Public Policy Position
ADM File No. 2022-03: Proposed Amendment of MCR 1.109

The Religious Liberty Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 256 members. The Religious Liberty Law Section is not the State Bar of Michigan and the position expressed herein is that of the Religious Liberty Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Religious Liberty Law Section has a public policy decision-making body with 9 members. On April 6, 2023, the Section adopted its position after a discussion and vote at a scheduled meeting. 6 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Oppose

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COMMENT OF THE RELIGIOUS LIBERTY LAW SECTION OF THE STATE BAR OF MICHIGAN ON PROPOSED AMENDMENT OF RULE 1.109 OF THE MICHIGAN COURT RULES

The Michigan Supreme Court provided notice of a proposed amendment to Rule 1.109 of the Michigan Court Rules, "to afford interested persons the opportunity to comment on the form or the merits of the proposal." The proposed amendment authorizes parties and attorneys to provide "personal pronouns" to a court. It further requires judges, with no attention to the factual circumstance of the case before the court, "to use those personal pronouns when referring to or identifying the party or attorney."

The Religious Liberty Law Section of the State Bar of Michigan ("RLLS") was formed to advance, educate, discuss, and disseminate information regarding the constitutional right of religious liberty protected by the U.S. Constitution, federal statutes, Michigan Constitution, and Michigan statutes and case law. The RLLS currently has approximately 256 members. This comment was approved by the governing council of the RLLS at its meeting on April 6, 2023 by a vote of 6 to 0 (with 3 members absent) and reflects only the opinion of the RLLS and not that of the State Bar as a whole. As of the date of this submission, the State Bar Board of Commissioners has not taken an official position for or against the proposed amendment to Rule 1.109.

The RLLS strongly opposes adoption of the proposed amendment. This Court has particularly requested comments on the constitutional implications of the proposed rule. There are many. This comment focuses on two that cut to the heart of why the proposed amendment must not be adopted. First, the proposed amendment unconstitutionally infringes upon fundamental liberties protected by the First Amendment of the United States Constitution, namely the right to freedom of speech and the right to the free exercise of religion. Second, the proposed amendment imposes unnecessary, impractical, and unconstitutional due process problems on the state court judiciary.

I. The Proposed Amendment Infringes Upon I First Amendment Right to Freedom of Expression, Especially Expression of One's Personal Conscience and Religious Identity

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech[.]" US Const, Am I. Enacted as a response to the intolerant laws of seventeenth century England used to persecute individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a

well-ordered central government. *See, e.g.*, Knoll, *A History of Christianity in the United States and Canada* (Eerdmans, 1992), pp 25-65; Makower, *The Constitutional History and Constitution of the Church of England* (1895) 68-95. The First Amendment Speech Clause embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their freedoms but embrace the security and liberty only a pluralistic society affords.

Indeed, the "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v Maynard*, 430 US 705, 714, 97 S Ct 1428 (1977). The State cannot force individuals to deliver messages that they do not wish to make or to which they disagree. *Id.* (holding that a state may not compel individuals to display a certain license plate motto on their vehicles); *W Va State Bd of Educ v Barnette*, 319 US 624, 63 S Ct 1178, 87 L Ed 1628 (1943) (holding that a state must not compel individuals to participate in a flag salute and the pledge of allegiance in public schools). As Justice Jackson famously penned in *Barnette*,

> 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.

Id. at 643. The protection from compelled speech does not only apply to opinions but extends to statements of fact as well. *Rumsfeld v Forum for Acad & Institutional Rights, Inc.*, 547 US 47, 62, 126 S Ct 1297, 164 L Ed 2d 156 (2006). The Free Speech Clause protects the expression of viewpoints and ideas motivated by a person's religious beliefs and subjects a State's restriction or compulsion of this expression to the strictest of scrutiny. *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission,* 138 S Ct 1719, 1745-46; 201 L Ed 35 (2018) (Thomas, J., concurring) (noting the necessity of applying "the most exacting scrutiny" where state law penalized and compelled expression that violated the religious conscience of a cake designer) (citing *Texas v Johnson*, 491 US 397, 412; 109 S Ct 2533; 105 L Ed 2d 342 (1989); accord, *Holder v. Humanitarian Law Project*, 561 US 1, 28; 130 S Ct 2705; 117 L Ed 2d 355 (2010); see also, *Reed v Town of Gilbert*, Ariz., 576 US 155, 164; 135 S Ct 2218; 192 L Ed 2d 236 (2015). In *Shurtleff v. Boston*, 142 S. Ct. 1583, 1593; 212 L Ed 2d 621 (May 2, 2022) the U.S. Supreme Court unanimously reaffirmed that government "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination,'" (quoting *Good News Club v. Milford Central School*, 533 U. S. 98, 112; 121 S Ct 2093; 150 L Ed 2d 151 (2001)). See also, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 828-830; 115 S Ct 2510; 132 L Ed 2d 700 (1995).

The proposed amendment changes the State Bar's rule from its current form, which is gender neutral, to one which spotlights gender by authorizing parties and attorneys to provide "personal pronouns" to a court and then compels judges "to use those personal pronouns when referring to or identifying the party or attorney." Forced acceptance of such policy preferences that directly implicate political, religious, and moral opinion as well as statements which depart from fact, by force of law and punishment, is especially wrong when the government action unconstitutionally interferes with constitutionally protected liberty. Here, the proposed amendment effectively censures judges in this state if they do not speak as the proposed amendment compels them to. The proposed amendment requires some judges to act contrary to their consciences or misstate the unique facts of the case before them. It requires some judges to act contrary to their personal religious or moral identity. The disturbing diminishment of the Free Speech and Religion Clauses of the First Amendment, as a practical matter, denudes any meaningful constitutional protection of liberty.

The United States Court of Appeals for the Sixth Circuit has already ruled that forcing a government official to comply with a mandatory preferred personal pronoun rule violates the First Amendment. *Meriwether v Hartop*, 992 F3d 492 (CA 6, 2021). In *Meriwether*, the Sixth Circuit ruled that a professor had stated a valid claim for a First Amendment violation where he was punished by his employer, a public college, for objecting to compliance with a rule forcing him to use students' preferred personal pronouns. The *Meriwether* court noted about Professor Meriwether that "like many people of faith, his religious convictions influence how he thinks about 'human nature, marriage, gender, sexuality, morality, politics, and social issues.'" *Id.* at 498 (cite omitted). Like many religious judges, Meriwether "believes that 'God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires.'" *Id*. Furthermore, like many religious judges (and non-religious judges), Meriwether "believes that he cannot 'affirm as true ideas and concepts that are not true.'" *Id*. The court concluded that by refusing to use gender identity based pronouns, Professor Meriwether was communicating a message that he does not believe that one's sex change can be changed. *Id.* at 508.

The *Meriwether* court noted that in refusing to use gender identity based pronouns, Professor Meriwether engaged in speech:

> And the "*point* of his speech" (or his refusal to speak in a particular manner) was to convey a message. *Id. at 1187*. Taken in context, his speech "concerns a struggle over the social control of language in, a crucial debate about the nature and foundation, or indeed real existence, of the sexes." Professors' Amicus Br. At 1. That is, his mode of address *was* the message. It reflected his conviction that one's sex

> cannot be changed, a topic which has been in the news on many occasions an "has become an issue of contentious political … debate." See *Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1051 (6th Cir 2001).*
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> *Meriwether*, 992 F3d at 508 (emphasis added).

The *Meriwether* court outlined the important underlying constitutional principles:

> The First Amendment protects 'the right to speak freely and the right to refrain from speaking at all.' *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977). Thus, the government 'may not compel affirmance of a belief with which the speaker disagrees.' *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). When the government tries to do so anyway, it violates this 'cardinal constitutional command.' *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, - U.S. -, 138 S. Ct. 2448, 2463, 201 L.Ed.2d 924 (2018).
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> It should come as little surprise, then, 'that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed.' *Id*. at 2471 *n.8 (citing examples including Thomas Jefferson, Oliver Ellsworth, and Noah Webster). Why? Because free speech is 'essential to our democratic form of government.' *Id*. at 2464. Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish. *See id.*
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> Government officials violate the First Amendment whenever they try to 'prescribe what shall be orthodox in politics, nationalism, religious, or other matters of opinion,' and when they 'force citizens to confess by word or act their faith therein.' *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).
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> *Meriwether*, 992 F.3d at 508.

In weighing whether a public employee's right to speak on a matter (or refrain from speaking), the courts have engaged in a two-part inquiry. *Id.* at 507-508. The first inquiry is whether the speech concerns a matter of public concern. *Meriwether*, 992 F.3d at 507-508 (citing *Connick v Myers*, 461 US 138, 146; 103 S Ct 1684; 75 L Ed 2d 708 (1983) and *Pickering v Bd of Educ.*, 391 US 563, 568; 88 S Ct 1731; 20 L Ed 2d 811 (1968)). The *Meriwether* decision makes clear that forcing public officials to use a person's preferred personal pronoun concerns speech about a matter of public concern. *Meriwether*, 992 F.3d at 508. The *Meriwether* court concluded: "[p]ronouns

can and do convey a powerful message implicating a sensitive topic of public concern." This inquiry is equally applicable when a public official seeks to refrain from making statements. *Meriwether*, supra.

Since a mandatory personal pronoun rule involves a matter of public concern, the second test requires the court to arrive at a balance between the interests of the [public 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 service it performs through its employees." *Meriwether*, 992 F.3d. at 509 (citing *Pickering,* 391 US at 568). This public employee speech balancing test required by the federal courts is impacted by several important factors in this case. First, the judges troubled by this proposed amendment do not seek to make on-the-bench speeches about gender identity. They simply seek to refrain from stating things they believe are untrue. In this regard, the proposed amendment is inconsistent with the duty of candor required of judges under the Michigan Rules of Professional Conduct. Rule 3.3 of the Michigan Rules of Professional Conduct requires:

> (a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer

While the comment suggests the rule governs the conduct of a lawyer representing a client in a tribunal, it expressly also says that "[a]s officers of the court, lawyers have special duties to avoid conduct that undermines the integrity of the adjudicative process." The proposed amendment to the judicial rules inappropriately, and unconstitutionally, requires a lawyer/judge to do just that.

Second, in Michigan, both judges and juries are forbidden from making courtroom decisions based on gender identity. The Code of Judicial Conduct states that "Without regard to a person's race, or other personal protected characteristics, a judge should treat every person fairly, with courtesy and respect." Code of Judicial Conduct, Canon 2(B). Likewise, and even more explicit, this Court's standard civil jury instruction forbids juries from making their decisions based on "gender identity," placing it in the category of factors that are "irrelevant to the rights of the parties." M Civ JI 2.06 (jurors to keep open minds) (underlining added) ("Nor should your decision be influenced by prejudice or be as regarding disability, gender, or gender identity, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status, or any other factor irrelevant to the rights of the parties.") (Underlining added). This proposed rule would create an inexplicable procedural cross-current by repeatedly requiring judges (and prodding jurors) to remember and highlight a gender identity status they are both supposed to utterly ignore. The state has a minimal interest in forcing a religious judge to repeatedly highlight an attorney's gender identity status when the state also bars the judge (and the jury) from taking into account gender identity in making their decisions.

