . . .

Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose students’ status to others, including parents/guardians and other school

staff members, unless legally required to do so or unless students have authorized such disclosure.

Id. When a staff member speaks to a parent of a transgender student, the Guidelines instruct staff members to “use the student’s legal name and pronoun that correspond to the student’s sex assigned at birth,” “[u]nless the student or parent/guardian has specified otherwise.” *Id.* The Guidelines do not tell staff members what they must say to parents if they inquire about their child’s gender identity. *Id.* Rather, the Guidelines encourage staff members to keep such information confidential and authorize disclosure only if it is legally required or if the student consents to disclosure. *Id.*

B. Kimberly Polk and Her Reaction to the Guidelines

Kimberly Polk worked as a substitute teacher for MCPS during the 2021–2022 school year. *Id.* ¶ 24. The Guidelines were in effect that year. *Id.* ¶ 11. Polk taught ten times at eight different MCPS elementary schools. *Id.* ¶ 24. She primarily taught in preschool special education classes, but she also taught kindergarten and second and fourth grade. *Id.* ¶ 25. She “received uniformly positive reviews and responses concerning her teaching.” *Id.* ¶ 26. Polk was qualified to return to MCPS as a substitute teacher for the 2022–2023 school year without reapplying. *Id.* ¶ 24. She planned to substitute teach more frequently during the 2022–2023 school year. *Id.* ¶ 28.

“As part of the retention process for the 2022-23 school year,” Polk was required to review online instructional videos about MCPS policies and

procedures. *Id.* ¶ 29. One of those videos was about the Guidelines. *Id.*

Polk watched the Guidelines video. *Id.* At the end of the video, the screen instructed Polk to electronically sign an affirmation, by clicking a box, that she had watched and understood the instructional video and would “fully adhere to” the Guidelines. *Id.* ¶ 30.

Because of her “sincerely held religious beliefs,” Polk “was not able to affirm that she would adhere to [the Guidelines].” *Id.* ¶ 31. Polk believes that “God created individuals as either male or female and she would act unethically if she assisted children to present as other than their God-given sex.” *Id.* This would “include lying to children by using pronouns for them that do not match their God-given, biological sex.” *Id.* Polk also believes that “God gave parents the primary responsibility for the care and upbringing of their minor children and it would be unethical for her to hide from parents that their child is transitioning genders at school.” *Id.* Polk’s beliefs are “based on her understanding of her Christian religion and the Holy Bible.”² *Id.*

In November 2022, Polk submitted a request for a religious accommodation to Khalid Walker, the MCPS compliance coordinator. *Id.* ¶ 32. Polk also submitted a request for an accommodation on the MCPS website. *Id.* Afterward, Polk and Walker spoke on the phone about a possible accommodation. *Id.* ¶ 33.

² Polk also claims that the Guidelines violate her religious beliefs by requiring her “to assist a child of one sex to use the restroom of the opposite sex while others of the opposite sex were present.” ECF 1, ¶ 31.

Walker told Polk that any accommodation they discussed would be “subject to further MCPS approval.” *Id.* Walker “informed [Polk] that she would not have to use preferred pronouns,” “would not be required to sign the affirmation,” and “would be permitted to teach in the elementary schools and preschool special education program but not in the middle or high schools.” *Id.* Walker also “informed [Polk] that, in the event a child presented gender identity issues such that she could not adhere to [the Guidelines], the school would provide her with someone else, like a school administrator, who would be able to provide her with support and to interact instead with the student.” *Id.*

In December 2022, Walker informed Polk that MCPS had rejected “any accommodation for her.” *Id.* ¶ 34. Because she did not receive an accommodation, Polk did not teach in MCPS schools during the 2022–2023 or 2023–2024 school years. *Id.* ¶ 35. Her inability to substitute teach for MCPS has negatively impacted her family’s finances. *Id.* ¶ 36.

C. Procedural History

Polk timely filed a charge of employment discrimination with the Equal Employment Opportunity Commission (“EEOC”) in August 2023. *Id.* ¶ 37. She alleged that MCPS violated her rights under Title VII by denying her a religious accommodation. *Id.* In February 2024, MCPS filed a statement of position with the EEOC. *Id.* ¶ 38. MCPS said it was amenable to one accommodation: Polk would not have “to execute the affirmation in the training materials that she would abide by the policy in its entirety, but she would still be required to do so

when working.” *Id.* Polk does not believe this was a “true accommodation,” because it “compels” her “to choose between losing her job and being untrue to her religious convictions.” *Id.* In April 2024, Polk requested and received from the EEOC a right to sue notice. *Id.* ¶¶ 41–42.

In May 2024, Polk filed her complaint in this Court against MCPS, the Board of Education, and the elected Board members and the interim MCPS Superintendent in their individual and official capacities. *Id.* ¶¶ 7–10. Polk asserts three claims against all defendants: (1) a violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, for failing to provide her with a religious accommodation; (2) a violation of 42 U.S.C. § 1983 for violating her First Amendment right to free speech; and (3) a violation of 42 U.S.C. § 1983 for violating her First Amendment right to free exercise of religion. *Id.* ¶¶ 53–71. Polk seeks monetary damages and a declaration that the Guidelines violate her constitutional rights and her rights under Title VII. *Id.* at 17. She also seeks “[a] preliminary injunction allowing her to continue to substitute teach in classrooms in which students who are transitioning genders are not enrolled” and “[a] permanent injunction consistent with the declaratory relief.” *Id.*

Polk moves for a preliminary injunction. ECF 4. Though Polk eventually wants a permanent injunction that would allow her not to comply with the Guidelines at all, she pledges, for the duration of the preliminary injunction, to “limit her substitute services to elementary school classrooms with no transitioning students attending them” and to “obtain assistance from other MCPS personnel promptly if

she must engage a transitioning student in a way that would violate her religious beliefs.” *Id.* at 1. The defendants oppose the preliminary injunction and move to dismiss Polk’s complaint. ECF 28. Both motions are fully briefed. ECF 4, 4-1, 28, 28-1, 30, 31. After briefing was complete, Polk filed three notices of supplemental authority. ECF 32, 37, 38. The Court held a motions hearing on October 17, 2024. ECF 36.

II. Motion to Dismiss

The defendants move to dismiss Polk’s free exercise and free speech claims because she has not stated a cognizable constitutional claim. The defendants also move to dismiss Polk’s Title VII failure-to-accommodate claim because accommodating her would pose an undue hardship on her employer. Polk’s First Amendment claims are dismissed. Polk’s Title VII claim survives.

A. Standard of Review

Rule 8 of the Federal Rules of Civil Procedure requires a party to state “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a party may seek dismissal of a claim because the pleader does not “state a claim upon which relief can be granted.” *Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 290 (4th Cir. 2021) (quoting Fed. R. Civ. P. 12(b)(6)). “To survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Merely “reciting” a claim’s elements and “supporting them by conclusory

statements does not meet the required standard.” *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 212 (4th Cir. 2019).

