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Session 6

Speech, Pronouns, Discrimination, and More: A Survey of the Legal Issues Affecting LBQTQ+ Students in Wisconsin

Christine Donahoe and Elisabeth W. Lambert, ACLU of Wisconsin, Milwaukee
Kari Rice, Department of Public Instruction, Madison

About the Presenters...

Chris Donahoe is a staff attorney at the ACLU of Wisconsin, where litigates civil rights and liberties cases in federal and state courts. She holds a B.S. in French and Conservation Biology from University of Wisconsin-Madison, with distinction, and a J.D. from Washington University in St. Louis, cum laude. She is a board member of the Civil Rights and Liberties Section of the Wisconsin State Bar. She has presented many CLEs, most recently Working with Trans Clients 101, and loves to design a PowerPoint. She has no hobbies because she has two toddlers, but she imagines a day in the future when she can again say that she goes bike-camping, gardens, takes Spanish classes, and plays trombone in the American Legion band.

Elisabeth Lambert is founder of the Wisconsin Education Law & Policy Hub. She holds a B.A. in English Literature from Harvard University, magna cum laude, a M.S. in K-12 Curriculum and Instruction from the University of Wisconsin-Milwaukee, and a J.D. from Marquette University Law School, summa cum laude. She clerked for two years for the Honorable Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin, and spent two years as an Equal Justice Works fellow with the ACLU of Wisconsin representing public school students in discrimination actions. In 2022, she received the Linda Sundberg Civil Rights Defender Award from Community Shares of Wisconsin.

Christine M. Rice is a Shareholder and the President of Simpson & Deardorff, S.C. She graduated *cum laude* with a bachelor's degree in nursing from Carroll College, and after practicing for several years as a registered nurse, she returned to law school and graduated *magna cum laude* from Marquette University. Ms. Rice practices in all areas of insurance defense, specializing in insurance coverage. Ms. Rice is a member of the State Bar of Wisconsin. She also served on Wisconsin Defense Counsel's Board of Directors from 2014 through 2021 and was President of the organization from 2019-2020.

Speech, Pronouns, Discrimination, & More:
A Survey of Legal Issues Facing LGBTQ+ Students

Chris Donahoe - ACLU of Wisconsin
Elisabeth Lambert - Wisconsin Education Law & Policy Hub
Kari Race - WI Department of Public Instruction
June 16, 2023

Outline

1. **Definitions**
    a. Sexual Orientation
    b. Gender identity
    c. Transgender
    d. Nonbinary
2. **2021 Youth Risk Behavior Survey- LGBTQ youth:**
    a. Over 80% report anxiety, nearly twice the rate for their homosexual peers.
    b. experience depression at rate of 66% vs. 25% for heterosexual youth.
    c. more likely to be bullied at school - nearly 33% compared to about 14% of heterosexual youth.
    d. Only 39% of LGBQ youth feel they belong at school, compared to 68% of heterosexual youth.
    e. Nearly half of LGBQ youth seriously considered attempting suicide during the pandemic, more than four times the rate of heterosexual youth. 22% attempted suicide, more than four times the rate of heterosexual youth.
3. **Timeline of pressing issues/ Decisions**
    a. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) - Established "sex-stereotyping" theory of sex discrimination. Plurality of Supremet Court and two justices concurring in the judgment found that female employee plaintiff had adequately alleged employer violated Title VII by discriminating against her for being too "masculine." Plurality emphasized, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group." Id. at 251.
    b. *Whitaker v. Kenosha Unified S.D. No. 1 Bd. Of Educ.*, 858 F.3d 1034 (7th Cir. 2017). - Applied Price Waterhouse sex-stereotyping theory of discrimination to conclude that transgender high school student could bring a claim under Title IX where school district did not allow him to use bathroom that conformed with his gender identity. "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender nonconformance, which in turn violates Title IX. The school district's policy also subjects Ash,, as a transgender student, to different rules, sanctions and treatment than non-transgender students, in violation of Title IX." Id. at 1049-1050.

c. *Bostock v. Clayton County*, 590 U.S. ___ (2020) - It is "impossible to discriminate against a person" on the basis of sexual orientation or gender identity without "discriminating against that individual based on sex."
d. Dept of educ Title IX Rulemaking implementing Bostock (proposed 2021/2022 — not yet in effect)
e. Kluge v. Brownsburg (2023)
f. Dept of Educ proposed amendments to title IX re transgender student sports participaltion (proposed 2023)