In contrast, a judge's religious liberty interest deserves to be weighted strongly. The Michigan Supreme Court has strongly emphasized in *People v. DeJonge*, 442 Mich. 266, 275-276 (1993) the significance of our religious liberty protections.

> The prominence of religious liberty's protection in the Bill of rights is no historical anomaly, but the consequence of America's religious clashes regarding religious freedom. The First Amendment's protection of religious liberty was born from the fires of persecution, forged by the minds of the Founding Fathers, and tempered in the struggle for freedom in America.
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> The Founders understood that this zealous protection of religious liberty was essential to the "preservation of a free government.
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> The Founding Fathers then reserved special protection for religious liberty as a fundamental freedom in the First Amendment of the constitution. This fortification of the right to the free exercise of religious was heralded as one of the Bill of Rights' most important achievements.

As recognized in *Meriwether*, supra, a government employer that insists on its employees expressing the preferred personal pronouns of others wants "its employees to communicate a message: People can have a gender identity inconsistent with their sex at birth." Where the employee has religious convictions that prompt them to disagree with and not want to communicate that message, it can violate the First Amendment to force them to do so. *Meriwether*, supra. As the *Meriwether* court observed, mandatory personal pronouns rules require the government employee to express the message that "People can have a gender identity inconsistent with their sex at birth." *Meriwether*, 992 F.3d at 507. If the government employee disagrees with that message on religious grounds, forcing them to deliver it can violate the First Amendment. *Meriwether*, 992 F.3d at 507 and 14-17.

The proposed rule is also utterly devoid of any opportunity for accommodation of judge's religious convictions. In *Meriwether*, the Sixth Circuit made clear that a government's refusal to accommodate any religious accommodation can contribute to a conclusion that the government is hostile to religious beliefs.

The *Meriwether* court also rejected the idea that the existence of governmental gender identity anti-discrimination laws always justifies regulation of a public official's speech. *Meriwether*, 992 F.3d at 510. The *Meriwether* court rejected the

suggestion that the U.S. Supreme Court's prior case law held "that the government always has a compelling interest in regulating employee's speech or matters of public concern."

Other courts, on constitutional grounds, have also refused to allow government to force public officials to use the preferred personal pronouns of others, nor to allow officials to be punished for criticizing such policies. *Ricard v Geary County KS School Board*, 2022 WL 147137 (D. Kansas, 2023) (unpublished slip opinion) (finding that compelling public school teachers to use student's preferred personal pronouns violated her free exercise rights) (court addresses the school's selective and discriminatory exemption from compliance with the nondisclosure process) (unpublished, attached as Exhibit 1). (It is now public knowledge that the school settled with the teacher, paying her $95,000) (see 31, Tul J. L. and Sexuality 149); see also *Loudon School Board v Cross*, 2021 WL 9276274 (Va, 2021) (unpublished) (Virginia Supreme Court upheld preliminary injunction in favor of teacher when she expressed opposition to a school gender policy that included compelled use of preferred personal pronouns) (unpublished, attached as Exhibit 2)."

B. The Proposed Amendment Seeks to Impose a Governmental Policy Preference that Unconstitutionally Interferes with Fundamental First Amendment Liberty

Ubiquitous special preferences for gender identity too often conflict with and threaten fundamental First Amendment liberties. Broad, sweeping rules, like the proposed amendment, necessarily require people, here judges, to relinquish their right to truthful expression based on the individual facts of the case before them and require compelled speech contrary to constitutionally protected religious and moral conscience rights. The government-imposed speech conditions in the proposed amendment substantially interfere with a person's freedom of speech, and religion. Because the rule restricts and compels expression based on viewpoint, the amendment must satisfy strict scrutiny. The proposed amendment, however, fails such exacting scrutiny. No compelling interest exists in mandating that a judge act contrary to his/her best judgment pertaining to the individual facts of the case or act contrary to his/her religious or moral conscience. *Hurley v Irish American, Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 US 557, 572-73; 115 S Ct 2338; 132 L Ed 2d 487 (1995); *accord, Boy Scouts of America v. Dale*, 530 U.S. 640, 654, 657-659; 120 S Ct 2446; 147 L Ed 2d 554 (2000); *Masterpiece Cakeshop,* 138 S Ct at 1741 (Thomas, J., concurring).

The proposed rule cannot be reconciled with the U.S. Supreme Court's holding in *Hurley,* 515 U at 568-81. In *Hurley*, this Court held that the First Amendment gave the organizers of a private St. Patrick's Day parade the right to not communicate a message about homosexual conduct to which they objected. *Id*. The First

Amendment protected the parade organizers' right "not to propound a particular point of view," *id.* at 575, and the U.S. Supreme Court protected the "principle of speaker's autonomy" *id.* at 580. In doing so, the Court unanimously ruled that a State's action must not be applied to compel a speaker to communicate an unwanted message or express a contrary viewpoint. The Court condemned the notion that state action should force free individuals to express and convey messages to which they disagree because "*this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.*" *Id.* at 573 (emphasis added).

The *Hurley* Court noted that, "this general rule, that the speaker has the right to tailor the speech, applies not only to expression of value or endorsement, but equally to statements of fact the speaker would rather avoid," *id.* at 573, and the benefit of this rule is not limited to the press or just some people but is "enjoyed by business corporations generally." *Id.* at 574.

The U.S. Supreme Court, in later applying *Hurley*, noted that "the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Dale*, 530 U.S. at 653–54. In *Hurley*, the parade organizers did not seek to discriminate, but wished to communicate their St. Patrick's Day message as they saw fit, without being compelled to adopt and promote other messages in their parade.

Like the parade organizers whose First Amendment rights the U.S. Supreme Court protected in *Hurley*, Christian people serving as judges do not, and have never, wished to discriminate against anyone based on their sexual orientation or who they are. Given that these judges always address everyone in their courtrooms without regard to their sexual orientation lifestyle, it is not the lawyer's or their client's sexual orientation that creates problems here. Rather, it is solely the State's action compelling and censuring the judge's expression.

Judges in Michigan are required to treat all people equally. They reserve, though, the right to abstain from affirming that all conduct is equal—especially when compelling judges to express such a message violates their religious faith. The First and Fourteenth Amendments afford the liberty to not be forced or compelled by the State to do so. As the U.S. Supreme Court previously declared, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 US at 579. And the proposed amendment that seeks to punish one opinion by promoting another is unconstitutional; "[t]olerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination." *Ward v Polite*, 667 F3d 727, 735 (CA 6, 2012).

Gender identity preferences, enforced via censures and punishments, as here are unconstitutional compelled speech which forcibly collides with the protections of the First Amendment. Enforcement of speech directives advancing such preferences frequently weaponize State action to subjugate the Free Speech Clause as an important constitutional constraint on the exercise of State authority. At present, religious people in our nation and State face a far more onerous predicament than the drafters and ratifiers of the Constitution and Bill of Rights could ever have imagined. The promise of liberty amounts to nothing more than empty words when the State punishes its citizens for expressing their thoughts and views inhering in their personal identity. Persecution of religious identity via censorship and compelled speech, imposed by the State upon its citizens, must not stand in the United States, nor as a rule required to practice law or serve as a member of the judiciary in the State of Michigan. The First Amendment, promulgated to protect free expression and religious tolerance, requires rejection of the proposed amendment.

C. The Proposed Amendment Runs Contrary to the Protection of Liberty Interests Recognized in *Obergefell v Hodges*, Which Reinforced the Importance of Freedom of Speech

In *Obergefell v. Hodges*, the United States Supreme Court recognized the constitutional right of personal identity for all citizens. 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015).[1] Justice Kennedy, writing for the majority held that: "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593; *see also Masterpiece Cakeshop,* 138 S Ct. at 1727. *Obergefell* affirmed, therefore, not just the freedom to define one's belief system, but freedom to express it. *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id.* This understanding of personal identity broadly comprehends factual contexts well beyond the same-sex marriage facts of that case. 135 S Ct at 2589. Understanding then that the Court meant for the rules established in *Obergefell* to protect all individuals equally without preference, the right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define their personal identity through their religious conscience communicated in their thoughts and expression.

[1] While we question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell,* we expect government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S Ct 2012; 198 L Ed 2d 551 (2017), the Supreme Court held that "denying a generally available benefit solely on account of *religious identity* imposes a penalty on [First Amendment liberty]." *Id.* at 2019 (emphasis added). The concept of "religious identity" was recognized twice in the majority opinion, as well as in the concurrences of Justice Gorsuch, Justice Thomas, and Justice Breyer. *Id.* at 2019, 2024, n 3, 2025, 2026. And *Obergefell* specifically recognized that adherence to divine precepts and religious principles (*i.e.*, religious identity) is "central" to the "lives and faiths" of religious individuals. *Obergefell*, 135 S Ct at 2607.

Many religious people, including many judges in this State, find their identity in their God and in the sacred scriptures. For many religious people, including religious judges, adhering to divine commands is the most personal choice central to their individual dignity and autonomy. Truthful expression of thoughts, conscience, and viewpoints inherent in such personal religious identity, is entitled to at least as much constitutional protection as those who find their identity in their sexuality.

There can be no doubt that *Obergefell's* personal identity jurisprudence informs against government authorities who use public policy to discriminate against religious people by compelling and censuring expression. Indeed, government must not use its power in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm. *Masterpiece Cakeshop,* 138 S. Ct. at 1731. Certainly, government ought to protect and not impede the free expression of conscience. *Cf. Trinity Lutheran,* 137 S. Ct. at 2022 (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *cf. Burwell v. Hobby Lobby Stores, Inc.,* 573 US 682; 134 S. Ct. 2751, 2775; 189 L Ed 2d 675 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196; 132 S Ct 694; 181 L Ed 2d 650 (2012) (barring an employment discrimination suit brought against a religious school). State actions must uphold constitutionally protected freedoms, not grant special protections for some, while coercing others to engage in expression adverse to their personal identity and conscience.

Contrary to *Obergefell's* holding, the proposed rule eviscerates the constitutional right to free speech and identity, enabling the Michigan Supreme Court to claim a compelling interest in subjectively deeming infringement on expression and conscience lawful. The Michigan Supreme Court should reject the proposed rule's diminishment of the liberty protected by the Free Speech and Religion Clauses, especially considering *Obergefell's* recognition of constitutional protection afforded to personal identity in this area.

For judges and lawyers, who view the world through their personal religious identity, their God and his sacred texts are real, and therefore really matter. It is

part of who they are. Judges should not have to choose between fidelity to their religious identity or participation in judicial service. Yet, here, the proposed amendment prohibits expression inherent to a person's religious identity, while compelling speech wholly incompatible with it. By making faith or conscience-informed expression illegal, without regard to the facts presented before the judge, via suppressed and compelled speech, the proposed amendment deprives people of faith of their dignity.