When considering a Rule 12(b)(6) motion to dismiss, the Court must “accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in the plaintiff’s favor.” *Langford v. Joyner*, 62 F.4th 122, 124 (4th Cir. 2023). The Court “does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses.” *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020) (quoting *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013)). Still, the court must “draw on its judicial experience and common sense” to determine whether the plaintiff has stated a claim that is plausible, not merely possible. *Iqbal*, 556 U.S. at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

B. Proper Employer Defendant

Before resolving the motion to dismiss, the Court first addresses the defendants’ argument that MCPS is not Polk’s employer and thus is not a proper defendant. They argue that the proper employer defendant is the Board of Education. They are correct. MCPS is the name of a local school district. Under Maryland law, a “school district . . . does not exist as a separate entity for purposes of suit.” *Adams v. Calvert Cnty. Pub. Schs.*, 201 F. Supp. 2d 516, 520 n.3 (D. Md. 2002). Instead, state law establishes “a county board of education for each county school system,”

Educ. § 3-103, which “[m]ay sue and be sued,” *id.* § 3-104(b). The county board of education is the proper defendant in a civil lawsuit brought by an employee of a public school system in Maryland. *See Eller v. Prince George’s Cnty. Pub. Schs.*, 580 F. Supp. 3d 154, 167 (D. Md. 2022) (noting the proper defendant in Maryland public school teacher’s anti-discrimination lawsuit was county board of education); *Adams*, 201 F. Supp. 2d at 520 n.3 (treating janitor’s anti-discrimination lawsuit as suit against county board of education); *cf. James v. Frederick Cnty. Pub. Schs.*, 441 F. Supp. 2d 755, 758 (D. Md. 2006) (holding county board of education was proper defendant in excessive force suit brought by parent against school system). Thus, the Board of Education, not MCPS, is the proper employer defendant in this action. The claims against MCPS are dismissed.³

C. Free Exercise

The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Const. amend. I. “Many matters fall under the ambit of the Free Exercise Clause, encompassing both direct and indirect coercion of religion.” *Mahmoud v. McKnight*, 102 F.4th 191, 204 (4th Cir. 2024). To state a violation of the Free Exercise Clause, the plaintiff must allege facts showing that a government action has burdened her religious exercise. *Id.* at 205. The plaintiff need not show that the action imposes a “substantial burden”

³ Throughout this opinion, the Court refers to MCPS and its policies and decisions. These references do not imply that MCPS is the proper defendant. The only legal entity that Polk may sue is the Board of Education.

on her religious exercise—just that the law imposes “a burden.” *Id.* at 207 & n.12; *see also Firewalker-Fields v. Lee*, 58 F.4th 104, 114 n.2 (4th Cir. 2023) (recognizing that the Supreme Court overruled prior cases requiring a “substantial burden” on religious practice). “[A] burden exists whenever government conduct either ‘compel[s] a violation of conscience’ or ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.’” *Mahmoud*, 102 F.4th at 208 (second and third alterations in original) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981)). If the plaintiff plausibly alleges that government action burdens her religious exercise, “then the analysis shifts to whether the government can justify the limitation or intrusion under the applicable level of scrutiny.” *Id.* at 205 (emphasis omitted). If the government action is subject to rational basis review, “[t]he party challenging the law bears the burden of negating ‘any reasonably conceivable state of facts that could provide a rational basis’ for the law.” *Kim v. Bd. of Educ.*, 93 F.4th 733, 749 (4th Cir. 2024) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

1. Burden

Polk alleges the Guidelines burden her religious exercise by forcing her to act in violation of her Christian beliefs. Polk objects to the requirements that she address students by pronouns that do not correspond to the sex assigned to them at birth and that she “hide from parents that their child is transitioning genders at school.” ECF 1, ¶ 31. Polk insists that if she agrees to these requirements, she would be forced to act contrary to her Christian beliefs that “God created individuals as either male or

female” and that “God gave parents the primary responsibility for the care and upbringing of their minor children.” *Id.* Polk says MCPS forced her to choose between violating her religious beliefs and losing her job. Indeed, because Polk refuses to abide by the Guidelines, she is not allowed to substitute teach. That suffices to allege a burden on her religious practice. *See Mahmoud*, 102 F.4th at 208.

The Board argues Polk has not alleged a religious burden because “the only thing required . . . to date has been to review the training materials” and attest that she has reviewed them and understands her obligation to comply with them. ECF 28-1, at 36. According to the Board, the “attestation does not require her to shed her religious beliefs or endorse the policy; it only requires her to attest that she is aware of the expectation that she comply with the policy.” *Id.*

The Board’s argument is too clever by half. There is no meaningful difference between Polk affirming that she will comply with the Guidelines and Polk actually complying with them. Polk has refused to do either. When Polk requested accommodations that would alleviate the burden on her religious exercise, MCPS rejected them. When MCPS suggested it could accommodate Polk by eliminating the affirmation requirement, it insisted that Polk “would still be required to [comply with the Guidelines] when working.” ECF 1, ¶ 38. Polk has refused this “accommodation” because she believes it compels her “to choose between losing her job and being untrue to her religious convictions.” *Id.* Because Polk will not comply with the Guidelines, MCPS will not employ her as a substitute teacher. Their employment

relationship remains severed. Polk has alleged a religious burden.

2. Neutrality and General Applicability

“The Court’s free exercise analysis does not end with proving the existence of a burden on religious exercise . . . because ‘[n]ot all burdens on religion are unconstitutional.’” *Mahmoud*, 102 F.4th at 206 (alteration in original) (quoting *United States v. Lee*, 455 U.S. 252, 257 (1982)). For example, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Emp. Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring)). Under *Smith*, “laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (citing *Smith*, 494 U.S. at 878–82).⁴ If the law is neutral and generally applicable, the government need show only that it survives rational basis review, which “requires merely that the law at issue be rationally related to a legitimate governmental interest.” *Canaan Christian Church v. Montgomery County*, 29 F.4th 182, 199 (4th Cir. 2022) (internal quotation marks omitted)

⁴ Polk argues that *Smith* rests on “shaky ground” and “should be overruled.” ECF 4-1, at 29 & n.5 (observing that in *Fulton*, five justices agreed that *Smith* “should be reconsidered and likely overruled”). As of today, *Smith* is the law of the land, and this Court must and will apply it.

(quoting *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013)). If the law is not neutral or generally applicable, strict scrutiny applies. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). The plaintiff bears the burden of showing that the government action is not neutral or generally applicable. *Id.*

i. Neutrality

The “[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.” *Fulton*, 593 U.S. at 533; *see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 640 (2018). “Conversely, government action is neutral if it has no object that infringes upon or restricts practices *because* of their religious motivation.” *Kim*, 93 F.4th at 748 (quoting *Alive Church of the Nazarene, Inc. v. Prince William County*, 59 F.4th 92, 108 (4th Cir. 2023)) (cleaned up in original).

To determine whether a law targets religion, a court “must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The text of the Guidelines is facially neutral. It does not mention religion at all. The Guidelines do not discriminate on their face.

Polk disagrees. She proclaims that it is “obvious from the face of” the Guidelines that they target people like her who “hold to traditional religious teachings on transgenderism” and “disagree with the idea that students should be free to transition from

their God-given sex.” ECF 4-1, at 30. Yet Polk points to nothing in the text of the Guidelines that supports this sweeping proclamation. It is not, as Polk insists, “obvious from the face of” the Guidelines that they discriminate against people with her religious beliefs. The Guidelines are facially neutral.