4. Schools Affirmative Duties re Multicultural Education

a. Wisconsin Regs
   i. Wis. Stat. § 121.02(1) and Wis. Admin. Code § PI 8.01(2) enumerate "school district standards". Imposes a duty - "shall" - on school boards.
   ii. Including "provide adequate instructional materials, texts, and library services which reflect the cultural diversity and pluralistic nature of American society." Wis. Stat. § 121.02(1)(h).
   iii. DPI has authority to conduct an inquiry into compliance upon receipt of a complaint, or an audit on its own initiative. Wis. Stat. § 121.02(2); Wis. Admin. Code § PI 8.01(2).
b. Equal Access Act
   i. Title VIII of the Education for Economic Security Act, passed in 1984
   ii. Westside Community Board of Education v. Mergens, 496 U.S. 226 (1990)
   iii. Constitutionally protected prayer is a point of emphasis for the U.S. Department of Education. In order to receive federal funds under the ESEA, Local Educational Agencies (LEAs) must specifically certify no policy prevents prayer and DPI must annually report to the DoE on compliance.

5. Nondiscrimination

a. Federal Protections
   i. Laws
      1. Equal Protection Clause
      2. Title VII (Prohibits employment discrimination, but informs interpretation of Title IX)
      3. Title IX
      4. Equal Access Act
   ii. Agencies
      1. U.S. Department of Education
         a. Guidance
            i. Title IX
            ii. Bullying and Harassment
            iii. Equal Access Act
         b. Complaint Process
      2. U.S. Department of Justice
b. State Protections

i. Laws
   1. Wis. Stat. § 118.13(1): no person may be denied admission to any public school or be denied participation in or denied the benefits of any curricular or extracurricular program because of their sex, race, religion or sexual orientation (among other protected classes).
   2. Wis. Stat. § 118.13(2)(a); Wis. Admin. Code ch. PI 9.: Boards must develop written policies and procedures to address nondiscrimination complaints.
   3. Wis. Admin. Code Ch. PI 9.02(12): sexual orientation has the meaning in Wis. Stat. § 111.32(13m). "Sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.
   4. PI 9.02(5): "Discrimination" means any action, policy or practice, including bias, stereotyping and pupil harassment, which is detrimental to a person or group of persons and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities, privileges, roles or rewards based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability, or which perpetuates the effects of past discrimination.
   5. PI 9.02 (9): "Pupil harassment" means behavior towards pupils based, in whole or in part, on sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment.

ii. Enforcement
   1. DPI
      a. DPI has authority to hear appeals of "negative determinations" on discrimination complaints. Wis. Stat. § 118.13(2)(b).
      b. On appeal, DPI reviews whether the district came to the correct conclusion with respect to the allegations; AND whether the district complied with its policies in conducting the investigation.
      c. If DPI finds a violation of § 118.13 or of Ch. PI 9, the district must submit a Corrective Action Plan. Wis. Admin. Code § PI 9.08(a)4.
      d. A finding that district failed to comply with own discrimination policies and procedures: did not timely complete investigation; did not take specific steps

enumerated in the procedure; or staff did not report complaints to district compliance officer.
e. Corrective action plans ordered have required: training for staff in the policies and procedures; a new investigation that complies with the policies and procedures; or actions to ensure future compliance.
f. When discrimination is substantiated, corrective action plans ordered have required: equity audits; education on discrimination and ways to prevent for both staff and students; or community engagement on equity issues.

2. Dept. of Educ. OCR / U.S. DOJ
   a. Complaint filed within 180 days of event or
   b. OCR investigates District's compliance with various ffederal laws, including Title IX
   c. OCR can 1) settle; 2) go through administrative enforcement, or refer to U.S. DOJ for enforcement (often litigation)
   d. Cases can also be referred to U.S. Department of Justice directly–they don't have to go through OCR

6. Free Speech

a. Teachers
   i. Generally, public school teachers have very limited free speech rights while teaching in the classroom or otherwise speaking in furtherance of their official duties.
   ii. Leading cases:
      1. Garcetti v. Ceballos, 547 U.S. 410 (2006)- a government employee speaking pursuant to his position as a public employee does not have a right to free speech
      2. Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988): students writing in a student newspaper had a lower level of free speech rights because the student newspaper is considered school-sponsored speech.
   iii. DPI can investigate licensed school officials in response to allegations of immoral conduct.
      1. Immoral conduct is conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare, or education of any pupil. Wis. Stat. § 115.31(1)(c)1.
      2. Conduct must necessarily have a nexus to pupils.
      3. Speech by a teacher could constitute immoral conduct in certain contexts, e.g., slurs directed at, or in presence of, students.