Prohibiting an idea or viewpoint, informed by ageless sacred tenets, because it is not presently politically preferred, prevents thousands of years of wisdom from informing the public ethic. The perilous challenges society faces today ought to begin with the preservation of the First Amendment and its protection of freedom of expression, thought, conscience, and religion. Preserving unalienable First Amendment freedoms promotes good governance, peace, stability, prosperity, charity, and pluralism. Conversely, when government suppresses expression of religious identity and the free expression of ideas, it often results in tragic consequences. The extent to which unbridled State power governing speech prevails over the plain meaning of the First Amendment will determine: 1) whether unalienable liberty for free speech will continue to be relevant as an objective limit on government action; and 2) whether the State replaces the Framers' intent with its own personal social policy views.

Many judges in this State are keenly aware of the stakes. Despite the holdings in *Meriwether* and *Masterpiece Cakeshop*, the proposed amendment expands an agenda which places compelled speech pertaining to gender identity above First Amendment liberty, without restraint and without any regard for the facts of the cases before the court. The Constitution does not support such totalitarian action.

II. <u>The Proposed Amendment Creates Overwhelming Practical and Due Process Concerns</u>

The United States Court of Appeals for the Fifth Circuit has rejected the notion that judges are required to use "'pronouns' matching [litigant's] subjective gender identity." *United States v Varner*, 948 F3d 250, 255 (CA 5, 2020) (noting that, as to other courts, so far, "[n]one has adopted the practice as a matter of binding procedure, and none has purported to obligate litigants or other to follow the practice."). *Varner* identified "no federal statute or rule requiring counsel in other practices to judicial proceeding to use pronouns according to a litigant's gender identity." *Varner*; 948 F3d at 255. In *Varner*, the Fifth Circuit points out that if a court were to compel the use of preferred pronouns at the initiation of the litigant, it could raise delicate questions about judicial impartiality. *Id.* at 256 (stating "the court may unintentionally convey its tacit approval of the litigant's underlying legal position."). The *Varner* court also noted that "use of a litigant's preferred pronouns may well turn out to be more complex than it may first appear." *Id.*

The *Varner* court stated:

> It oversimplifies matters to say that gender dysphoric people merely prefer pronouns opposite from their birth sex "her" instead of "his," or "his" instead of "her." In reality a dysphoric person's "[ex]perienced gender may include alternative gender identities beyond binary stereotypes." DSM-5, at 453; *see also, e.g.,* Dylan Vade, *257 *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People,* 11 Mich. J. Gender & L. 253 261 (2005) (positing that gender is not binary but rather a three-dimensional "galaxy"). Given that, one university has created this widely circulated pronoun usage guide for gender-dysphoric persons:

1	2	3	4	5
(f)ae	(f)aer	(f)aer	(f)aers	(f)aerself
e/ey	em	eir	eirs	eirself
he	him	his	his	himself
per	per	pers	pers	perself
she	her	her	hers	herself
they	them	their	theirs	themself
ve	ver	vis	vis	verself
xe	xem	xyr	xyrs	xemself
ze/zie	hir	hir	hirs	hirself

> *Pronouns – A How to Guide,* LGBTQ+ Resource Center, University of Wisconsin-Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns/; *see also* Jessica A. Clark, *They, Them and Theirs,* 132 Harv. L. Rev. 894, 957 (2019) (explaining "[s]ome transgender people may request … more unfamiliar pronouns, such as ze (pronounced 'zee') and hir (pronounced 'hear'))." If a court orders one litigant referred to as "her" (instead of "him"), then the court can hardly refuse when the next litigant moves to be referred to as "xemself" (instead of "himself"). Deploying such neologisms could hinder communication among the parties and the court. And presumably the court's order, if disobeyed, would be enforceable through its contempt power. *** When local governments have sought to enforce pronoun usage, they have had to make refined distinction based on matters such as the types of allowable pronouns and the intent of the "misgendering" offender. *See* Clark, 132 Harv. L. Rev. at 958-59 (discussing New York City regulation prohibiting "intentional or repeated refusal" to use pronouns including "them/them/theirs or ze/hir" after person has "made clear" his preferred pronouns). Courts would have to do the same. We decline to enlist the federal judiciary in this quixotic undertaking."

Varner, 948 F3d at 256-257 (footnote omitted).

The comments submitted to this Court by 12 Michigan Court of Appeals Judges in a joint letter to this Court highlight that litigants' preferred pronouns can also be used to promote malicious purposes, even including the promotion of white supremacy and Nazi ideology.

Some on the bench have expressed to us that parties have actually tried to insist that they be referred to as Dracula, Jesus or other similar names. This proposed amendment would encourage absurd behavior and negatively affect a judge's ability to control his/her own courtroom. When we start forcing judges to make ideological declarations insisted upon by the attorneys or litigants, we have overstepped and diminished the role of the judiciary.

Conclusion

For the reasons provided in this comment, we urge this Court to preserve the right of judges to truthfully exercise fundamental freedoms under the First Amendment and reject the proposed amendment. This Court should not force judges to violate their religious and moral consciences or compel judges to use certain gender identity expressions, especially when this Court has previously declared in its jury instructions to be amongst a long list "protected characteristics" that are, in its own words, "irrelevant to the rights of the parties."

Religious Liberty Law Section
of the State Bar of Michigan

EXHIBIT 1

2022 WL 1471372
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Pamela RICARD, Plaintiff,
v.
USD 475 GEARY COUNTY, KS SCHOOL BOARD, et al., Defendants.

Case No. 5:22-cv-04015-HLT-GEB
|
Signed 05/09/2022

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MEMORANDUM AND ORDER

HOLLY L. TEETER, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Pamela Ricard brings constitutional claims against Defendants USD 475 Geary County, KS School Board; school board members Ron Johnson, Kristy Haden, Anwar Khoury, Jim Schmidt, Beth Hudson, Mark Hatcher, Jason Butler; Geary County Superintendent Reginald Eggleston; and Fort Riley Middle School Principal Kathleen Brennan ("the District"). [1] Doc. 1. These claims stem from Plaintiff's opposition to the District's policies that (1) require her to refer to students by preferred first name and pronouns ("Preferred Names and Pronouns Policy") and (2) prohibit her from referring to a student by the student's preferred names and pronouns in her communications with the student's parents unless the student requests the administration or counselor to do so ("Communication with Parents Policy").

1 The Court recognizes that Plaintiff has sued some defendants in a personal and official capacity. The parties make no effort to analyze this nuance in briefing and in arguing the preliminary-injunction motion. And given the very tight timelines in this case, the Court does not either. The Court refers generally to the District.

Plaintiff moves for a preliminary injunction on her free speech, free exercise, and due process claims. Doc. 5. The Court received evidence and heard arguments at the May 6, 2022 hearing. Because the District affirmatively stated that Plaintiff's current practice would not be deemed a violation of the Preferred Names and Pronouns Policy, the Court finds that Plaintiff is unlikely to experience irreparable harm from enforcement of that policy before the Court rules on the merits in this case and denies a preliminary injunction on the Preferred Names and Pronouns Policy on that basis. But the Court finds that Plaintiff has made a sufficient showing that her free exercise claim merits a preliminary injunction of the Communication with Parents Policy, so the Court enjoins Defendants in the manner set forth below.

I. BACKGROUND

The Court makes the following factual findings based on the record. The Court includes additional facts throughout the order as needed. Plaintiff has taught in the District since 2005. Doc. 1 ¶ 1. Plaintiff is a Christian who believes that God immutably creates each person as male or female; these two distinct, complementary sexes reflect the image of God; and rejection of one's biological sex is a rejection of the image of God within that person. *Id.* ¶¶ 84, 86. Additionally, she believes that there are only two anatomical sexes except in very rare scientifically demonstrable medical circumstances. *Id.* ¶ 79. Plaintiff also believes that the Bible prohibits dishonesty and lying. *See id.* ¶ 88. Plaintiff further believes that referring to children with pronouns inconsistent with biological sex is harmful because it is untrue. *Id.* ¶ 89. And Plaintiff believes that parents have a fundamental right to control the upbringing and education of their children. *Id.* ¶ 74.

Plaintiff taught Math Strategies for sixth, seventh, and eighth grade students at Fort Riley Middle School during the 2020-21 school year. *Id.* ¶ 95. There were two students in her class that school year who were biological females and enrolled in the District's record system (e.g., Skyward) under their legal first and last names and their biological sexes. *Id.* ¶¶ 96-97. Both students requested to go by names that were different than their legal names and by pronouns inconsistent with their biological sex.

***2** Plaintiff was suspended and disciplined for not using one student's preferred name and because both students felt discriminated against based on Plaintiff not using the preferred name. Plaintiff returned from her suspension on April 15, 2021. *Id.* ¶ 134. Then-Principal Shannon Molt gave Plaintiff a formal written reprimand for violating three board policies. *Id.* These policies did not have any specific guidance for handling a social transition for transgender students. *See* Doc. 1-4. But Plaintiff was nevertheless found to have violated those policies because her behavior was "against the guidance provided by building leadership via email on March 31, 2021 and the building's weekly newsletter on April 4, 2021." *Id.* at 4.

Six days later, Molt emailed Fort Riley Middle School staff diversity training on gender identity, gender expression, and guidance on "Use of Preferred Names and Pronouns." *See* Doc. 1 ¶ 139; *see also* Doc. 1-6; Doc. 1-7. Several months later, in September 2021, the board formally amended its policies such that "[s]tudents will be called by their preferred name and pronouns" (i.e., the Preferred Names and Pronouns Policy). Doc. 1-18 at 5. On October 8, 2021, Defendant Brennan informed teachers that Defendant Eggleston had emailed parents and guardians the previous day to tell them that students would be referred to by their preferred name and pronouns, but the District would "not communicate this information to parents unless the student requests the administration or counselor to do so, per Federal FERPA Guidance" (i.e., the Communication with Parents Policy). Doc. 1-16 at 2. [2] , [3]

2 Plaintiff unsuccessfully appealed the disciplinary action to the superintendent and the Board. *See* Doc. 1 ¶¶ 138-149, 154-174, 183-87. The Board also rejected Plaintiff's religious accommodation request. *Id.* ¶¶ 150, 184.

3 The parties have heavily litigated whether certain district directives are a "policy," "guidance," or "implementation" material. Form does not matter. *See Ashaheed v. Currington*, 7 F.4th 1236, 1243 (10th Cir. 2021) ("[T]he First Amendment applies to exercises of executive authority no less than it does to the passage of legislation." (citation omitted)). What matters is what the governmental rule is, and whether Plaintiff is entitled to preliminarily enjoin that rule pending judgment on the merits.