Even so, “[f]acial neutrality is not determinative.” *Lukumi*, 508 U.S. at 534. The Free Exercise Clause “forbids subtle departures from neutrality’ and ‘covert suppression of particular religious beliefs.” *Id.* (first quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971); and then quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (plurality opinion)). So, “[w]hen presented with a law that affects religious practice, even if indirectly, a court must look behind the law’s text to determine if it was enacted ‘because of’ and not ‘in spite of’ its effect on religion.” *Alive Church of the Nazarene*, 59 F.4th at 108 (quoting *Lukumi*, 508 U.S. at 540). “Such an inquiry compels the court to look at contemporaneous statements made by decisionmakers or community members surrounding the law’s passage, and any deviations from standard decisionmaking procedures.” *Id.*

In her complaint, Polk does not allege that the Board made any religiously hostile statements contemporaneous with the enactment of the Guidelines. Polk also does not allege that the Board deviated from standard procedures when it implemented the Guidelines. Indeed, the Guidelines largely follow the Maryland State Department of Education’s gender identity guidelines. The state guidelines are not binding on local school systems, but they are “designed to serve as suggestions for consideration for school systems and administrators

who may want to develop their own transgender policy, procedures, and/or guidelines.” ECF 28-5, at 1.⁵ Those guidelines indicate that staff should refer to students by their preferred pronouns and suggest that parents should not be told about their child’s gender identity unless the child consents. *See id.* at 6, 7. The state guidelines explain that “no provision of state or federal law requires schools to affirmatively disclose this sensitive [gender identity] information to parents.” *Id.* at 7. Instead, “while information in official student records must be disclosed upon the request of parents, sensitive information related to gender identity generally need not be disclosed without the student’s consent.” *Id.* The state policy encourages local school systems to create training and practices that “prevent accidental disclosure of information that may reveal a student’s transgender status to others, *including parents* and other school staff unless the student and/or the student’s parent has authorized school staff to make such disclosure or staff is legally required to do so.” *Id.* (emphasis added). Following this guidance, the Board implemented its own policy on transgender and gender nonconforming students that largely mirrors the state’s policy.

⁵ The Court may take judicial notice of the state’s gender identity guidelines, which are a matter of public record, without converting the motion to dismiss into a summary judgment motion. *See Philips v. Pitt Cnty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (approving the consideration of “publicly available [statistics] on the official redistricting website of the Virginia Division of Legislative Services” at the motion to dismiss stage); *see also Corbitt v. Balt. City Police Dep’t*, 675 F. Supp. 3d 578, 583 n.5 (D. Md. 2023) (taking judicial notice of a police department policy on a motion to dismiss).

In her briefing, Polk points to statements that MCPS made in response to her employment discrimination charge with the EEOC. Polk maintains that, in its EEOC position statement, “MCPS claimed that it could not tolerate even a single person in its teaching ranks who holds a traditional religious view of transgenderism and parental authority over minor children.” ECF 4-1, at 30. Polk asks the Court to infer from this position statement that the Board had covert religious hostility when it enacted the Guidelines. No such inference can be drawn.

Polk does not allege in her complaint that the position statement is evidence of discriminatory intent, and she cannot amend her complaint through her preliminary injunction briefing. *See Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 748 n.4 (D. Md. 1997) (explaining that a plaintiff “is bound by the allegations contained in its complaint and cannot, through the use of motion briefs, amend the complaint”), *aff’d*, 141 F.3d 1162 (4th Cir. 1998).

Even if Polk had alleged that the position statement was evidence of discriminatory intent, it would not change the outcome. MCPS, through counsel, submitted its position to the EEOC in February 2024. Counsel’s statements, written years after the Guidelines were enacted, were made in connection with an adversarial proceeding. They are not “contemporaneous statements made by decisionmakers or community members” that are relevant to whether the Board enacted the Guidelines “because of . . . [their] effect on religion.” *See Alive Church of the Nazarene*, 59 F.4th at 108 (quoting *Lukumi*, 508 U.S. at 540).

Even so, Polk insists her case is like *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*. It is not. In *Lukumi*, the Supreme Court found that a city violated the free exercise rights of people who practiced Santeria. 508 U.S. at 547. Members of the religion engaged in animal sacrifice as “one of the principal forms of devotion” of their faith. *Id.* at 524. In response, city lawmakers enacted three ordinances banning animal sacrifice. *Id.* at 527–28. The Supreme Court held that the ban violated the First Amendment because it was not religiously neutral. *Id.* at 545–46. Indeed, there was overwhelming evidence that the city enacted the ordinances with the intent of preventing the church members from engaging in the religious ritual. The ordinances prohibited only animal sacrifice (not other animal killings), legislators and community members made hostile comments about the church on the public record, and the city passed a resolution noting the concern of city residents about the practices of “certain religions.” *Id.* at 535–42. No such allegations are found here. Polk makes only conclusory allegations about intent. She offers no facts from which the Court could plausibly infer that the Board created the Guidelines to target teachers who adhere to traditional religious teachings on gender identity or that the Board was hostile towards any religion when it enacted the Guidelines. The Guidelines apply to everyone. Anyone who disagrees with them—for religious, secular, or other reasons—must nevertheless abide by them.

Polk’s attempt to analogize this case to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* fails for the same reasons. In *Masterpiece Cakeshop*, the Supreme Court found that the Colorado

Civil Rights Commission’s treatment of a cakeshop owner’s religious discrimination claim reflected hostility towards his religious beliefs and violated his free exercise rights. 584 U.S. at 640. During the Commission’s meetings, several of the Commission members made inappropriate and dismissive comments about the shop owner’s faith. *Id.* at 634–35. One member even described his faith as “one of the most despicable pieces of rhetoric that people can use” and said his faith was used to justify slavery and the Holocaust. *Id.* at 635. The Court found that those “statements cast doubt on the fairness and impartiality of the Commission’s adjudication of [his] case.” *Id.* at 636. The Commission violated the cake shop owner’s free exercise rights by not adjudicating his civil rights complaint in a manner “neutral toward religion.” *Id.* at 640. The factual allegations here could not be more different. There are no contemporaneous statements by members of the Board of Education that suggest religious animus motivated the Guidelines.

Polk does not plausibly allege that the Board enacted the Guidelines because of religious animus. Still, Polk argues that she is “[a]t a minimum . . . entitled to discovery on [neutrality].” ECF 30, at 26. Nothing entitles Polk to discovery on neutrality. She alleges no facts from which the Court could infer religious animus. Polk may not try to find those missing facts in discovery. *See Iqbal*, 556 U.S. at 678–79 (stating that Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

The Guidelines are neutral.

ii. General Applicability

The Court next considers whether the Guidelines are generally applicable. A policy is not generally applicable “if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions’” or “if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton*, 593 U.S. at 533–34 (alteration in original) (quoting *Smith*, 494 U.S. at 884).

Polk argues that the Guidelines are not generally applicable for three reasons. None persuades. First, Polk argues that she was not required to affirm the Guidelines when she was hired as a substitute teacher in 2021 but she is required to affirm them now. MCPS’s decision to require affirmation of the Guidelines does not make them generally inapplicable. All teachers have been treated the same. Before 2022, no one, including Polk, was required to affirm the Guidelines. Since 2022, everyone, including Polk, must affirm them. There are no allegations that MCPS has ever allowed, on an individual basis, teachers to be exempt from complying with the Guidelines. MCPS’s decision to impose an affirmation requirement for the 2022–2023 school year and beyond does not render the Guidelines generally inapplicable.

