NO. 26-8

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

REPLY BRIEF OF PETITIONER

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SUMMARY OF THE ARGUMENT

This case presents issues of nationwide importance that this Court can and should resolve. Nothing in the brief filed by Montgomery County Public Schools—the same school district this Court admonished in *Mahmoud*—undermines that conclusion.

First, under *Mahmoud*, *Smith* does not apply to free-exercise burdens of the same character as those imposed in *Barnette* and *Yoder*. Compelled endorsement of ideological views on issues of faith is anathema to our nation's historical tradition. In *Mahmoud*, this Court told MCPS that even compelled *exposure* to such views can violate the Free Exercise Clause. Compelled endorsement is worse. And even if *Smith* applied, the lower court's ruling that a law's impact on the religious cannot make it non-neutral splits with the Ninth Circuit's contrary opinion.

Second, on speech, courts are deeply divided over whether school districts can force educators to use—or stop using—biologically incorrect pronouns. They're also deeply divided over the broader issue of whether schools can dictate everything a teacher says in the classroom. And MCPS's concession that its policy was unlawful proves that it violated Polk's free-speech rights, even assuming *Garcetti* applies.

Third, while MCPS concedes that none of its post-judgment policy changes moot this case, it says they make the issues less important. Wrong. MCPS's half-measures highlight that school districts are not falling in line post-*Mirabelli*. And the issues presented here affect thousands of teachers, not to mention placing millions of parents and students at risk. The Court should grant the petition and reverse.

ARGUMENT

I. The Court Should Resolve Whether the Free Exercise Clause Allows the Government to Compel Expression on Issues of Faith

A. *Smith* Does Not Apply When the Government Forces Religious Objectors to Endorse Its Ideological Viewpoints

As Ms. Polk argued below, *Smith*'s neutral-and-generally-applicable test does not apply when the government imposes a burden on religious exercise of the same character as the burden it imposed here, C.A.Opening.Br.8–9; C.A.Reply.Br.5.n.3; C.A.28(j). Letter.1–2 (July 24, 2025).

MCPS tried to force Polk, as a condition of her continued employment, to agree to endorse MCPS's viewpoint on gender identity by using biologically incorrect pronouns and lying to parents about their child's gender expression at school. Pet.7–8. In so doing, MCPS burdened Polk's deeply rooted right to be free from compelled religious expression—a right this Court embraced more than 80 years ago in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943). Pet.14–15; Am.Br.First.Amend.Scholars.4–12; Am.Br.Coal.Jewish.Values.2–3, 5–9.

Mahmoud v. *Taylor*, 606 U.S. 522 (2025), demonstrates that the test enunciated in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), does not apply to cases of the same character as *Yoder* or *Barnette*, as *Smith* distinguished both. Pet.13–17. This case is like both, so strict scrutiny applies.

In response, MCPS takes refuge behind this Court's statement in *Mahmoud* that "*Smith* applies 'in most circumstances.'" Opp.26 (quoting *Mahmoud*, 606 U.S. at 564). But that doesn't answer whether *Smith* applies *here*. "In most circumstances," schools simply require teachers to *convey* the government's views by teaching the curriculum. Forcing teachers to use biologically incorrect pronouns (and compelling them to lie to parents) commandeers teachers to *personally endorse* the government's views.

Reaching further, MCPS latches onto this Court's statement in *Smith* that *Barnette*, "while 'involv[ing] freedom of religion,' was 'decided exclusively upon *free speech* grounds.'" Opp.25 (quoting *Smith*, 494 U.S. at 882) (emphasis added by MCPS). But MCPS offers no response to Polk's argument that the Court decided *Barnette* on *both* free-speech and free-exercise grounds. Pet.14–15; accord Am.Br.First.Amend. Scholars.11–12. MCPS simply ignores *Mahmoud*'s identification of *Barnette* as a free-exercise case. If that creates tension with *Smith*'s statement that *Barnette* was resolved purely on free-speech grounds, this Court should resolve that tension.

Finally, citing one line in Polk's supplemental-authority letter below, MCPS says she failed to preserve her argument that *Smith* does not apply to a *Barnette*-like free-exercise burden. Opp.14. Polk *did* preserve that argument—in the very next line of her letter: "Both [this case and *Yoder*] involve individuals whose free exercise rights are infringed in public school situations, together with infringements of other constitutional rights—in *Yoder*, parental rights, and, here, *free speech* and parental rights." C.A.28(j). Letter.1–2 (July 24, 2025) (emphasis added).