Plaintiff currently has two new transgender students in her class. One student told Plaintiff of a preferred name and preferred pronouns in fall 2021 and the other informed Plaintiff in March 2022. Plaintiff refers to both students by their preferred first names, but she avoids using their preferred pronouns to be consistent with her religious beliefs. Plaintiff does not generally use pronouns in class for any student and avoids the use of pronouns. But she does occasionally use pronouns when referring to students in class. Plaintiff has had to email one of the transgender student's parents regarding that student's performance in school. Because the student has not authorized the district to disclose the student's transgender status to the student's parents, Plaintiff used the student's legal name and biological pronouns in the email. Plaintiff believes that addressing students one way at school and a different way when speaking to their parents is dishonest. Being dishonest violates her sincere religious beliefs.

II. STANDARD

To obtain a preliminary injunction, the movant must show that she is (1) substantially likely to succeed on the merits, (2) will suffer irreparable injury if the injunction is denied, (3) her threatened injury outweighs the injury the opposing party will suffer under the injunction, and (4) the injunction would not be adverse to the public interest. *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 883 (10th Cir. 2021) (citations omitted). If a movant is seeking a disfavored injunction, she faces a higher standard. *Id.* Preliminary injunctions are disfavored when the injunction alters the status quo, constitutes a mandatory injunction, or gives the movant all the relief that she would recover at trial. *Id.* at 883-84. Disfavored injunctions require a strong showing on the likelihood of success and balance of harms elements. *Id.* at 884.

III. ANALYSIS

***3** Plaintiff contends the Preferred Names and Pronouns Policy and the Communication with Parents Policy violate her free speech, free exercise of religion, and due process rights. The Court analyzes each below.

A. Preferred Names and Pronouns Policy

As noted above, the District's Preferred Names and Pronouns Policy states: "Students will be called by their preferred name and pronouns." Doc. 1-18 at 5. Plaintiff argues this directive violates both her freedom of speech and free exercise rights under the First Amendment and her due process rights under the Fourteenth Amendment.

While the directive appears mandatory and without exception, the District represented at the hearing that: (1) an employee is not required to use preferred pronouns and may refer to students only by their preferred first name, provided the employee elects not to use pronouns for any student; and (2) inadvertent or unintentional use of pronouns to refer to some students, where an employee's standard practice is to refer to all students only by preferred first name, will not transform the employee's standard practice into a policy violation. [4]

4 There appear to be numerous other exceptions and caveats to this policy. For example, the District itself refers to a student by the student's legal name, even when the student has requested to be referred to by a preferred name, in official records; as a login credential for Skyward; for the student's email address; and in yearbooks. Further, coaches and gym teachers are apparently allowed to use last names to refer to students in lieu of preferred names and pronouns because the use of last names is more convenient in a sports setting. And District employees are not required to use preferred names and pronouns when employees are speaking about a student outside the student's presence.

Plaintiff testified at the hearing that she has been and is willing to continue referring to all students by their preferred first names (albeit, not their preferred pronouns). The District's counsel indicated that this practice would not violate the District's policy provided any occasional use of pronouns by Plaintiff, despite her default practice of referring to students by their preferred first name, was inadvertent or unintentional. Given the parties' apparent agreement that Plaintiff's present practice is acceptable to both, the Court finds Plaintiff is unlikely to experience any irreparable harm from this policy before the Court rules on the merits in the ordinary course of this case. *See State*, 989 F.3d at 884. Therefore, the Court will deny injunctive relief at this time and without prejudice to Plaintiff's ability to seek preliminary injunctive relief should circumstances change.

In denying preliminary injunctive relief regarding the Preferred Names and Pronouns Policy, the Court specifically relies on statements made by the District that Plaintiff's current practice is not subject to discipline. The Court is not making any ruling on the merits of Plaintiff's free speech, free exercise, and due process claims as it pertains to the Preferred Names and Pronouns Policy. These claims remain live given Plaintiff's requests for a permanent injunction, declaratory judgment, damages, and attorney fees. The Court will resolve these merits questions in the ordinary course of the litigation.

B. Communication with Parents Policy

***4** While the parties may have reached détente regarding the Preferred Names and Pronouns Policy, the parties remain very much at odds over the Communication with Parents Policy and the potential for disciplinary action should Plaintiff violate it. This policy prohibits employees from revealing to parents that a student has requested use of a preferred name or different set of pronouns at school "unless the student requests the administration or a counselor to do so, per Federal FERPA guidance." Doc. 1-16 at 2. In application, the policy prohibits teachers not only from initiating communication with parents for the express purpose of disclosing preferred names and pronouns, but it also prohibits teachers from revealing preferred names and pronouns as part of a communication with parents about an unrelated matter, such as grades or attendance. It is this latter application of the policy from which Plaintiff seeks relief. [5]

5 In other words, Plaintiff disclaims any plan to affirmatively reach out to parents for the purpose of telling them that their child is using preferred names or pronouns.

Like her challenge to the Preferred Names and Pronouns Policy, Plaintiff contends the Communication with Parents Policy violates her free speech and free exercise rights under the First Amendment, and her due process rights under the Fourteenth Amendment. The Court finds that Plaintiff is entitled to a preliminary injunction based on her free exercise rights. Therefore, the Court declines to address Plaintiff's free speech and due process arguments at this time; it will instead address those matters in the ordinary course of the litigation.

1. Likelihood of Success

The free exercise clause of the First Amendment states, in pertinent part, that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I. While the First Amendment by its terms applies only to Congress, it was incorporated by the Fourteenth Amendment and now applies to state and local governments, including public school districts. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The fundamental principle of the free exercise clause is that "government commit 'itself to religious tolerance.' " *Meriwether v. Hartop*, 992 F.3d 494, 512 (6th Cir. 2021) (citing *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018)). Under this principle, government laws and rules that burden religious exercise are "presumptively unconstitutional unless they are both neutral and generally applicable." *Id.* (citing *Emp't Div., Dept' of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877-78 (1990)). A law "is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.' " *Fulton v. City of Phila., Penn.*, 141 S. Ct. 1868, 1877 (2021) (alteration in original) (citations omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (citation omitted).

In considering whether a law is neutral and generally applicable, this Court must "look beyond the text and scrutinize the history, context, and application of a challenged law." *See* *Hartop*, 992 F.3d at 512 (citing *Masterpiece*, 138 S. Ct. at 1731; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (discussing the neutrality prong)). If a rule that burdens religious exercise is not neutral and generally applicable, it will survive constitutional challenge only if the government can demonstrate "interests of the highest order" and that the rule in question is "narrowly tailored" to achieve those interests. *Fulton*, 141 S. Ct. at 1881 (citation omitted).

Here, Plaintiff demonstrates that the Communication with Parents Policy burdens her exercise of religion. Plaintiff has testified that she is a Christian and believes the Bible prohibits dishonesty and lying. She believes it is a form of dishonesty to converse with parents of a child using one name and set of pronouns when the child is using and being referred to at school by a different name and pronouns, unbeknownst to the parents. The Court finds Plaintiff's testimony concerning her religious beliefs to be credible and subjectively sincere. *See* *City of Hialeah*, 508 U.S. at 531 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection." (internal quotations and citation omitted)).

***5** Plaintiff has also demonstrated that, as part of her job, she regularly communicates with parents, whether by email or in person. In fact, she has had to communicate in writing with the parents of a transgender student earlier this year, and it is highly likely she will further communicate with transgender students' parents before the end of the academic year. Neither of Plaintiff's transgender students have authorized the District to disclose their preferred names and pronouns to their parents. Plaintiff would face the Hobbesian choice of complying with the District's policy and violating her religious beliefs, or abiding by her religious beliefs and facing discipline.

The District counters that its policy does not require Plaintiff to use any student's name or pronouns in conversations with parents—it merely prohibits Plaintiff from revealing to a student's parents a preferred name or pronouns the student is using at school if the student has not authorized the parents to know. Thus, argues the District, Plaintiff can simply refer to students in conversation with parents as "your child" or "your student," never referring to the child by name or pronoun. But Plaintiff has testified to her belief that having a conversation with parents about a child, and not disclosing the name and pronouns used at school, is itself a form of "conceal[ment]" [6] —a material omission if you will—given Plaintiff's belief that parents have a fundamental right to control the upbringing of their children. Moreover, it is simply unrealistic to suppose that a teacher can communicate with parents about their child and never refer to the child by name or pronoun. Such a system would be "impossible to comply with," and when Plaintiff "slipped up," she could face discipline. *See* *Hartop*, 992 F.3d at 517. This Court agrees that Plaintiff's religious rights "do not hinge on such a precarious balance." *Id.* Therefore, the Court finds Plaintiff has demonstrated continued application of the Communication with Parents Policy to her burdens her religious exercise.

6 Plaintiff's subjective perception that this is "conceal[ment]" is not fanciful. The District grants parents access to its Skyward system. When a parent logs in, Skyward displays certain information about their child, including the child's legal name as reflected on District records and any preferred name the parent has disclosed to the District. The Skyward database also contains

> preferred names and pronouns that students are using at school but that parents may be unaware of. Although the District's administrators and teachers can see these preferred names and pronouns when they login into Skyward, this data is not populated and visible in the version of Skyward that parents are granted access to.

Because the Communication with Parents Policy burdens Plaintiff's religious rights, the Court must determine whether the Communication with Parents Policy is neutral and generally applicable. The Court concludes the policy is not generally applicable because the District has created multiple exceptions that either necessitate consideration of the putative violator's intent or the District has exempted conduct for secular reasons but is unwilling to exempt Plaintiff for religious reasons. *See* *Fulton*, 141 S. Ct. at 1877.

First, testimony at the hearing established that at least a "couple" of other District employees had inadvertently disclosed to parents the preferred name or pronouns of children who had not authorized the District to disclose this information to parents. The District stated that such persons were not disciplined for violating the policy despite the policy's language drawing no distinction between unintentional or purposeful violations. Thus, in the District's practice, to determine whether the policy has been violated by a particular disclosure, the District must determine whether the putative violator intended to violate the policy or not.

***6** Second, while the policy by its terms would prohibit any disclosure of a child's preferred name and pronouns to parents absent a child's permission, the District admitted at the hearing that if parents requested copies of education records that included information concerning preferred names and preferred pronouns, the District would disclose the information to parents without a child's permission because the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99, requires it. Thus, the District is willing to make an exception for the secular purpose of complying with federal law, but not religious reasons.

Third, at the hearing, the Court asked what the District would expect a teacher to do if, during a conversation with parents, parents specifically asked the teacher if their child was being addressed at school by a preferred name or pronouns. The District's counsel indicated that such a teacher should refer the parents to an administrator and the administrator would then answer the question and disclose the requested information in a subsequent conversation or meeting. [7] But the policy does not facially carve out administrators from its scope. Thus, the District has created another exemption in practice for administrators to disclose information when necessary for the secular purpose of responding to a parent's direct [8] question, but again is unwilling to grant an exemption for religious purposes.