Second, Polk claims that “MCPS has unbridled discretion with respect to how to apply the policy to parents” and how to discipline teachers who violate the Guidelines. ECF 4-1, at 31. That is beside the point. Even if MCPS has discretion over how to apply

the policy to parents on a case-by-case basis and how to discipline teachers who violate the policy, MCPS does not have any discretion to exempt teachers from their obligation to comply with the Guidelines. Contrast these facts with those in *Fulton*. There, the city of Philadelphia refused to make referrals to a Catholic foster care agency because the agency refused to certify same-sex couples as foster parents. 593 U.S. at 531. The foster care agency sued the city, alleging that the referral freeze violated its First Amendment free exercise rights. *Id.* The city argued that the agency’s practice violated the nondiscrimination provision in the city’s standard foster care contract. *Id.* at 534. The Supreme Court held that the contract’s nondiscrimination provision was not generally applicable because it “incorporate[d] a system of individual exemptions” from the provision that could be invoked in the contract administrator’s “sole discretion.” *Id.* at 535. The city would not exempt the Catholic foster care agency from the nondiscrimination provision. *Id.* That was a *Smith* problem. Under *Smith*, the city could not “refuse to extend [the exemption] system to cases of religious hardship without compelling reason.” *Id.* (internal quotation marks omitted) (quoting *Smith*, 494 U.S. at 884). And even though the city had never granted an exemption, “[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . . because it ‘invite[s]’ the government to decide which reasons for not complying with the policy are worthy of solicitude, here, at the Commissioner’s ‘sole discretion.’” *Id.* at 537 (alteration in original) (internal citation omitted). Because the policy was not

generally applicable, it triggered strict scrutiny. *Id.* at 541. The Court found that the policy did not survive strict scrutiny and violated the First Amendment. *Id.* at 542.

Here, no system of individual exemptions exists. The Board's requirement that teachers comply with the Guidelines applies to every teacher; there is no mechanism for granting exemptions to it. That the Board may exercise discretion in how it implements the Guidelines with parents and how it disciplines teachers who violate the Guidelines does not alter the fact that all teachers must abide by them. *See Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 680 F. Supp. 3d 1250, 1284 (D. Wyo. 2023) (finding similar policy generally applicable when the complaint contained no allegation that the school ever granted an exception to a policy requiring teachers to use students' preferred names and pronouns).

Finally, Polk argues that exemptions from the Guidelines are available under Title VII. On Polk's account, because someone *could* get a religious accommodation under Title VII, compliance with the Guidelines is not uniformly required and thus not generally applicable. Assuming the premise of Polk's argument is true—that a religious accommodation is available under Title VII—Polk offers no authority to support the proposition that the possibility of an accommodation under a federal anti-discrimination employment statute turns an otherwise generally applicable policy into one that allows exemptions. Under *Fulton*, a court must determine whether the policy itself creates a mechanism for individual exemptions, not whether a federal anti-

discrimination law may require individual accommodations.

The Guidelines are neutral and generally applicable.

3. Rational Basis

The neutral and generally applicable Guidelines are subject to rational basis review. *See Jesus Christ Is the Answer Ministries, Inc. v. Baltimore City*, 915 F.3d 256, 265 (4th Cir. 2019), *as amended* (Feb. 25, 2019). “Under rational basis review, a classification enjoys a strong presumption of validity and is constitutional as long as ‘there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.’” *United States v. Timms*, 664 F.3d 436, 447 (4th Cir. 2012) (quoting *Heller*, 509 U.S. at 320). The government’s “policy decisions are ‘not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.’” *Van Der Linde Hous., Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290, 293 (4th Cir. 2007) (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)). A court may not judge a policy’s rationality “on the basis of its wisdom, fairness, or logic (or lack thereof).” *Id.* at 293–94.

On a motion to dismiss, the court considers the allegations in the complaint to determine whether the plaintiff has sufficiently negated a rational basis for the challenged policy. *See Kim*, 93 F.4th at 749 (affirming dismissal of free exercise claim when plaintiff made no effort in the complaint to show policy lacked a rational basis); *Alive Church of the Nazarene*, 59 F.4th at 110 (affirming dismissal of free

exercise claim because plaintiff did not allege facts that would negate a rational basis).

Polk has not alleged any facts that would negate a rational basis for the Guidelines.

For its part, the Board identifies three purposes of the Guidelines: “(1) protecting student safety and preventing discrimination against students; (2) complying with its obligations under federal law, including Title IX [of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.], which prohibits discrimination based on gender identity; and (3) hiring staff who will nurture transgender and non-transgender students in equal measure.” ECF 28-1, at 30. These are legitimate government purposes.

The Board’s requirement that teachers address students by their preferred pronouns is rationally related to its obligations under Title IX, which prohibits discrimination against transgender students at school. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) (finding school board’s refusal to let transgender student use bathroom corresponding to his gender identity and update school records to reflect his gender identity violated Title IX). Likewise, the Board’s requirement that teachers keep students’ gender identities confidential, even from their parents, is rationally related to the Board’s goal of supporting and protecting the safety of the students whose parents may object to their decision to transition. *See* ECF 28-4, at 13 (the Guidelines) (“In some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of

gender identity can be complex and may involve familial conflict.”); *cf. Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 887 (4th Cir. 2023) (finding school admissions policy supported by rational basis and explaining that “federal courts should not lightly interfere with the day-to-day operation of schools,’ given that ‘school officials are far more intimately involved with running schools’ than are judges” (quoting *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013))). Finally, the requirement that all teachers must abide by the Guidelines is rationally related to the Board’s goal of hiring staff who will treat and nurture every student equally. The Guidelines are rationally related to legitimate government purposes. Polk’s allegations do not defeat the Guidelines’ “strong presumption of validity.” *Timms*, 664 F.3d at 447.

Polk has alleged the Guidelines burden her religious exercise. Under *Smith*, the Guidelines are subject to rational basis review because they are neutral and generally applicable to all staff. The Guidelines easily pass that level of review. They are rationally related to legitimate government purposes, and Polk has not alleged facts that would defeat the presumption of their validity. In consequence, Polk has not alleged that the Board violated her free exercise rights when it terminated their employment relationship after Polk refused to abide by the Guidelines. Polk has failed to state a free exercise claim. The Board’s motion to dismiss this claim is granted.

D. Free Speech

Polk also claims that the Board violated her First Amendment right to freedom of speech. Polk argues that the Board compelled her—as a condition of employment—to speak in a manner that conflicts with her religious beliefs in two respects. First, the Board compelled her to use children’s preferred pronouns even if the pronouns do not correspond to the children’s assigned sex at birth. Second, the Board compelled her not to discuss with parents their child’s desire to transition genders. Because Polk refused to engage in this speech, the Board refused to allow her to substitute teach.

It has long been settled that “a state cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” *Connick v. Myers*, 461 U.S. 138, 142 (1983). That bedrock principle applies to public school teachers. Teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Kennedy*, 597 U.S. at 527 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). However, “certain limitations are placed on the[ir] free speech rights . . . due to the nature of their employment by government-operated schools.” *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 693 (4th Cir. 2007).

When public school teachers and other government employees assert free speech claims, courts “use a three-prong test to determine if the employee’s rights under the First Amendment were violated.” *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017). First, the court asks

“whether the speech at issue was that of a private citizen speaking on a matter of public concern.” *Lee*, 484 F.3d at 694 (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc)); see *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). “This prong can in turn be divided into two inquiries: whether the speech was made as a citizen or pursuant to the employee’s duties, and whether the content of the speech addressed ‘a matter of interest to the community’ rather than ‘complaints over internal office affairs.’” *Crouse*, 848 F.3d at 583 (internal citation omitted) (quoting *Connick*, 461 U.S. at 149). Second, if—and only if—the speech was made as a private citizen and addressed a matter of public concern, then the court must balance “the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) (“*Pickering* did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices.”). Finally, the court must determine whether the employee’s speech caused the disciplinary action. See *Crouse*, 848 F.3d at 583.

Polk’s free speech claim fails at the first prong. Polk does not make the speech as a private citizen. She makes the speech pursuant to her official duties as a public school teacher.