b. Students
   i. Students have the right to free speech in public schools so long as the speech does not cause a substantial disruption. Tinker v. Des

Moines Independent Community School District, 393 U.S. 503 (1969).

ii. Schools can regulate off-campus speech if it causes a substantial disruption. Morse v. Frederick, 551 U.S. 393 (2007) (BongHits4Jesus), Mahanoy Area School District v. B.L., 594 U.S. ___ (2021)(F*** Cheer!)

iii. Rights are more limited for school-sponsored speech. Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988)

7. Religious Liberty for Teachers

a. First Amendment to U.S. Constitution and Wis. Const. Art. 1, Section 18 provide for freedom of religion.
b. Title VII prohibits employee discrimination based on religion
c. Teachers entitled to reasonable accommodations that do not cause undue hardship.

8. Parental Rights

a. 14th Amendment: substantive due process
b. *Meyer v. Nebraska*, 262 U.S. 390 (1923) - right to choose a private school that teaches German
c. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) - right to send kids to private school
d. *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005)- identifying the limits of parental rights

9. Recent Pronoun Policy Cases

a. *Kluge v. Brownsburg Community School Corp*. (7th Cir. 2023) - school did not violate religious rights of teacher who refused to comply with school pronoun policy
b. *Vesely v. Illinois School District 45*, (N.D. Ill. Apr. 18, 2023) - dismissed for failure to state a claim
c. Wisconsin
    i. *Doe v. Madison Metropolitan School District*
        1. Dismissed for lack of standing (2022)
        2. Appeal pending
    ii. *Parents Protecting Our Children v. Eau Claire Area School District* (dismissed for lack of standing) (2023)
    iii. *T.F. v. Kettle Morraine School District* (pending in circuit court)

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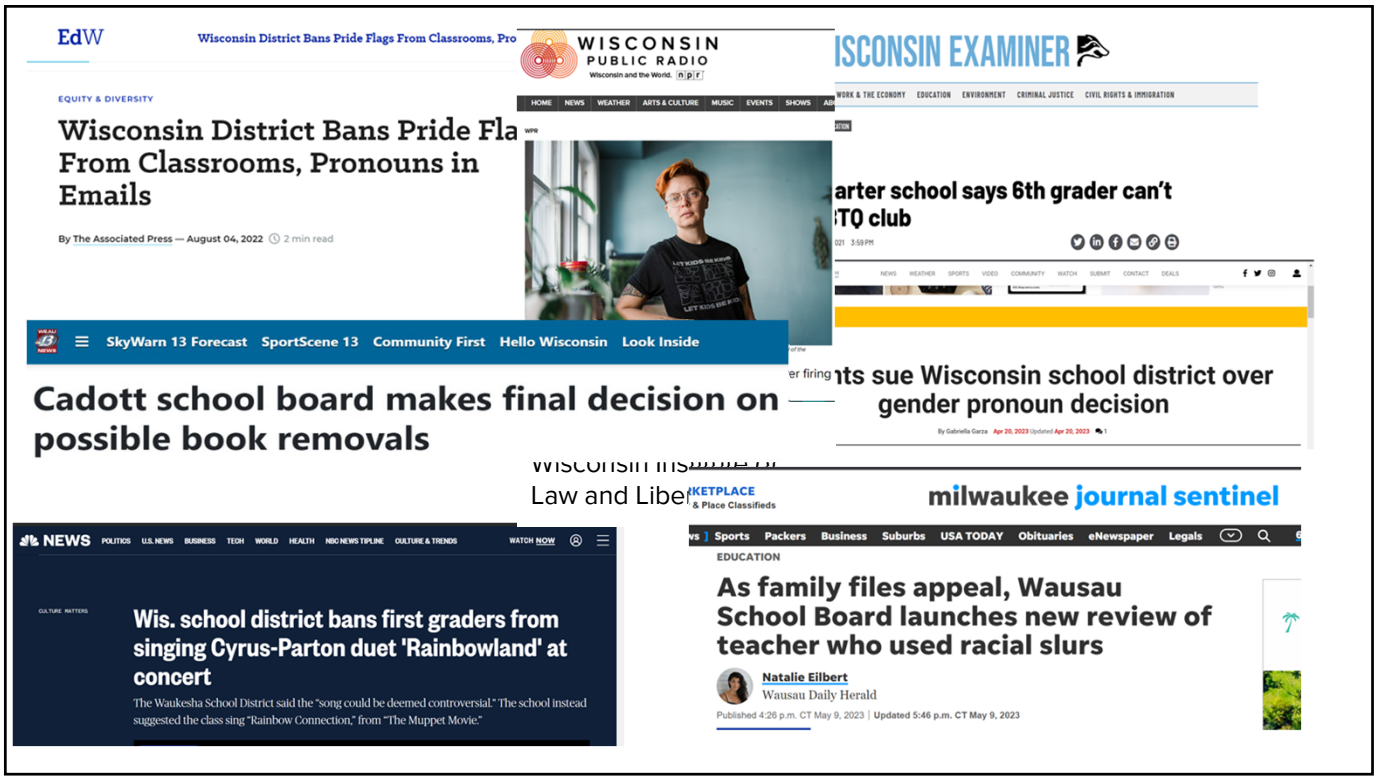