7 As explained by *Fulton*, the Court must consider whether the secular exemption undermines the District's asserted interests in a similar way. As discussed below, the District told parents the policy was adopted for the purpose of complying with FERPA. But, as also discussed below, FERPA does not restrict parental access to student records; to the contrary, it requires a school district to provide education records to parents whether a child wants the records disclosed or not. Thus, allowing an administrator to disclose to parents because they asked is no less a violation of the District's flawed understanding of FERPA than if the District allowed a teacher to disclose for religious reasons. The District later articulated it did not want preferred name and pronoun information disclosed because it is not the District's "place" to "out" students to parents who might disagree with the child's desire to go by a preferred name or pronoun. This stated interest is undermined just as much by an administrator disclosing the information to parents who ask, as it is by a teacher doing so when necessary to avoid a religious conflict.

8 Of course, some parents may be totally ignorant of the fact that their minor child is being called by a different name and pronouns at school, in which case they would never know to ask for education records. Under the District's practice, it is only those parents who affirmatively ask the right question who would receive this information. This seems rather inconsistent with the District's stated position that parents are "full partners in their child's education."

Because the Communication with Parents Policy is not generally applicable, the District has the burden to demonstrate the policy is justified by "interests of the highest order"—a so-called, "compelling" interest—and that the policy in question is "narrowly tailored" to achieve those

interests. *Fulton*, 141 S. Ct. at 1881; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006) (government bears the burden to satisfy strict scrutiny even at the preliminary injunction phase).

When operating under a strict scrutiny standard, the Court must consider the genuine interest that the District believed supported the policy when it adopted the policy. *See Yellowbear v. Lampert*, 741 F.3d 48, 58-59 (10th Cir. 2014); *see also Fox v. Washington*, 949 F.3d 270, 283 (6th Cir. 2020) ("[B]ecause the government's asserted interest must be genuine, not hypothesized or invented *post hoc* in response to litigation, [the government] will be limited to raising justifications it cited at the time it made the decision" (internal citations and quotations omitted)).

***7** To that point, the policy was announced by the District's Superintendent, Dr. Reginald Eggleston in an email dated October 7, 2021, and sent to all parents and guardians. That email stated, in pertinent part, "USD 475 will not communicate [preferred names and pronouns] to parents unless the student requests the administration or counselor to do so, per FERPA guidelines." (emphasis added). Thus, the District told parents that the reason for its policy was to comply with FERPA. There is no reason to believe the District told parents one thing, while having a hidden, subjective motivation it did not disclose. Therefore, the Court accepts the October 7, 2021 email as an accurate explanation of the District's contemporaneous justification for adopting the policy.

The problem for the District is that FERPA does not prohibit the District from communicating with parents about their minor child's preferred name and pronouns. To the contrary, FERPA is a law that specifically empowers parents to receive information about their minor students; it mandates the District to make education records [9] available to parents upon request—whether the child wants their parents to have the records or not. *See* 34 C.F.R. § 99.10(a) ("Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records" (emphasis added)). [10] And FERPA does not exempt from its disclosure obligation education records that deal with preferred names and pronouns. Thus, the District's contemporaneous justification for adopting the policy is predicated on an erroneous understanding of the law. And the District's statement to parents that "FERPA guidelines" prevented the District from disclosing preferred name and pronoun information without a child's permission, was misleading. The District could not have a legitimate, compelling interest in withholding information based on FERPA when FERPA in fact required the District to disclose the very information at issue—at least to the extent the information was contained in an education record.

9 Under FERPA, an education record is a record that is "directly related" to a student and that is "maintained" by a school or party "acting for" the school. 34 C.F.R. § 99.3. Evidence at the hearing established that the District maintains information about a student's preferred name and pronouns in Skyward and, for some students, in a binder stored in the registrar's office. It also maintains such information in emails sent and retained by the counselor and completed forms that the District previously required students to fill out. All these documents seem to be education records under FERPA.

10 *See generally* U.S. Dep't of Educ. Student Priv. Pol'y Off., *A Parent's Guide to the Family Educational Rights and Privacy Act* (2021), https://studentprivacy.ed.gov/resources/ferpa-general-guidance-parents.

Even if the Court were to consider the post hoc explanation the District has given in the context of this litigation, the Court still concludes that the District has failed to establish the Communication with Parents Policy is supported by a compelling interest. Specifically, at the hearing, the District's administrator took the position it was not the District's place to "out" a student to their "parents." And the District's counsel argued that "if the home life is such that the —the student doesn't want to be out to their parents, it's not our job to do it."

But as noted above, federal policy as evidenced by FERPA is that parents do have a right of access to information held by the school about their minor children. Moreover, even if FERPA did not mandate that schools make education records available to parents who ask for them, the fact that it is not the school's duty to disclose information to parents does not mean the school has a compelling interest in directing teachers to withhold or conceal such information and punishing teachers if they violate the policy.

***8** Moreover, as the District conceded at the hearing, parents in the United States have a constitutional right to control the

upbringing of their children. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). This is not a trivial right—it is a fundamental one that is "perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It rests on a fundamental premise that a child is "not the mere creature of the State," *id.* (emphasis added) (citation omitted), and that parents—"those who nurture him and direct his destiny"—"have the right, coupled with the high duty, to recognize and prepare him for additional obligations," *id.* (citation omitted). It is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns. [11]

11 Of course, Plaintiff does not have standing to assert constitutional claims on behalf of parents, nor does she attempt to. But the fundamental rights that parents have are a valid consideration in determining whether the District has established a legitimate, compelling interest in prohibiting Plaintiff from disclosing to parents the preferred name and pronouns the child is using, while threatening Plaintiff with disciplinary sanctions if she violates the policy.

Presumably, the District may be concerned that some parents are unsupportive of their child's desire to be referred to by a name other than their legal name. Or the District may be concerned that some parents will be unsupportive, if not contest, the use of pronouns for their child that the parent views as discordant with a child's biological sex. But this merely proves the point that the District's claimed interest is an impermissible one because it is intended to interfere with the parents' exercise of a constitutional right to raise their children as they see fit. [12] And whether the District likes it or not, that constitutional right includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred.

12 Because it is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right, there are real questions whether the District's claimed interests in the Communication with Parents Policy—broadly written as it is—would satisfy even the rational basis standard that would govern if the rule were neutral and generally applicable.

The Court can envision that a school would have a compelling interest in refusing to disclose information about preferred names or pronouns where there is a particularized and substantiated concern that disclosure to a parent could lead to child abuse, neglect, or some other illegal conduct. Indeed, at least in Kansas, were such a case to arise, a school would likely have to report the matter to the Department for Children and Families. *See generally* K.S.A. § 38-2223. But the District has not articulated such an interest here—either abstractly or in the case of the specific students in Plaintiff's class. [13]

13 To be clear, there is no evidence in the record that the transgender students in Plaintiff's class are at risk of harm from their parents.

Even if the District had articulated an interest in preventing abuse by a parent (that is, abuse as the law defines it, and not simply as an administrator might subjectively perceive it), the Communication with Parents Policy would not be narrowly tailored to achieve such an interest. The policy is overinclusive because it prohibits the disclosure of preferred name and pronoun information to parents without any assessment of whether disclosure would actually pose a risk. Moreover, the policy would also be underinclusive insofar as it permits administrators to disclose preferred name and pronoun information to parents simply if parents ask, and without any determination whether such disclosure poses a risk to the child. *See* *City of Hialeah*, 508 U.S. at 546 (finding laws not narrowly tailored where they were "overbroad or underinclusive in substantial respects"). An appropriately tailored policy would, instead, make an individualized assessment whether there is a particularized and substantiated concern of real harm—as opposed to generalized concern of parental disagreement—and prohibit disclosure only in those limited instances.

***9** Because the Communication with Parents Policy substantially burden's Plaintiff's exercise of religious rights, is not generally applicable, and fails both prongs of the strict scrutiny analysis, the Court finds that Plaintiff has demonstrated a substantial likelihood of success on her free exercise claim as it concerns this policy.

2. Irreparable Harm

The District argues that Plaintiff is not at serious risk for future irreparable injury. Any employment discipline she could receive would be compensable with money damages and her chances of being disciplined are low because she has not been disciplined this school year and Plaintiff is not returning to work at Fort Riley Middle School next year. Plaintiff counters by arguing that the District's past practice shows that she can be disciplined within a few days. [14] Additionally, Plaintiff has already not been able to follow her conscience with regards to parental communications.

14 Plaintiff was issued a notice of suspension one day after the April 2021 incidents.

Any deprivation of any constitutional right is an irreparable injury. *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 806 (10th Cir. 2019). Here, the Court has already determined that Plaintiff is likely to succeed on her free exercise claim on the Communication with Parents Policy. And the Court also finds it reasonable that she would communicate with the parent of one of the transgender students before the end of the academic year. Although the short timeline and change in work next year does not obviate irreparable harm, it is a reason for limiting the timeframe of the preliminary injunction. Thus, Plaintiff has established irreparable injury.

3. Balance of Harms

The District argues that a preliminary injunction would significantly hinder the District's "obligations to protect young persons entrusted to its care." Doc. 11 at 36. But "[w]hen a constitutional right hangs in the balance, though, 'even a temporary loss' usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citation omitted). The Court recognizes that the District is trying to create a stable learning environment for children. But the District fails to articulate any specific, concrete harms sufficient to outweigh Plaintiff's weighty interest in preliminary relief. Therefore, the balance of harms favors Plaintiff.

4. Public Interest

It is "always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 807. Because the Court finds that Plaintiff is likely to succeed on her free exercise claim for the Communication with Parent Policy, this factor also favors Plaintiff. Thus, Plaintiff has made a sufficient showing as to all four elements for a preliminary injunction against enforcement of this policy. [15] Because the Court holds for Plaintiff on her free exercise basis for a preliminary injunction, it does not address Plaintiff's other arguments for her other claims on this policy.

15 The District argues that Plaintiff seeks a disfavored injunction. Plaintiff is not seeking a disfavored injunction. Plaintiff is seeking a prohibitory injunction rather than a disfavored mandatory injunction because she seeks to prohibit the District from taking adverse action against her for a violation of her constitutional rights. Plaintiff is not seeking a disfavored injunction that grants her all the relief she'd receive after a trial on the merits either because she could receive other relief (such as damages and attorneys' fees). Finally, this injunction simply seeks to preserve "the last peaceable uncontested status existing between the parties before the dispute developed." *Free the Nipple*, 916 F.3d at 798 n.3 (citation omitted). That peaceable status with regards to the Communication with Parents Policy was prior to the policy's implementation. So Plaintiff does not seek a disfavored preliminary injunction that alters the status quo.

IV. CONCLUSION

***10** The Court has carefully analyzed the record and the law in the limited time afforded by this case. And the Court realizes that this is a difficult and complex area of the law that continues to develop. But based on the record before the Court, the Court denies a preliminary injunction as it relates to the Preferred Names and Pronouns Policy but grants a limited preliminary injunction on the Communication with Parents Policy because Plaintiff has shown the four necessary factors for her free exercise rights.

THE COURT THEREFORE ORDERS that Plaintiff's motion for a preliminary injunction (Doc. 4) is GRANTED IN PART

and DENIED IN PART. The Court denies a preliminary injunction on the Preferred Names and Pronouns Policy based on statements made by the District that Plaintiff's current practice would not be deemed a policy violation.