The Supreme Court's decision in *Garcetti v. Ceballos* forecloses Polk's free speech claim. In *Garcetti*, a state prosecutor, Richard Ceballos, wrote a memorandum to his supervisors in which he identified misrepresentations in an affidavit in support of a search warrant and recommended dismissal of a pending criminal case. 547 U.S. at 414. His supervisors disagreed with the recommendation and refused to dismiss the charges. *Id.* Later, Ceballos was called as a defense witness to testify at a motions hearing on the validity of the search warrant. *Id.* at 415. In the aftermath of these events, Ceballos's supervisors reassigned him, transferred him to another courthouse, and denied him a promotion. *Id.* Ceballos argued that his memorandum was protected speech and that his supervisors retaliated against him in violation of his First Amendment rights when they punished him because he wrote the memorandum. *Id.*

The Supreme Court disagreed. It held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Ceballos, a public employee, did not dispute that he wrote the internal memorandum pursuant to his official duties as a prosecutor. *Id.* Still, the Court explained the reasons why it agreed the memo was written "pursuant to [his] official duties." *See id.* at 421–22. The "controlling factor" was that "Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Id.* at 421. He wrote the memo "because that is

part of what he, as a calendar deputy, was employed to do.” *Id.* The Court elaborated: When Ceballos “went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings,” he “did not act as a citizen,” and he did “not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case.” *Id.* at 422. Because Ceballos was “simply performing [his] job duties” when he wrote the memorandum, it was not protected speech, and his supervisors did not violate his First Amendment rights when they disciplined him because of the memorandum. *Id.* at 423. The Court declined to apply the *Pickering* balancing test to Ceballos’s speech because to do so “would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.” *Id.*

Applying *Garcetti* to these facts, the Court finds that the speech Polk challenges is made pursuant to her official duties as a substitute teacher. Using pronouns when interacting with and communicating about students is intrinsic to teaching. *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019) (“[H]ow faculty members relate to students *is* part of their jobs.”). And communicating with parents about their children’s conduct in school is “part and parcel” of a teacher’s responsibilities. *See Coomes v. Edmonds Sch. Dist. No. 15.*, 816 F.3d 1255, 1264 (9th Cir. 2016). The Guidelines enhance these traditional responsibilities of a teacher. These responsibilities now include referring to students by their preferred pronouns and not communicating with parents about

their child's gender identity without the student's consent. Both categories of speech would occur only to fulfill Polk's responsibilities as a teacher. See *Garcetti*, 547 U.S. at 421. In the words of *Garcetti*, the speech "is part of what [Polk], as a [substitute teacher], was employed to do." See *id.*⁶

The speech required by the Guidelines is part of Polk's official duties as a teacher. When Polk uses pronouns to refer to students in the classroom setting, she is acting as a teacher, not as a citizen. When Polk speaks to parents about their child's behavior in school, she is acting as a teacher, not as a citizen. Such speech is not protected by the First Amendment. Under *Garcetti*, the Board may require Polk to use student-preferred pronouns and may restrict what Polk says to parents about their child's gender identity. Polk may object to the employer-mandated speech on religious grounds, but if she chooses to teach in public schools, she is a government employee and must perform "the tasks [she] was paid to perform." See *id.* at 422. Conditioning Polk's employment as a substitute teacher on her agreement to abide by the Guidelines does not violate her right to free speech.

Determined to avoid the outcome that *Garcetti* requires, Polk insists that *Garcetti* does not apply here for two reasons.

⁶ Polk argues that referring to children by pronouns and keeping their confidences about the gender identity they express in school are "not curricular matters." ECF 30, at 14. True, the challenged speech does not concern a subject taught in school. Even so, the speech is part of Polk's job responsibilities as a substitute teacher.

First, Polk argues *Garcetti* does not apply because this case involves speech related to teaching, which Polk claims is afforded more constitutional protection than *Garcetti* provides. Polk grounds her argument in the following dicta in *Garcetti*: “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” *See id.* at 425. The *Garcetti* Court did not resolve that argument. It declined to decide “whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.* The Supreme Court still has not decided the issue.

The Fourth Circuit has—in the context of speech of public university faculty members. In this circuit, “the *Garcetti* rule does not extend to speech by public university faculty members, acting in their official capacity, that is ‘related to scholarship or teaching.’” *Porter v. Bd. of Trs. of N.C. State Univ.*, 72 F.4th 573, 582 (4th Cir. 2023) (quoting *Garcetti*, 547 U.S. at 425); *see Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) (finding *Garcetti* did not apply “to the academic work of a public university faculty member” whose “speech . . . was intended for and directed at a national or international audience on issues of public importance unrelated to any of [the professor’s] assigned teaching duties . . . or any other terms of his employment”). Other circuits have held similarly. *See Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021) (holding *Garcetti* did not apply to university professor’s refusal to use preferred pronouns because of the importance of “the free

exchange of ideas in the college classroom”); *Heim v. Daniel*, 81 F.4th 212, 227 (2d Cir. 2023) (highlighting the Supreme Court’s “deep[] commit[ment] to safeguarding academic freedom’ as ‘a special concern of the First Amendment” and holding *Garcetti* does not apply to a public university professor’s academic writing and teaching (alteration in original) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967))); *Demers v. Austin*, 746 F.3d 402, 411–12 (9th Cir. 2014) (holding that *Garcetti* did not apply to a public university’s teaching and academic writing because “the Court . . . ‘ha[s] long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003))).

When it comes to the classroom speech of public elementary and secondary school teachers, the Fourth Circuit has not decided whether *Garcetti* applies. The court had the opportunity to answer that question in *Lee v. York County School Division*, but it declined to do so. *See Lee*, 484 F.3d at 694 n.11 (opting not to decide whether *Garcetti* applied to the posting of religious materials on a middle school Spanish teacher’s blackboard and instead deciding the speech was not a matter of public concern under *Pickering*).

Several other circuits have found that *Garcetti* does apply to the in-class speech of public elementary and secondary school teachers. *See Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016) (noting *Garcetti* applies to school teachers because the “core of the teacher’s job is to speak in the classroom on the

subjects she is expected to teach” and finding teacher’s “impromptu lesson on racial epithets” not protected because it was given “in the course of his regular grammar lesson to a sixth grade class”); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 & n.12 (9th Cir. 2011) (holding *Garcetti*’s carve-out for “academic freedom” does not apply to “primary and secondary school teachers” and finding high school teacher spoke as a government employee when he displayed religious banners in his classroom because his speech “owe[d] its existence’ to his position as a teacher” (quoting *Garcetti*, 547 U.S. at 421–22)); *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010) (finding *Garcetti* applied to high school English teacher who was fired because she taught books and topics not in line with the approved curriculum); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (holding *Garcetti* applied to speech of probationary elementary school teacher who was fired because she expressed her personal views on the Iraq War in a lesson that “was part of her assigned tasks in the classroom” despite the principal’s order that teachers not take sides in political controversies).

These cases suggest two reasons why courts have found *Garcetti* applies to the classroom speech of elementary and secondary school teachers. First, public school teachers are paid to speak. “Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.” *Mayer*, 474 F.3d at 479. When “teachers hire out their own speech,” they “must provide the service for which employers are willing to pay.” *Id.* When a “school board . . . hires [a teacher’s] speech, it can surely

‘regulate the content of what is or is not expressed.’” *Evans-Marshall*, 624 F.3d at 340 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).

Second, public education is compulsory, and elected school board officials, not teachers, decide the curriculum and how teachers present it in the classroom. *See Mayer*, 474 F.3d at 479. “This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them—their children’s education—by giving them control over membership on the board.” *Evans-Marshall*, 624 F.3d at 341. “The First Amendment does not ban this policy choice or this accountability measure.” *Id.* As the Seventh Circuit has explained:

Children who attend school because they must ought not be subject to teachers’ idiosyncratic perspectives. Majority rule about what subjects and viewpoints will be expressed in the classroom has the potential to turn into indoctrination; elected school boards are tempted to support majority positions about religious or patriotic subjects especially. But if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers. At least the board’s views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues.