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Public Schools – Laws & Policies

1. Affirmative Duties
2. Discrimination
3. Freedom of Speech
4. Religious & Parental Rights
5. Case Studies re Pronoun Policies

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Definitions

Sexual Identity

Gender Identity

Trans/ Transgender

Nonbinary

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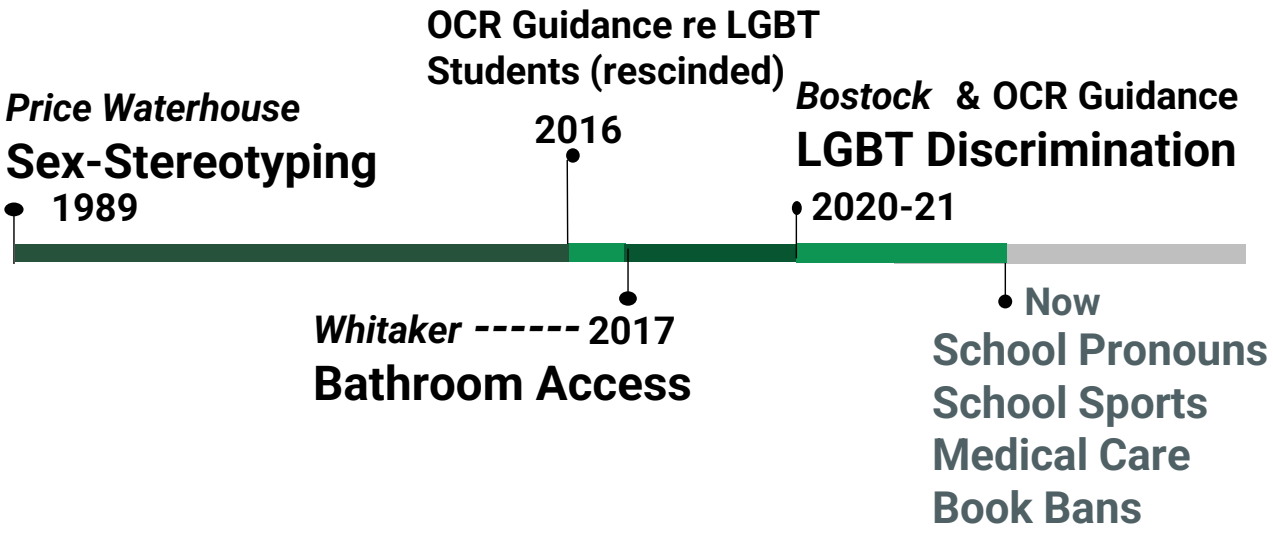
Timeline of LGBT Student Rights



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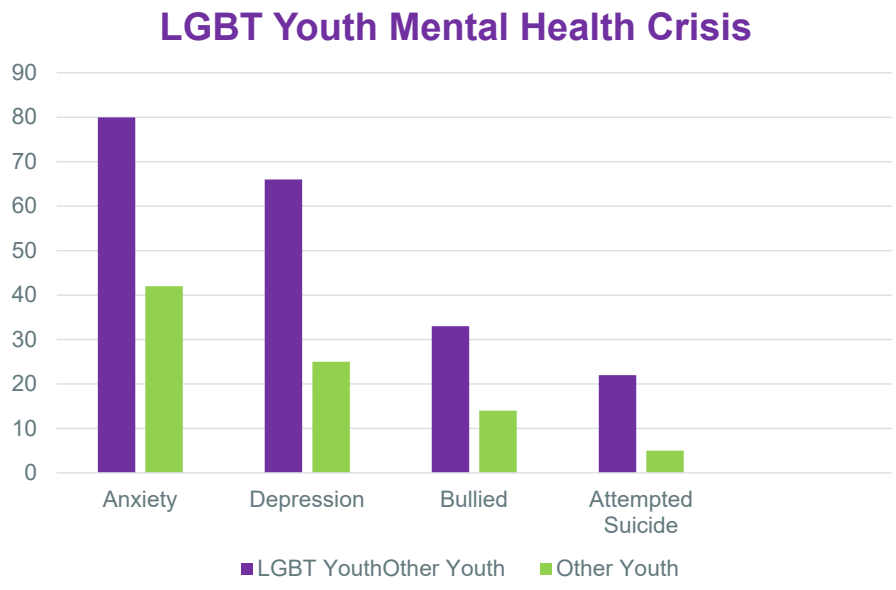
Why Is This So Important Now?