As *Mahmoud* made clear, *Barnette* involved an especially egregious free-exercise violation that encompassed the *free-speech* right to be free from compelled affirmation of a belief. *Mahmoud*, 606 U.S. at 548. Polk's supplemental-authority letter preserved that argument.[1]

In sum, "*Yoder* and *Barnette* embody a very different view of religious liberty" than the cramped view that MCPS has advanced here—and previously advanced in *Mahmoud*. 606 U.S. at 559. Polk's view "comports with the fundamental values of the American people" and should be affirmed. *Ibid.*

B. The Fourth and Ninth Circuits Conflict over How *Smith* Applies When a Policy Primarily Affects the Religious

Even if *Smith* applied, the Fourth Circuit's strict implementation of it—requiring evidence of government motivation to target religion—sharply conflicts with the Ninth Circuit's approach in *Bates* v. *Pakseresht*, 146 F.4th 772 (9th Cir. 2025). In *Bates*, the Ninth Circuit did not "find[] that Oregon acted with an unconstitutional motive" or that the law "exclusively burden[ed] religious persons." *Id.* at 795. That didn't matter: the law was non-neutral because it "implicate[d] uniquely religious matters that prove[d] most problematic for parents who view these issues through a traditional religious lens." *Ibid.*

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[1] What's more, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondido,* 503 U.S. 519, 534 (1992). Polk is "not limited to the precise arguments [she] made below." *Ibid.*; accord *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

All of that applies equally here. Yet the court below rejected Polk's non-neutral argument because it thought that "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." App.22a (emphasis added). As MCPS concedes, the court below thought this Court's cases require evidence of "religious targeting." Opp.17–18. The Ninth Circuit disagrees. *Bates*, 146 F.4th at 795.

Trying to reconcile the two cases, MCPS argues that the Ninth Circuit didn't mean what it said. In MCPS's telling, the Ninth Circuit relied on "evidence and other signifiers of religious targeting" before concluding that "no *further* showing of 'overt' hostility was required to establish non-neutrality." Opp.18 (emphasis added). But that makes a hash of the Ninth Circuit's words.

In *Bates*, the court stated plainly that this Court "has never suggested that overt hostility is required" to show non-neutrality. *Bates*, 146 F.4th at 795. It concluded that an "unconstitutional motive" is not required, and the court made "no such determination." *Ibid.* Quite the opposite, the court accepted that Oregon did *not* act "out of hostility or animus toward religion." *Ibid.*

Given that, MCPS's claim that the Ninth Circuit required evidence of "religious targeting" and at least some "showing of 'overt' hostility" is baffling. Opp.18 (quoting *Bates*'s statement that overt hostility is *not* required). The split is real; MCPS's revised version of *Bates* is not.

II. The Court Should Resolve Whether Public Schools Can Compel Speech That Is Non-Curricular, Ideological, and Unlawful

A. Courts Are Divided Over Whether *Garcetti* Allows Public Schools to Compel Speech on Issues Like Gender Identity

Respondents say the second question presented is "[f]actbound." Opp.19. But they never explain why; they merely make the assertion in headings. *Ibid.* Sadly, there's nothing unique about a policy compelling public schoolteachers to mouth a school's views on "gender identity," a matter of "profound" public concern. *Janus* v. *American Fed'n of State, Cnty., and Mun. Emps.*, 585 U.S. 878, 913–14 (2018). Such policies are ubiquitous in today's public schools.

Nor is this question "[s]plitless." Contra Opp.19. Indeed, a federal court in Massachusetts recently recognized that "[c]ourts around the country are divided as to whether a teacher's refusal to comply with their employer's policy to use students' preferred pronouns is protected under the Free Speech Clause, with some holding that it is not protected,"[2] "and others holding that it is."[3] *Ellis* v. *The Brooke Charter Schs.*, 2026 WL 2350204, at *4 (D. Mass. 2026).

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[2] Citing *Kluge* v. *Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 838–39 (S.D. Ind. 2020); *Ramirez* v. *Oakland Unified Sch. Dist.*, 2025 WL 1507092, at *8 (N.D. Cal. 2025); *Willey* v. *Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 680 F. Supp. 3d 1250, 1287 (D. Wyo. 2023); and *Sullivan* v. *Unified Sch. Dist. No. 512, Johnson Cnty., Kan.*, 2025 WL 2732589, at *14 (D. Kan. Sep. 25, 2025).