Mayer, 474 F.3d at 479–80. The Constitution does not “entitle teachers to present personal views to captive

audiences against the instructions of elected officials.” *Id.* at 480.

The Court finds the reasoning of these cases persuasive. When the Board hires Polk to be a substitute teacher, it is paying her to speak on its behalf. She must provide the service for which she is being paid. The Board has the responsibility and authority to determine the educational policies for MCPS. *See* Educ. § 4-108(3). Pursuant to that authority, the Board implemented the Guidelines. When Polk works for the Board, Polk must follow her employer’s directives, including the Guidelines. If the residents of Montgomery County disagree with the Guidelines, they have the power to vote the members of the Board of Education out of office and make changes. But Polk, in her capacity as a substitute teacher, cannot deviate from the Board’s policies. She must provide the service that the Board is paying her to provide, and that includes complying with the Guidelines. The speech at issue here does not “implicate[] additional constitutional interests” that are “not fully accounted for by . . . customary employee-speech jurisprudence.” *See Garcetti*, 547 U.S. at 425. *Garcetti* applies to the speech Polk makes pursuant to her official duties as a public school teacher.

Next, Polk argues that *Garcetti* does not apply to government-compelled speech. Unlike the government employee in *Garcetti*, Polk was not punished because of what she said; Polk was punished because of what she refused to say. On Polk’s account, hers is a challenge to government-compelled speech. For that reason, Polk argues that compelled speech cases, such as *Riley v. National Federation of*

the Blind of North Carolina, 487 U.S. 781 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018), apply to her case, and *Garcetti* does not.⁷ The Court is unconvinced.

Polk is correct that *Garcetti* did not involve compelled speech. The prosecutor was not required to write the memorandum that resulted in his discipline. Even so, *Garcetti* did not turn on whether the employee’s speech was compelled. *Garcetti* turned on whether the speech was part of the employee’s official duties. If it is, then the employer may restrict the employee’s speech without violating their right to freedom of speech. *See Garcetti*, 547 U.S. at 421–22. As the *Garcetti* Court explained, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Id.* More recently, the Supreme Court in *Kennedy v. Bremerton School District* confirmed that “[i]f a public employee speaks ‘pursuant to [his or her] official duties,’ . . . the Free Speech Clause generally will not shield the individual from an employer’s control and discipline because that kind of speech is—for constitutional purposes

⁷ *Riley*, *Wooley*, and *Becerra* are not government employee speech cases. *See Riley*, 487 U.S. at 803 (restrictions on professional fundraisers violated the First Amendment); *Wooley*, 430 U.S. at 717 (motorist had free speech right not to display state motto on his license plate); *Becerra*, 585 U.S. at 779 (state requirement that crisis pregnancy centers provide certain notices to patients likely violated the First Amendment).

at least—the government’s own speech.” 597 U.S. at 527 (second alteration in original) (quoting *Garcetti*, 547 U.S. at 421).

The speech Polk objects to—even if it is compelled speech—“owes its existence to” Polk’s professional responsibilities as a public school teacher. See *Garcetti*, 547 U.S. at 421–22. The Board “commissioned” the Guidelines, and it may “exercise control over” the speech of teachers who are bound by them. See *id.* at 422. For constitutional purposes, the speech Polk challenges is the Board’s own speech.⁸ The Board, like other government employers, “need[s] a significant degree of control over [its] employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” See *id.* at 418–19 (citing *Connick*, 461 U.S. at 143 (“[G]overnment offices could not function if every employment decision became a constitutional matter.”)). The Board may restrict Polk’s speech by requiring her to use student-preferred pronouns and by limiting what she says to parents about their child’s desire to transition genders. This speech falls within *Garcetti*’s reach.

If there ever was any doubt about whether *Garcetti* applies to government-compelled speech, the Supreme Court dispelled it in *Janus v. American Federation of State, County, and Municipal*

⁸ Polk argues that a child’s preferred pronouns are the child’s speech, not the Board’s speech. True, the child, not the Board, has chosen the pronouns they prefer to use in school, but the Board has chosen to require teachers to use the child’s preferred pronouns. The use of preferred pronouns when referring to children in the classroom is the speech of the Board.

Employees, Council 31, 585 U.S. 878 (2018). In *Janus*, the Court held unconstitutional an Illinois statute that authorized public-sector unions to assess fees from nonmember public employees. 585 U.S. at 885–86. The Court found that the arrangement “violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.” *Id.* The union argued, unsuccessfully, that *Garcetti* allowed it to assess the fees on nonmember public employees. *Id.* at 909. The *Janus* Court found *Garcetti* “totally inapposite” because “the union speaks for the *employees*, not the employer,” and “if the union’s speech is really the employer’s speech, then the employer could dictate what the union says”—a result the Court assumed would not please the unions. *Id.* at 910. In reaching this conclusion, the *Janus* Court confirmed that *Garcetti* applies to employer-compelled speech: “Of course, if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.” *Id.* at 908 (citing *Garcetti*, 547 U.S. at 421–22, 425–26).⁹ So, under *Janus* and *Garcetti*, the Board may “dictate” or “insist” that Polk, as part of her official duties as a substitute teacher, speak in accordance with the Guidelines. *See id.* at 908, 910.

Polk does not dispute that the Board “may insist that [she] deliver any lawful message” as part of her official duties. *See Janus*, 585 U.S. at 908. Yet Polk

⁹ After this statement, the *Janus* Court observed that “it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.” 585 U.S. at 908. Polk’s case may be that situation.

argues that the message the Board insists she deliver is unlawful. According to Polk, the restrictions on her speech imposed by the Guidelines would require her to deceive (or be complicit in deceiving) parents about their child’s desire to transition genders. This deception, in turn, would violate the parents’ substantive due process rights to direct the care and upbringing of their children—rights that were recognized a century ago in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Pierce v. Society of the Sisters of the Holy Names*, 268 U.S. 510, 534–35 (1925). Polk claims the Board cannot force her to speak in a manner that would result in a violation of the substantive due process rights of the parents of the children she teaches.

Polk cites no authority for her novel argument. *Janus* does not recognize a First Amendment cause of action under these circumstances. And no court in the country has held that a school board violates a teacher’s right to freedom of speech when it prohibits the teacher from speaking to parents about their child’s desire to transition genders without the child’s consent. This Court will not be the first to extend the reach of the First Amendment that far.¹⁰

¹⁰ Polk may believe the Guidelines violate parents’ substantive due process rights, but her First Amendment free speech claim is not the proper vehicle to advance that argument. There is no authority to support her expansive view of the First Amendment. One district court has suggested a public school teacher might have a viable free speech claim if the school forces the teacher to lie to parents who ask about their child’s preferred pronouns or their child’s desire to transition genders. See *Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1215 (S.D. Cal. 2023) (observing teachers could have a free speech claim if school