THE COURT FURTHER ORDERS that Defendants are ENJOINED from disciplining Plaintiff for referring to a student by the student's preferred name and pronouns in her communications with the student's parents within the regular course of her duties. The Court relies on Plaintiff's statements that she does not intend to communicate with a parent for the sole purpose of disclosing a student's preferred name and pronouns. This injunction terminates on May 18, 2022, or at the conclusion of Plaintiff's contractual responsibilities to the District, whichever is later.

IT IS SO ORDERED.

All Citations

Slip Copy, 2022 WL 1471372

EXHIBIT 2

2021 WL 9276274
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Supreme Court of Virginia.

LOUDOUN COUNTY SCHOOL BOARD, et al., Petitioners,

v.

Byron Tanner CROSS, Respondent.

Record No. 210584

|

August 30, 2021

Synopsis

Background: Public-school teacher, who was placed on administrative leave following comments he offered in opposition to county's proposed transgender-student policy during public comment period of school board meeting, brought action against county school board and superintendent, seeking declaration that defendants unlawfully retaliated against teacher for exercising right to free speech under state constitution and violated constitutional provision on viewpoint discrimination, and teacher also sought permanent injunction directing his reinstatement and precluding future punishment for such speech. The Circuit Court, No. CL21003254-00, granted teacher's request for preliminary injunction. Board and superintendent petitioned for review, which was granted.

Holdings: The Supreme Court held that:

[1] teacher's comments constituted pure speech subject to constitutional protection rather than fighting words or obscenity, and

[2] trial court acted within discretion in finding that teacher was likely to succeed on merits of claim.

Affirmed.

Procedural Posture(s): Petition for Discretionary Review; Motion for Preliminary Injunction.

West Headnotes (8)

[1] **Courts** Abuse of discretion in general

A court abuses its discretion when it (1) does not consider a relevant factor that should have been given significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) considers proper factors but commits a clear error of judgment while weighing those factors.

[2] **Injunction** Extraordinary or unusual nature of remedy

Injunction Discretionary Nature of Remedy

Injunction Prohibitory nature; preservation of status quo

An injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case and is meant to preserve the status quo between the parties while the litigation is ongoing.

[3] **Injunction** Factors Considered in General

Injunction Injury, Hardship, Harm, or Effect

Whether to grant a temporary injunction requires consideration of the requesting party's allegations and the veracity and magnitude of the asserted harm.

[4] **Injunction** Weight and Sufficiency

On a motion for a preliminary injunction, a court may contemplate the substance and adequacy of factual support for a plaintiff's allegations.

[5] **Constitutional Law** Public or private concern; speaking as "citizen"

Under the First Amendment, government may not take adverse employment actions against its employees in reprisal for their exercising their

right to speak on matters of public concern. U.S. Const. Amend. 1.

[6] **Constitutional Law** Efficiency of public services

Determining whether the government transgressed First Amendment prohibition on adverse employment actions against its employees in reprisal for their exercising their right to speak on matters of public concern involves a two-step inquiry, where the first step asks whether employee spoke on an issue of social, political, or other interest to a community, and second step requires weighing employee's interest in making his public comments against the government's interest in providing effective and efficient services to the public. U.S. Const. Amend. 1.

[7] **Constitutional Law** Statements at board meetings

Education Protected activities in general

Public-school teacher's comments at public comment period of school board meeting objecting to county's proposed policy on transgender students, stating that he believed policy would damage students through improper lack of pushback and that policy was "sinning against our God," constituted pure speech subject to First Amendment protection, rather than fighting words or obscenity, for purposes of teacher's claim that he was placed on administrative leave in retaliation for those comments. U.S. Const. Amend. 1.

[8] **Civil Rights** Employment practices

Trial court acted within discretion in finding, at preliminary-injunction stage, that public-school teacher's interest in making his public comments outweighed any government interest in providing effective and efficient services to public, as would support finding that teacher was likely to succeed on merits of his claim that his suspension, based on comments he made during public comment period of school board meeting criticizing county's proposed policy on transgender students, violated state constitution's right to free speech; both teacher and public were centrally interested in open discussion of agenda items at public meetings, teacher was opposing a policy that might burden his freedoms of expression and religion, and there was no evidence of actual disruption of school operations. Va. Const. art. 1, § 12.

Upon a Petition for Review Under Code § 8.01-626, Justices Kelsey, McCullough, and Chafin, Circuit Court No. CL21003254-00

Opinion

***1** The defendants/petitioners, Loudoun County School Board, Superintendent Scott A. Ziegler, and Interim Assistant Superintendent Lucia V. Sebastian, petition under Code § 8.01-626 for review of the circuit court's order granting a temporary injunction to Byron Tanner Cross, a Loudoun County Public Schools teacher. Cross was placed on administrative leave following comments he offered in a public forum. We grant the petition for review for purposes of reviewing the lower court's decision on the merits. Having done so, we affirm the court's preliminary injunction and offer the following explanation.

BACKGROUND

Cross has worked in Loudoun County Public Schools as an elementary school physical education teacher for eight years. Pursuant to Code § 22.1-23.3, [*] the School Board is considering whether to adopt Policy 8040, "Rights of Transgender Students and Gender-Expansive Students" ("transgender policy"). If adopted, the transgender policy will: (1) allow students to use a name different than their legal name; (2) allow students to use gender pronouns different from those corresponding to their biological sex; (3) require school staff to use students' chosen name and gender pronouns; and (4) allow students to use school facilities and participate in extra-curricular activities consistent with their chosen gender identity. Cross' complaint asserted that, based on scientific evidence regarding gender and child development, his philosophical views on the rights of parents

and educators, and his Christian religious beliefs, he objects to (1) the idea that someone can be transgender, (2) treating children as transgender, and, accordingly, (3) numerous aspects of the transgender policy.

*

> Code § 22.1-23.3(A) provides that "[t]he Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools." Further, "[e]ach school board shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education." Code § 22.1-23.3(B).

Cross learned the Board would be considering whether to adopt the transgender policy during its May 25, 2021 meeting. He registered to speak during the meeting's public comment period and delivered the following statement:

> My name is Tanner Cross. And I am speaking out of love for those who suffer with gender dysphoria. *60 Minutes,* this past Sunday, interviewed over 30 young people who transitioned. But they felt led astray because lack of pushback, or how easy it was to make physical changes to their bodies in just 3 months. They are now de-transitioning. It is not my intention to hurt anyone. But there are certain truths that we must face when ready. We condemn school policies like 8040 and 8035 because it will damage children, defile the holy image of God. I love all of my students, but I will never lie to them regardless of the consequences. I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God.

***2** The next day, Cross alleged, he fulfilled his teaching duties as usual. That evening, however, a supervisor asked to speak with Cross the next morning. When they met, the supervisor informed Cross he was being placed on administrative leave with pay. As an explanation for this decision, Cross received a letter from Assistant Superintendent Sebastian stating Cross was under investigation for allegations he engaged in conduct that had a disruptive impact on the operations of Leesburg Elementary. The letter also informed Cross that, absent permission from Leesburg Elementary principal, Shawn Lacey, he was banned from Loudoun County Public Schools property and events. Later that day, an email was sent to "all Leesburg Elementary parents and staff" informing them of Cross' suspension.

On May 28, 2021, Cross, through counsel, contacted Assistant Superintendent Sebastian demanding that Cross be reinstated. The Board's counsel responded, refused Cross' demand, and stated his suspension was due to his public comments and the "significant disruption" they caused at Leesburg Elementary, including "multiple complaints and parents requesting that ... Cross have no contact with their children."

Cross alleged he would like to offer further public comments at future Board meetings but he fears doing so will draw additional sanctions. Cross also alleged that other Loudoun County Public Schools employees wish to voice their opinions about the transgender policy but have refrained for fear of retaliation like Cross has experienced. Cross provided supporting affidavits from five such employees. Finally, Cross alleged that "[o]ther [public school] employees have made public comments at ... Board meetings on a variety of proposed policies, including in support of [the transgender policy] and other gender-identity related policies but [the Board] ha[s] not punished those employees because of their viewpoints."

Based on these allegations, Cross' "First" and "Second Cause[s] of Action" (collectively, "free speech claims") claimed the Defendants were retaliating against him for exercising his right under the Virginia Constitution to express his views regarding "gender-identity education policy." Further, Cross asserted the Defendants erected a prior restraint by effectively banning him from Board meetings and that his suspension and the threat of further sanction was chilling his right to speak publicly as a private citizen. Relatedly, Cross claimed the Defendants violated the Virginia Constitution's prohibition on viewpoint discrimination by punishing and

threatening to punish him in the future for expressing his opinion of the transgender policy but not disciplining other Loudoun County Public Schools employees who "expressed different views on proposed gender-identity education policy."

Cross' "Third" and "Fourth Cause[s] of Action" (collectively, "free exercise claims") claimed the Defendants violated his right to freely exercise his religion under the Virginia Constitution and the Act for Religious Freedom, Code § 57-2.02, when they sanctioned and threatened to sanction him for his public comments. Cross asserted his "views and expression related to gender-identity education policy are motivated by his sincerely held religious beliefs, are avenues through which he exercises his religious faith, and constitute[ ] a central component of his sincerely held religious beliefs." Therefore, Cross contended, his suspension substantially burdened his free exercise of religion by diminishing his ability to profess and maintain his opinions on religious matters.

As relief, Cross sought a declaration that the Defendants had unlawfully retaliated against him for his public comments. Further, Cross requested "a temporary restraining order" and a permanent injunction directing the Defendants to, among other things, reinstate him and refrain from punishing him for speaking about the transgender policy.

***3** At a June 4, 2021 hearing on Cross' request for a temporary injunction pending the resolution of his complaint, the Board argued Cross is unlikely to succeed on his free speech claims because his public comments created a significant and continuing disruption at Leesburg Elementary and his suspension was an appropriate response. The Board also suggested the reasonable anticipation that Cross would not comply with Loudoun County Public Schools' existing non-discrimination policy or the proposed transgender policy justified the actions taken against him.

To support these contentions, the Defendants provided an affidavit from Principal Lacey. Lacey recounted that, a little over one week before Cross' public comments, Cross sent a lengthy email to Superintendent Ziegler and the Board members professing his disagreement with the transgender policy. The email discussed how the concept of being transgender is contrary to Cross' Christian beliefs and how he believes supporting or facilitating children's desire to transition to another gender could harm them physically and psychologically. Cross also stated that his religious beliefs would prevent him from treating a child as other than their biological gender. Although a Board member interpreted Cross' email to indicate he would not follow Loudoun County Public Schools' "pronoun usage policy," no immediate disciplinary action was taken against Cross because, according to Principal Lacey, the email "did not cause any disruption to the operation of Leesburg Elementary."