[3] Citing *Meriwether* v. *Hartop*, 992 F.3d 492 (6th Cir. 2021); *Geraghty* v. *Jackson Loc. Sch. Dist. Bd. of Educ.*, 2024 WL

Respondents try to distinguish some of the cases supporting Polk, but the conflicts remain. Yes, *Meriwether* involved a college professor. But the "three critical interests" on which the Sixth Circuit relied to hold that student pronouns are the *teacher's* speech are present here: "(1) the student's interest in receiving informed opinion, (2) the [teacher]'s right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints." 992 F.3d at 507. And in both cases, the free-speech violations cut both ways. In *Meriwether*, the defendants' logic meant a university could "*prohibit* professors from addressing university students by their preferred gender pronouns." *Id.* at 506. Under MCPS's logic, a more conservative school district could do the same. App.39a (Wilkinson, J., dissenting). That's why *Geraghty* correctly applied *Meriwether* to K–12 teachers.

Likewise, the Virginia Supreme Court in *Vlaming* applied *Meriwether* and this Court's decisions in *Janus*, and *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023), to hold that *Garcetti*'s official-duties doctrine does not apply when a public school forces a K–12 teacher to use compelled pronouns. *Vlaming*, 895 S.E.2d at 739–42. That's the exact opposite of what the panel majority held here. As things now stand, federal courts will be bound by the Fourth Circuit's interpretation of those federal cases, while Virginia courts will be bound by the Virginia Supreme Court's contrary reading of the same federal cases in *Vlaming*.

3758499, at *12 (N.D. Ohio Aug. 12, 2024); and *Vlaming* v. *West Point Sch. Bd.*, 895 S.E.2d 705, 738–44 (Va. 2023).

That judicial conflict is one piece of a broader division over whether in-class, *non*-curricular speech counts as government speech under *Garcetti*. Pet.26–30. That conflict played out in the Ninth Circuit's recent decision in *Theis* v. *InterMountain Education Service District*, 182 F.4th 1091 (9th Cir. 2026). There, the majority upheld a school district's viewpoint discrimination against classroom/office décor, forbidding a school counselor from merely displaying books that taught that gender is not malleable while allowing other teachers to display "pride" flags and LGBTQ materials in their workspaces on the theory that everything in those spaces is the school's speech. *Id.* at 1097–98. Judge VanDyke's dissent rightly lamented that, "when courts warp the distinction between personal speech and government speech," "school employees are functionally deprived of the promises of the First Amendment *and* students are fundamentally misled about many of the most contested issues facing our society today." *Id.* at 1101 (VanDyke, J., dissenting).

On the merits, Respondents cannot refute that the use of pronouns to identify a student's gender is not an educational function and, thus, is not the school's speech. As *Lane* v. *Franks* explains, the *Garcetti* question is whether speech is "ordinarily within the scope of an employee's duties," not whether it merely relates to those duties or occurs at work. 573 U.S. 228, 240 (2014). MCPS and school districts across the country have made Justice Alito's warning in *Morse* v. *Frederick* prescient: Schools are restricting 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).[4]

B. Schools Can't Compel Unlawful Speech, Which MCPS Concedes It Did Here

Even if *Garcetti* otherwise applied, MCPS cannot avoid the logical consequence of its admission that the policy it tried to enforce against Polk—by forcing her to affirm that she would lie to parents—violated parental rights under *Mirabelli* v. *Bonta*, 607 U.S. 492 (2026) (per curiam). Opp.11, 13. Requiring speech for an unlawful, illegitimate purpose is not allowed under *Garcetti*, which was not meant to shield "unlawful or otherwise inappropriate" government orders. *Garcetti* v. *Ceballos*, 547 U.S. 410, 426 (2006). Only a "lawful message" may be compelled as part of a government employee's official duties. *Janus*, 585 U.S. at 908.[5]

MCPS's concession that *Mirabelli* "resolved" that this aspect of its policy was unlawful further cements the need for this Court's review. Opp.11. If Polk is right that, even under *Garcetti*, MCPS could not constitutionally require her to lie to parents because that speech would have been unlawful, then she is entitled to relief for that completed constitutional harm.

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[4] MCPS wrongly suggests that Polk does not challenge on free-speech grounds the policy requiring her to hide information from parents. Opp.20 n.3. Polk challenges the Fourth Circuit's error in "expanding *Garcetti*'s 'government speech' exception to cover everything a teacher says to a student *or a student's parent*." Pet.21 (emphasis added); see also Pet.22, 29–31.