“policy compels them to violate the law or deliberately convey an illegal message”). Even if Polk had a First Amendment right not to lie to parents, she has not alleged that the Guidelines require her to lie. They require her to keep students’ confidences. If the Guidelines violate parents’ substantive due process rights, the Board is responsible, not Polk. Another judge in the District of Maryland recently found the Guidelines do not violate parents’ substantive due process rights, but that decision was vacated by the Fourth Circuit on other grounds. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 139 (D. Md. 2022), *vacated*, 78 F.4th 622, 626 (4th Cir. 2023). Other district courts have held that similar policies do not violate parents’ due process rights. *See Doe v. Del. Valley Reg’l High Sch. Bd. of Educ.*, No. 24-00107, 2024 WL 706797, at *8 (D.N.J. Feb. 21, 2024) (finding no “constitutional obligation on state actors to contact parents of a minor’ who requests to be recognized by a different gender identity, regardless of the minor’s preference as to parental notification” (quoting *Anspach ex rel. Anspach v. City of Phila., Dep’t of Pub. Health*, 503 F.3d 256, 262 (3d Cir. 2007)); *Regino v. Staley*, No. 23-00032, 2023 WL 4464845, at *4 (E.D. Cal. July 11, 2023) (holding parent had no substantive due process right to notice of her child’s gender transition at school and no right to provide consent before school staff referred to child by their preferred name and pronouns); *cf. Littlejohn v. Sch. Bd.*, 647 F. Supp. 3d 1271, 1283 (N.D. Fla. 2022) (holding school’s decision to let student use preferred name and pronouns without parents’ consent and failure to include parents in creation of student’s gender support plan did not violate parents’ substantive due process rights). At least one district court has held that a similar policy likely would violate parents’ due process rights. *See Willey*, 680 F. Supp. 3d at 1279–80 (holding parent was likely to succeed on claim that school policy preventing disclosure of student’s gender identity to parents without student’s consent violated parents’ substantive due process rights). This Court need not decide this issue now. Under the Free Speech Clause, Polk has no right to disregard her employer’s policy on what she may say to parents concerning their child’s gender identity on the ground that Polk believes the policy violates the parents’ due process rights.

When Polk refers to students by pronouns in the classroom and when she speaks with parents about their child’s conduct at school, she speaks pursuant to her official duties as a teacher. This speech is the speech of her employer, the Board. It is “unprotected” because “it is part of what [Polk] is paid to do.” See *Janus*, 585 U.S. at 905; see also *id.* at 910 (“[I]n general when public employees are performing their job duties, their speech may be controlled by their employer.”). When Polk decided to enter government service as a public school teacher, she “by necessity” had to “accept certain limitations on . . . her freedom.” See *Garcetti*, 547 U.S. at 418 (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (“[T]he government as employer indeed has far broader powers than does the government as sovereign.” (alteration in original))). Polk “retain[s] the prospect of constitutional protection for [her] contributions to the civic discourse” on transgender and gender nonconforming children, but the “prospect of protection . . . does not invest [her] with a right to perform [her job] however [she sees] fit.” See *id.* at 422.

Because the speech that Polk challenges is part of her official duties as a teacher, it is unprotected by the First Amendment. The Board may require Polk to speak in accordance with the Guidelines. Polk does not state a cognizable free speech claim. The claim is dismissed.¹¹

¹¹ Because Polk has no free speech claim under *Garcetti*, the Court need not engage in the *Pickering* balancing test. Polk does not speak as a private citizen when she speaks to students and parents, and even if she did, her speech does not involve a matter

E. Title VII

Polk’s final claim is a Title VII religious discrimination claim. Title VII makes it “an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual’s . . . religion.” 42 U.S.C. § 2000e-2(a). “Courts have recognized that employees may utilize two theories in asserting religious discrimination claims.” *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1017 (4th Cir. 1996). “These theories are denominated as the ‘disparate treatment’ and ‘failure to accommodate’ theories.” *Id.* Polk alleges a failure to accommodate.

A Title VII failure-to-accommodate claim proceeds in two steps. First, the employee bears the burden of establishing a prime facie case of discrimination. *See id.* at 1019. To show a prima facie failure to accommodate, an employee must prove that (1) they have “a bona fide religious belief that conflicts with an employment requirement”; (2) they “informed the employer of this belief”; and (3) they were “disciplined for failure to comply with the conflicting employment requirement.” *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 141 (4th Cir. 2017). If the employee makes a

of public concern. An elementary school student’s gender identity, preferred pronouns, and desire to transition genders cannot “be fairly considered as relating to any matter of political, social, or other concern to the community.” *See Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quoting *Connick*, 461 U.S. at 146). Nor is the speech “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *See id.* (quoting *Roe*, 543 U.S. at 83–84). The speech at issue here—using a child’s preferred pronouns in the classroom and speaking with parents about their child’s gender identity—is very much a matter of private concern.

prima facie case, the burden shifts to the employer to show “*either* (1) that it provided the [employee] with a reasonable accommodation for [their] religious observances *or* (2) that such accommodation was not provided because it would have caused an undue hardship[.]” *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008). To show undue hardship, “an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.” *Groff v. DeJoy*, 600 U.S. 447, 470 (2023).

To survive a motion to dismiss, a plaintiff need not plead a prima facie case of discrimination under Title VII. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *see also Bing v. Brivo Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020). Instead, the plaintiff must “allege[] facts that plausibly state a violation of Title VII ‘above a speculative level.’” *Bing*, 959 F.3d at 617 (quoting *Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010)).

As the Board concedes, Polk has stated a failure-to-accommodate claim. She alleges that (1) she has a bona fide religious belief that conflicts with the Guidelines; (2) she informed MCPS that she has a religious opposition to the Guidelines and will not comply with them; and (3) MCPS refused to hire her as a substitute teacher because she refuses to comply with the Guidelines.

The Board’s defense to the Title VII claim is that Polk’s proposed accommodation would cause it undue hardship. The Court does not consider an affirmative defense on a motion to dismiss unless it “clearly

appears on the face of the complaint.” See *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) (quoting *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)). An undue hardship defense to a failure-to-accommodate claim rarely appears on the face of the complaint. The defense usually arises at summary judgment. See *Niederberger v. Wegmans Food Mkts., Inc.*, No. JKB-23-2759, 2024 WL 2866609, at *4 (D. Md. June 6, 2024) (declining to decide reasonableness of religious accommodation and hardship on employer because they “are issues of fact more appropriately resolved on summary judgment”); *Dean v. Acts Ret. Life Cmtys.*, No. GLR-23-1221, 2024 WL 964218, at *6 (D. Md. Mar. 6, 2024) (“Whether an undue hardship exists is usually considered an issue of fact to be determined on summary judgment.”).

The Board says there is precedent for granting a motion to dismiss a failure-to-accommodate claim on the ground that the accommodation would cause the employer undue hardship. It cites *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023). There, the First Circuit affirmed the dismissal of a Title VII failure-to-accommodate claim brought by healthcare workers whose employers, healthcare providers, terminated them after they refused for religious reasons to get COVID-19 vaccinations. 68 F.4th at 709. In their complaint, the employees alleged that the only acceptable accommodation would be a waiver of the vaccination requirement. *Id.* at 719. That accommodation, however, would violate Maine law. *Id.* at 720. In consequence, the proposed accommodation would have caused a significant risk that the healthcare providers would lose their licenses

and be subject to monetary penalties. *Id.* The First Circuit had no trouble concluding that an undue hardship on the employers was apparent on the face of the complaint. *Id.* at 719–20 (noting that, even though “undue hardship is an affirmative defense,” dismissal on a Rule 12(b)(6) motion is appropriate “if ‘the facts establishing the defense [are] clear on the face of the plaintiff[s]’ pleadings’ and ‘there is “no doubt” that the plaintiff[s]’ claim[s] [are] barred” (alterations in original) (quoting *Zenon v. Guzman*, 924 F.3d 611, 616 (1st Cir. 2019))). The First Circuit affirmed dismissal of the complaint because the employees’ only requested accommodation obviously would have caused the employer an undue hardship. *Id.* at 720.