Lacey further recalled that he witnessed Cross' public comments and, the next morning, learned from school staff that students' parents were discussing the comments on social media. Shortly before 6:30 a.m., Lacey received an email from a student's parent expressing concern over Cross' public comments and requesting that her daughter not attend any of Cross' classes. As a result, Lacey relieved Cross of his responsibility to greet children as they arrived at school that morning and for the rest of the week, so as to avoid possible confrontations between Cross and parents. Another employee was assigned to take Cross' place. Over the course of that day, Lacey received emails from the parents of four more students voicing concern over Cross' statements and requesting that their children not interact with him. One of those parents, who identifies as transgender, stated that, although her children had "looked up to" Cross, they were "absolutely hurt" to learn of his public comments.

Lacey has "continued to receive communications from parents regarding ... Cross," including an email on June 2, 2021, from a parent asking that Cross not teach or supervise her child. That parent stated her child has "loved" being taught by Cross but that he has an older sibling who is transgender and who has struggled with serious mental health issues. Considering Cross' public comments and this lawsuit, the parent asked that Cross not teach or supervise her child out of concern for the mental health and safety of both of her children.

The Defendants also provided an affidavit from Superintendent Ziegler, in which he averred (1) he was apprised of the circumstances of Cross' situation as they developed, (2) the "disruption to Leesburg Elementary ... and to [Loudoun County Public Schools] has continued since ... Cross was placed on administrative leave," and (3) he has received "many emails in response to ... Cross' comments from community members and parents, including parents of transgender students, who expressed the harm that transgender students suffer when their gender identity is not affirmed or their choice of preferred pronoun or name is not

respected." Ziegler provided one such email, sent on June 3, 2021, from a concerned former Board member and "youth suicide prevention advocate." Superintendent Ziegler also claims that Loudoun County Public Schools has a generally applicable practice of suspending with pay any employee whose speech or conduct disrupts Loudoun County Public Schools' operations and has so suspended at least seven other employees in the past two years.

***4** Further, the Defendants offered a June 3, 2021 letter Assistant Superintendent Sebastian provided Cross. The letter explains in greater detail why Cross was suspended, including that his public comments "significantly interfered" with the operations of Leesburg Elementary and Loudoun County Public Schools, "impair the maintenance of discipline, impede the performance of [Cross'] duties, ... undermine the mission of Leesburg Elementary as well as Loudoun County Public Schools, and are in conflict with [Cross'] responsibilities as an employee of Loudoun County Public Schools." While acknowledging that Loudoun County Public Schools had yet to adopt the transgender policy, the letter claimed Cross' public comments conflicted with existing Loudoun County Public Schools policies and state and federal law. Specifically, the letter pointed to Loudoun County Public Schools' policy of providing an equitable and safe learning environment to all persons regardless of "gender identity" and of prohibiting demeaning or harmful actions, particularly if those actions are directed at personal characteristics such as sexual orientation, perceived sexual orientation, gender identity, or gender expression. Similarly, the letter cited Title IX of the Education Amendments Act of 1972 and the Virginia Human Rights Act, Va. Code § 2.2-3900, et seq., as prohibiting discrimination based on gender identity. The letter added that Cross could attend Board meetings with Principal Lacey's permission. Finally, the Defendants drew the circuit court's attention to *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), and *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), and their citation to research indicating that treating transgender students differently or singling them out is significantly detrimental to their mental wellbeing.

In granting Cross a temporary injunction, the circuit court explained the parties agreed that the four factors defined in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), should guide the court's decision. Those factors include (1) Cross' likelihood of success on his claims, (2) whether Cross would suffer irreparable harm absent an injunction, (3) the balance of the equities, and (4) the public interest. The court then found Cross was likely to succeed on his claim that "his suspension was an act of retaliation" for his public comments. Looking to *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), to guide its analysis, the court determined Cross made his comments as a private citizen speaking on a matter of public concern. Turning to whether Cross' interest in making his public comments outweighed the Defendants' interest in restricting his speech, the court relied on the nine factors outlined in *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292 (4th Cir. 2006), to gauge the strength of the Defendants' interest. Those factors question whether Cross' comments (1) impaired the maintenance of discipline by supervisors, (2) impaired harmony among coworkers, (3) damaged close personal relationships, (4) impeded the performance of Cross' duties, (5) interfered with the operation of Loudoun County Public Schools, (6) undermined the mission of Loudoun County Public Schools, (7) were communicated to the public or to coworkers in private, (8) conflicted with Cross' responsibilities within Loudoun County Public Schools, and (9) abused the authority and public accountability Cross' role entailed.

The court explained that, with respect to "many" of the *Ridpath* factors, there was simply an "absence of evidence," and, "[f]or others, the evidence lacked the persuasiveness that would weigh in support of [the Board's] actions." The court further explained that, when Cross was reassigned from greeting children, the school had only received one parent email expressing concern about Cross. Thus, no actual disruption of school operations had occurred at that time. Moreover, the court declined to give any weight to the disruption caused by communications Loudoun County Public Schools received regarding Cross following the decision to suspend him on May 26, 2021.

Because Leesburg Elementary serves at least 391 students, the court determined the relatively limited number of parental complaints lodged before Cross' suspension caused a "de minimis" disruption to the school's operations that could not justify "the actions taken by [the Board]." The court concluded its analysis of the *Ridpath* factors by stating that

> [t]hese facts are not exclusive to the Court's consideration but are reflective

> of some that were given greater weight than others not specifically mentioned herein. The Court finds that in balancing all of the factors and weighing the facts presented, [Cross'] interest in expressing his First Amendment speech outweigh[s] the [Defendants'] interest in restricting the same and the level of disruption that [Defendants] assert[ ] did not serve to meaningfully disrupt the operation or services of Leesburg Elementary School.

***5** Finally, the court determined the Defendants' suspending Cross was in response to and adversely impacted his constitutionally protected speech. The court explained that Cross was quickly suspended after his public comments and noted the affidavits of other Loudoun County Public Schools employees who feared speaking publicly due to Cross' suspension. Of particular concern to the court was that the Defendants did not merely suspend Cross, they "took the added, and seemingly unnecessary" step of drastically limiting his ability to offer further public comments at Board meetings. In turn, the court rejected the Defendants' contention that their actions were not retaliatory because they had not disciplined Cross for his email that expressed views similar to his public comments. Accordingly, the court concluded, Cross' suspension and the "additional restrictions placed on him" adversely affected his constitutionally protected speech.

The court found Cross' likelihood of success on his free exercise claims was less clear because, although "intertwined" with his free speech claims, the "direct facts in support of th[e] claim[s] are more vague." However, the court determined, the Defendants had a premature and misplaced expectation that Cross would violate the transgender policy if it was adopted because, as the court noted during the hearing, Cross could conceivably avoid using gender pronouns for any students. After commenting that establishing a likelihood of success on the merits "is a relatively low threshold when compared to other legal standards that fix a much higher bar," the court found Cross made the requisite showing.

Considering whether Cross may suffer irreparable harm absent a temporary injunction, the court determined he was suspended due to his speech and barred from further speech and that others were dissuaded from speaking as a result. The court concluded it need look no further than federal authority holding that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute[s] irreparable injury."

The court found the balance of the equities and the public interest also favored granting Cross a temporary injunction because stopping a retaliatory suspension would not harm the Defendants, restoring Cross to his position could ameliorate the potential damage to his reputation, and upholding individual constitutional rights against government repression serves the public good. The court noted the Defendants suspended Cross only three weeks before the end of the school year and then emailed the entire Leesburg Elementary "community" to announce the suspension. To the court, these actions appeared unnecessarily extreme and vindictive.

The court ordered the Defendants to reinstate Cross to his position and remove the ban prohibiting him from Loudoun County Public Schools property and events. The injunction will remain in force until December 31, 2021, unless otherwise dissolved or enlarged.

The Defendants raise the following assignments of error:

1. The trial court erred in finding that Respondent is likely to succeed on the merits of his claims.

2. The trial court erred in finding that Respondent was likely to suffer irreparable harm in the absence of temporary injunctive relief.

3. The trial court erred in failing to consider the totality of the circumstances and placing undue emphasis on the single factor of likelihood of success on the merits.

ANALYSIS

[1] [2] [3] [4] We conclude that the Defendants have not established the circuit court abused its discretion in granting Cross a temporary injunction. *See Commonwealth ex. Rel. Bowyer v. Sweet Briar Institute*, 2015 WL 3646914 (2015) (considering a petition for review under Code § 8.01-626 and reviewing the denial of a temporary injunction for an abuse of discretion). A court abuses its discretion when it (1) does not consider a relevant factor that should have

been given significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) considers proper factors but commits a clear error of judgment while weighing those factors. *Lawlor v. Commonwealth*, 285 Va. 187, 263, 738 S.E.2d 847 (2013). Although this Court has not definitively delineated the factors that guide granting the equitable relief of a temporary injunction, an "injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case" and is meant to preserve the status quo between the parties while the litigation is ongoing. *Bowyer*, 2015 WL 3646914 at *2; *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60, 662 S.E.2d 44 (2008). Further, "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity," Code § 8.01-628, and whether to grant a "temporary injunction requires consideration of the requesting party's allegations and the veracity and magnitude of the asserted harm." *Bowyer*, 2015 WL 3646914 at *2. Similarly, a court may contemplate the substance and adequacy of factual support for a plaintiff's allegations. *See* *Deeds v. Gilmer*, 162 Va. 157, 269-70, 174 S.E. 37 (1934).

***6** **[5]** **[6]** **[7]** Cross relies on Art. I, § 12 of Virginia's Constitution. Although we have not had occasion to map the precise contours of the rights protected by this Clause, we have generally described Art. I, § 12 of Virginia's Constitution as "coextensive with the free speech provisions of the federal First Amendment." *See Elliott v. Commonwealth*, 267 Va. 464, 473-74, 593 S.E.2d 263 (2004). Looking to federal precedent as persuasive, it is settled law that the government may not take adverse employment actions against its employees in reprisal for their exercising their right to speak on matters of public concern. *See* *Love-Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004) (citing *Pickering*, 391 U.S. at 573, 88 S.Ct. 1731). Determining whether the Defendants transgressed that prohibition involves a "two-step inquiry," where the first step asks whether Cross spoke on an "issue of social, political, or other interest to a community." *Urofsky v. Gilmore*, 216 F.3d 401, 406-07 (4th Cir. 2000) (citing *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). The Defendants do not dispute that Cross did. The targeted speech in our case 'did not amount to fighting words' and were 'not obscene' but rather were 'the kind of pure speech to which ... the First Amendment would provide strong protection.' " *Mahanoy Area School District v. B.L.*, —— U.S. ——, 141 S. Ct. 2038, 2047, 210 L.Ed.2d 403 (2021) (citations omitted).

[8] The second step requires weighing Cross' interest in making his public comments against the Defendants' "interest in providing effective and efficient services to the public." *Billioni v. Bryant*, 998 F.3d 572, 576 (4th Cir. 2021) (internal quotation marks omitted). Performing this "difficult" balancing of interests required the circuit court to examine the unique circumstances of this case, including the context in which Cross made his public comments and the extent to which they disrupted Loudoun County Public Schools' "operation and mission." *Connick*, 461 U.S. at 150, 103 S.Ct. 1684; *Ridpath*, 447 F.3d at 319 (internal quotation marks omitted). As the parties and the circuit court recognized, the Fourth Circuit has developed nine factors to consider when gauging the magnitude of the disruption a public employee's speech causes his employer. *See* *Ridpath*, 447 F.3d at 317.