[5] MCPS suggests the Court should GVR this case for reconsideration in light of *Mirabelli*. Opp.13 n.2, 28. Not so. Only a grant will resolve the deep divides implicated by this petition.

III. This Case Presents an Excellent Vehicle to Resolve These Issues, and MCPS's Late-Breaking Changes Only Highlight That

Months after the Fourth Circuit ruled in this case—and knowing a certiorari petition was coming—MCPS began making illusory policy changes and settlement offers. These changes now occupy prime billing in MCPS's brief. Opp.11–13. Yet MCPS rightly concedes that none of them moot this appeal. Opp.13. And none of them go as far as MCPS suggests. Schools can still force teachers to hide information from parents until parents expressly request it, and none of the policy changes prevent teachers from being forced to use biologically incorrect pronouns.

Early this year, MCPS learned that Polk intended to file for certiorari. MCPS shortly thereafter told her that she had been reinstated and could access job assignments without affirming compliance with MCPS's Gender Identity Guidelines. Opp.10. Save for MCPS now agreeing that it would allow Polk to avoid using pronouns, this appeared to be the same accommodation MCPS previously trotted out at the EEOC and in the district court, excusing Polk from affirming compliance while still requiring her to comply with the Guidelines while working. App.59a–60a. The district court properly rejected that "accommodation" as meaningless. App.65a–66a.

A few weeks later, MCPS issued Revised Guidelines, but they remain constitutionally deficient. First, the Revised Guidelines still muzzle teachers from disclosing a child's social gender transition unless a child's parent affirmatively requests that information. See perma.cc/QL3R-6ML2 at 3.

Second, even upon request, the new guidelines only permit a limited disclosure "that their student has expressed that they identify as transgender or gender nonconforming." *Ibid.* Third, even if a parent asks a teacher for that exact information, the teacher "must consult with the principal before releasing [it]," and a "risk of harm" assessment must be conducted. *Ibid.* And, fourth, the policy still compels teachers to use a child's preferred name and pronouns, apparently even if the child's parents object. *Ibid.*[6]

Further seeking to undermine the importance of the questions presented, MCPS now claims that it has joined a movement of school districts "across the country" rushing to update their policies to comply with this Court's interim-docket ruling in *Mirabelli*. Opp.11–13. But those policies do not clearly give *parents* what *Mirabelli* requires—much less protect *teachers* like Polk as they communicate with parents and students.

For example, the Ann Arbor and Anne Arundel policies do not even clearly permit disclosure upon a parent's request. See tinyurl.com/26yumu9f (Ann Arbor); perma.cc/YCW9-Q87A (Anne Arundel). And

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[6] The central revision to the policy provides as follows:

> *Upon request* of the student's parent/guardian, school staff must inform them that their student has expressed that they identify as transgender or gender nonconforming. Staff are not required to conceal this information from parents/guardians. However, staff *must consult with the principal* before releasing such information, especially when doing so may pose a significant risk of harm to the student.

perma.cc/QL3R-6ML2 at 3 (emphasis added).

while the Maryland Department of Education at least says parents should be included in conversations with their child and school officials about gender transitions, it does not direct officials to follow parents' wishes. See perma.cc/UY8R-MDAH.

Respondents also rely on pre-*Mirabelli* guidance from California. Opp.13. But in *Mirabelli* itself, California now argues that this Court's decision does not undermine its refusal to disclose other expressions of gender incongruence besides a name/pronoun change *or* its refusal to follow parents' directives that school staff use their child's legal name and biological pronouns. Defs.-Appellants' Opening Br. 23–26, 29–47, *Mirabelli* v. *Bonta*, No. 25-8056 (9th Cir. May 26, 2026). That is all contrary to what this Court said in *Mirabelli*. 607 U.S. at 497. California's cramped reading reflects a broader trend among litigants and lower courts: working around—rather than faithfully applying—this Court's interim-docket decisions. See *People Not Politicians* v. *Onder*, 2026 WL 2883222, at *1–2 (U.S. Sep. 25, 2026) (per curiam); *National Insts. of Health* v. *American Pub. Health Ass'n*, 145 S. Ct. 2658, 2665 (2025) (Gorsuch, J., concurring in part and dissenting in part).

In sum, the few halting half-measures that MCPS managed to collect, including its own, only highlight the need for this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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