This case is not remotely like *Lowe*. Polk does not allege, as the *Lowe* plaintiffs did, that she would accept only one accommodation that so obviously would violate the law and cause the Board an undue hardship. Polk does not demand, as the Board claims she does, that MCPS exempt her from teaching transgender and gender nonconforming students entirely or grant her permission to treat those students differently. Even though Polk does not have to plead a specific accommodation that would be acceptable to her, Polk suggests in her complaint and states her briefing that she might be amenable to an accommodation along the lines that she and the MCPS compliance coordinator discussed. *See* ECF 1, ¶ 33; ECF 4-1, at 12–13. That might include an exemption from using preferred pronouns and extra assistance from school administrators who would interact with the transgender students in her classroom. Such an accommodation may, as the Board

argues, violate Title IX and thus cause an undue hardship, but at this stage, it is premature to say that *any* accommodation suitable to Polk would be unreasonable. See *Kluge v. Brownsburg Cmty. Sch. Corp.*, 732 F. Supp. 3d 943, 962–70 (S.D. Ind. 2024), *appeal filed*, No. 24-1942 (7th Cir. May 31, 2024) (evaluating similar religious accommodations for high school teacher at summary judgment stage).

Even if this case were like *Lowe*, the First Circuit decided *Lowe* before the Supreme Court decided *Groff v. DeJoy*. The *Groff* Court emphasized that undue hardship is a “fact-specific inquiry.” 600 U.S. at 468. As *Groff* explained, Title VII requires an employer to consider all possible accommodations—“not merely [to] assess the reasonableness of a particular possible accommodation or accommodations.” *Id.* at 473. The Board may prove, after discovery, that every possible accommodation would cause undue hardship, but the Court cannot evaluate that fact-intensive defense now. See *Dodson v. Lutheran Vill. at Millers Grant, Inc.*, No. EA-23-169, 2024 WL 3597201, at *5 (D. Md. July 30, 2024) (“As the *Groff* decision makes clear, however, undue hardship must be assessed on a case-by-case basis. And because it is a fact-bound question, it is better suited for resolution on summary judgment as opposed to a motion to dismiss.”); *Phillips v. Rector & Visitors of the Univ. of Va.*, No. 3:22-cv-00075, 2024 WL 1201639, at *8 (W.D. Va. Mar. 20, 2024) (“If not clear before *Groff*, it is certainly clear now that an undue hardship analysis is premature at the motion to dismiss stage.”).

Polk’s Title VII claim may proceed, but only against the Board, not the Board members and the interim superintendent. As her employer, the Board

is the only proper defendant for the Title VII claim. See 42 U.S.C. §§ 2000e-2(a), 2000e(b) (defining “employer”); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 408 (4th Cir. 2015) (explaining that “[a]n entity can be held liable in a Title VII action . . . if it is an ‘employer’ of the complainant”). Polk does not assert any specific allegations about the individual defendants in their individual capacities. Even if the individual defendants could be considered Polk’s supervisors—and Polk does not allege they were—supervisors are not liable under Title VII in their individual capacities. See *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 181 (4th Cir. 1998). The claim against the individuals in their official capacities fares no better. A suit against an individual in their official capacity is a suit against the entity they represent, and that entity here is the Board. See *Adams v. Ferguson*, 884 F.3d 219, 225 (4th Cir. 2018) (stating that suits against government officials in their official capacity “generally represent only another way of pleading an action against an entity of which an officer is an agent” (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978))). Polk’s Title VII claim against the individual Board members and the interim superintendent is dismissed because it is duplicative of her claim against the Board. See *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004) (dismissing § 1983 claim against school superintendent in his official capacity as duplicative of same claim against school board); see also *Windsor v. Bd. of Educ.*, No. TDC-14-2287, 2016 WL 4939294, at *7 (D. Md. Sept. 13, 2016) (dismissing Title VII claims brought against Prince George’s County Board

of Education members in their individual and official capacities).

The motion to dismiss Polk's Title VII claim is denied as to the Board and granted as to the Board members and the interim superintendent.

III. Motion for a Preliminary Injunction

Finally, the Court considers whether Polk is entitled to a preliminary injunction on her sole remaining claim, the Title VII failure-to-accommodate claim. She is not.

“[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.” *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quoting *Direx Isr., Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1991)). Polk seeks “a particularly aggressive form of preliminary injunction, one that is ‘disfavored’ in ‘any circumstance.’” *See Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 209 (4th Cir. 2024) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014)). She seeks a “mandatory injunction,” because she seeks “an order altering the status quo before the case even begins.” *See id.* Such injunctions “are ‘warranted only in the most extraordinary circumstances.’” *Id.* (quoting *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994)).

To obtain a preliminary injunction, Polk must establish four factors: (1) that she is likely to succeed on the merits of her claims; (2) that she is likely to suffer irreparable harm without preliminary relief;

(3) that the balance of equities favors her; and (4) that an injunction is in the public interest. *See Frazier v. Prince George's County*, 86 F.4th 537, 543 (4th Cir. 2023) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Polk must prove all four factors. *See id.*

Polk has not shown irreparable harm. The harm caused by the alleged Title VII violation is financial. Financial harm generally does not suffice to establish irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90, 92 n.68 (1974) (holding that “temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury,” nor does “insufficiency of savings or difficulties in immediately obtaining other employment”). Polk conceded as much. ECF 30, at 27 (“Ms. Polk is well aware that requests for financial relief, standing alone, ordinarily do not qualify for injunctive relief.”). The irreparable harm that Polk relied on in support of her preliminary injunction motion was the alleged violation of her constitutional rights. Now that her constitutional claims have been dismissed, Polk cannot establish irreparable harm.

Polk is not entitled to a preliminary injunction on her Title VII claim. Her motion for a preliminary injunction is denied.

IV. Conclusion

The Board’s motion to dismiss Polk’s complaint is granted in part and denied in part. Polk’s First Amendment claims are dismissed without prejudice. Her Title VII claim survives. The only proper defendant for the Title VII claim is the Board. The claims against MCPS are dismissed with prejudice.

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The claims against the Board members and the interim superintendent are dismissed without prejudice. Polk's motion for a preliminary injunction is denied. A separate Order follows.

Date: January 17, 2025

/s/ Deborah L. Boardman
Deborah L. Boardman
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

KIMBERLY ANN POLK,	*	
	*	
Plaintiff,	*	Civ. No. DLB-24-
	*	1487
v.	*	
	*	
MONTGOMERY COUNTY PUBLIC SCHOOLS, <i>et al.</i>,	*	
	*	
Defendants.	*	

ORDER

For the reasons stated in the memorandum opinion issued this same date, it is this 17th day of January, 2025 hereby ORDERED that

1. The defendants' motion to dismiss, ECF 28, is GRANTED IN PART and DENIED IN PART as follows:
 - a. Counts Two and Three of the complaint are DISMISSED WITHOUT PREJUDICE;
 - b. The claims against Montgomery County Public Schools are DISMISSED WITH PREJUDICE;
 - c. The claims against the members of the Montgomery County Board of Education and the interim superintendent, in both their individual and official capacities, are DISMISSED WITHOUT PREJUDICE;

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- d. The defendants' motion to dismiss Count One of the complaint against the Montgomery County Board of Education is DENIED; and
2. Kimberly Polk's motion for a preliminary injunction, ECF 4, is DENIED.
 3. An answer is due January 31, 2025.

/s/ Deborah L. Boardman
Deborah L. Boardman
United States District Judge