The Defendants incorrectly minimize Cross' interest in making his public comments. *See* *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 195 (4th Cir. 1994) ("When an employee's speech substantially involves matters of public concern ... the state must make a stronger showing of disruption in order to prevail."). Cross made those comments at a public Board meeting where one of the issues under consideration was whether to adopt the transgender policy. As the Fourth Circuit has recognized, "[b]oth the [teacher] and the public are centrally interested in frank and open discussion of agenda items at public meetings." *Piver v. Pender Cnty. Bd. of Educ.*, 835 F.2d 1076, 1081 (4th Cir. 1987) (examining claim that teacher was retaliated against, in part, for comments made at a public hearing); *see also* *Pickering*, 391 U.S. at 573, 88 S.Ct. 1731 ("free and unhindered" debate on matters of public importance is the "core value" of the First Amendment). Further, in addition to expressing his religious views, Cross' comments also addressed his belief that allowing children to transition genders can harm their physical or mental wellbeing. This is a matter of obvious and significant interest to Cross as a teacher and to the general public. *See* *Janus v. American Fed. of State, Cnty., and Mun. Employees, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2476, 201 L.Ed.2d 924 (2018) (commenting that speech on sensitive and controversial political subjects that are of "profound value and concern to the public," like "sexual orientation and gender identity," "occupies the

highest rung of the hierarchy of First Amendment values and merits special protection.") (internal quotation marks and citation omitted). Moreover, Cross was opposing a policy that might burden his freedoms of expression and religion by requiring him to speak and interact with students in a way that affirms gender transition, a concept he rejects for secular and spiritual reasons. Under such circumstances, Cross' interest in making his public comments was compelling. *See* *Meriwether v. Hartop*, 992 F.3d 492, 509-10 (6th Cir. 2021) (explaining that a Christian university professor's First Amendment interest in not using students' preferred gender pronouns was "especially strong ... because [his] speech also relates to his core religious and philosophical beliefs" and because requiring the professor to use students' preferred gender pronouns "potentially compelled speech on a matter of public concern"); *see also* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) ("[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."). Although the Board may have considered Cross' speech to be "a trifling and annoying instance of individual distasteful abuse of a privilege," we believe Cross has a strong claim to the view that his public dissent implicates "fundamental societal values" deeply embedded in our Constitutional Republic. *Mahanoy*, 141 S. Ct. at 2048. (citation omitted).

***7** Further, the Defendants have not identified an abuse of discretion in the circuit court's conclusion that its interest in disciplining Cross was comparatively weak. First, the Defendants fault the court for acknowledging the *Ridpath* factors but then failing to "discuss or consider any of them" before concluding there "was an absence of evidence" and that the "evidence lacked the persuasiveness that would weigh in support of [the Board's] actions." However, and setting aside that *Ridpath* is merely persuasive precedent, following the comments the Board regards as too cursory, the court supplied discussion of the evidence it found particularly germane to its analysis. The court further stated that such evidence was not "exclusive to the [c]ourt's consideration but [was] reflective of some that [was] given greater weight than others not specifically mentioned." The record thus reflects that the circuit court did not engage in an inappropriately myopic or summary application of the law to the facts before it. *See* *Bottoms v. Bottoms*, 249 Va. 410, 414, 457 S.E.2d 102 (1995) ("Absent clear evidence to the contrary ... the judgment of a trial court comes ... with a presumption that the law was correctly applied to the facts.").

We also find unpersuasive the Defendants' suggestion that the circuit court did not give sufficient weight to their heightened interest in regulating Cross' speech because, as a teacher, he occupies a position of significant public contact and trust. Although the Board is correct that public employers have a greater interest in controlling the speech of employees who interact with the public and rely on the public's trust to perform their duties, such as police officers and teachers, there is no indication the court disregarded or did not appropriately consider the unique position Cross occupies. *See* *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) ("The more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer.") (internal brackets and quotation marks omitted); *see also, e.g.*, *Melzer v. Bd. of Educ.*, 336 F.3d 185, 198 (2d Cir. 2003) (a teacher's position "by its very nature requires a degree of public trust not found in many other positions of public employment").

Next, the Defendants argue the circuit court erred in refusing to consider that Cross' suspension was justified by the disruption school officials reasonably anticipated once parents quickly expressed their concern over his public comments. As evidence of this purported refusal, the Defendants point to the court's comment that no actual disruption to school operations had occurred when Principal Lacey reassigned Cross from meeting children because, at that time, Lacey had received only one parental complaint regarding Cross. The Board also cites that the court's order does not otherwise mention the subject of anticipated disruption.

Although the Defendants are correct that the negative consequences a public employer reasonably anticipates will result from an employee's speech may under some circumstances justify anticipatory adverse action against the employee to mitigate those consequences, the operative adverse action in this case is not Cross' reassignment from greeting children but the subsequent decision to suspend him and limit his access to public school events. Accordingly, the circuit court could sensibly discount the fact that Cross was removed from morning greeting duty.

Further, no evidence corroborates the Defendants' assertion that Cross was suspended because, after several parents

complained, there was a reasonable expectation that parents and students would avoid interacting with Cross to the point he could not fulfill his duties. Principal Lacey's and Superintendent Ziegler's affidavits do not aver they took their terminal adverse employment actions against Cross because they thought doing so would quell further disruption at Leesburg Elementary. To the contrary, Superintendent Ziegler's affidavit suggests Cross was suspended due to "a neutral and generally applicable practice of utilizing suspension or paid administrative leave when an employee engages in speech or conduct that causes a disruption in the operations of the school or school division." Of course, any such practice would be unconstitutional to the extent the Defendants deploy it overzealously to thwart protected employee speech. Consequently, the Defendants have not demonstrated the circuit court committed an error of law or otherwise abused its discretion. *See Bowyer*, 2015 WL 3646914 at *2 (concluding a circuit court abused its discretion in granting a temporary injunction based on an error of law).

***8** Likewise, the circuit court did not improperly discount the Defendants' interests in ensuring student wellbeing and that its employees support and comply with existing and proposed gender identity policies and corollary anti-discrimination laws. Those concerns appear pretextual because, first, they were not mentioned in either Principal Lacey's or Superintendent Ziegler's affidavits explaining Cross' suspension. Instead, they were raised for the first time in the second letter Cross received from Loudoun County Public Schools several days after he was suspended. More importantly, Cross' email to the Board and Superintendent Ziegler expressed, in even stronger terms than his public comments, his opposition to and unwillingness to comply with the transgender policy. However, the Defendants took no action based on that email because, as Superintendent Ziegler states, it "did not cause any disruption with the operation of Leesburg Elementary." Considering also that the Defendants have never attempted to specify how Cross' continuing to teach at Leesburg Elementary might pose a real and present threat that he or the Loudoun County Public Schools will contravene any anti-discrimination policy or law, neither that concern nor the Defendants' attendant concern that Cross might harm children can justify his swift suspension. *See* *Craig v. Rich Tp. High School Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013) ("[A]n employer's assessment of the possible interference caused by the speech must be reasonable - the predictions must be supported with an evidentiary foundation and be more than mere speculation.") (internal quotation marks omitted); *see also* *Meriwether*, 992 F.3d at 510-11 (rejecting university's assertion that its purported interests in preventing discrimination against transgender students and complying with anti-discrimination laws outweighed a professor's interest in refusing to use students' preferred pronouns).

Further, although the Defendants assert the circuit court should have considered that Cross' public comments necessitated that students' schedules be changed or that they miss required physical education instruction, they presented no evidence of that to the circuit court. There was also no evidence that it would have been problematic or administratively taxing to accommodate the parents who requested Cross not teach their children, nor was there any clear evidence Principal Lacey has diverted material time from his other obligations to manage the fallout from Cross' public comment.

The only disruption the Defendants can point to is that a tiny minority of parents requested that Cross not interact with their children. However, the Defendants identify no case in which such a nominal actual or expected disturbance justified restricting speech as constitutionally valued as Cross' nor have they attempted to explain why immediate suspension and restricted access to further Board meetings was the proportional or rational response to addressing the concerns of so few parents. *See* *Nat'l Gay Task Force v. Bd. of Educ. of City of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir. 1984) ("[A] state's interests outweigh a teacher's only when the expression results in a material or substantial interference or disruption in the normal activities of the school," and "a teacher's First Amendment rights may be restricted only if the employer shows that some restriction is necessary to prevent the disruption of official functions or to ensure effective performance by the employee"); *see also* *Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979, 991 (3d Cir. 2014) (where speech occupies the "highest rung of First Amendment protection," an employer "bear[s] a truly heavy burden" to demonstrate that speech was too disruptive to warrant protection) (internal quotation marks omitted).

Indeed, it appears only two cases have considered similar situations, and those cases support the conclusion that Cross has a potentially successful claim. In *Meriwether v. Hartop*, the Sixth Circuit emphatically held that a university professor stated viable free speech and free exercise claims based on his university's disciplining him for refusing, based

on his Christian faith, to use a student's preferred pronouns. *Meriwether*, 992 F.3d at 509-17. Further, although a federal district court determined a teacher did not have a constitutionally protected right to disobey a policy requiring that he refer to students by their preferred pronouns and names, the court cautioned that, "[i]mportantly, [the teacher] is not asserting that he was disciplined for criticizing or opposing the [p]olicy." *Kluge v. Brownsburg Cmty. School Corp.*, 432 F. Supp. 3d 823 (S.D. Ind. 2020); *see also Garcia v. Kankakee Cnty. Housing Auth.*, 279 F.3d 532, 534 (7th Cir. 2002) ("Although the [F]irst [A]mendment protects rank-and-file employees from discharge for taking a public stand on how the agency should be managed, it does not protect those who *act* on their views, to the detriment of the agency's operations."). Persuasive authority thus supports the circuit court's determination that at least some of Cross' claims have merit.

***9** Finally, the Defendants are also mistaken in their assertion that the circuit court erred in weighing the other factors it considered when granting Cross a temporary injunction. The Defendants do not contest the court's determination that Cross would be irreparably harmed absent an injunction other than to say it was incorrect because Cross is unlikely to succeed on his claims. However, as explained above, the Defendants have not shown as much. Further, although the Defendants fault the court for not taking adequate account of the need to protect the wellbeing of students and prevent what they term unlawful discrimination, no evidence in the record suggests there is any present threat Cross might be in a position to interact with a transgender student. Because the remaining interests the Defendants raise do not override Cross' and other teachers' interests in exercising their constitutionally protected right to speak on the proposed transgender policy, the circuit court did not abuse its discretion.

This order shall be certified to the Circuit Court of Loudoun County.

Justice Powell took no part in the resolution of the petition.

All Citations

Not Reported in S.E. Rptr., 2021 WL 9276274