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QUESTIONS RAISED

- ✓ What is discrimination?
- ✓ How do schools ensure nondiscrimination?
- ✓ Is gender identity a protected category? Is sexual identity?
- ✓ What are the limits on free speech?
- ✓ What rights do parents have in public schools? Teachers? Students?

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1) Schools' Affirmative Duties

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Multicultural Education

Instruction must “reflect the cultural diversity and pluralistic nature of American society”

Wis. Stat. § 121.02(1)(h)

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Equal Access Act (1984)

Noncurricular school groups get equal access to facilities

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2) Discrimination

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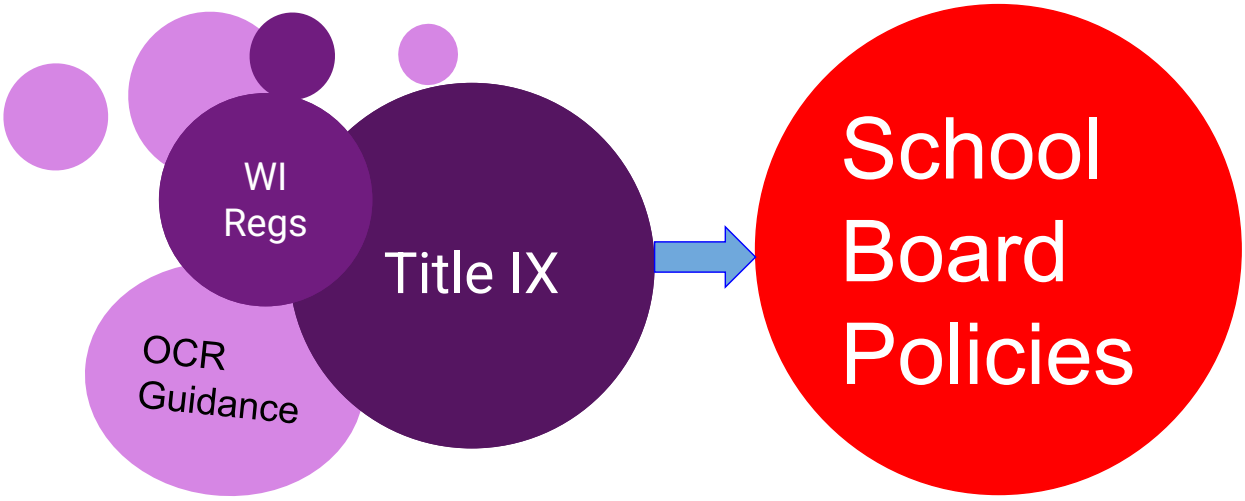
Statutory & Regulatory Framework



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Anti-Harassment - Anti-Discrimination

LGBT protected categories:
sex, sexual orientation

"sexual orientation"
heterosexuality, homosexuality or bisexuality … *or being identified with such a preference*

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Oversight

U.S. Department of Education Office of Civil Rights

1. Event
2. Complaint
3. Investigation (federal law)
4. Settlement, Admin. Enforcement, or DOJ Referral

WI Department of Public Instruction

1. District Determination
2. Appeal to DPI
3. Investigation (conclusion, policy compliance)
4. Corrective Action Plan

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Discrimination Complaint & Appeal Data

PROTECTED CLASS	COMPLAINTS (21 - 22)
Sex	1044
Race	1033
Disability	300
Sexual Orientation	618
Other	112
TOTAL	**3219**

PROTECTED CLASS	APPEALS (10 - 23)
Sex	7
Race	24
Disability	9
Sexual Orientation	4
Other	5
TOTAL	**49**

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Most Common Results of Appeals

Finding:
District failed to comply w/ its policies

→ Corrective Action Plans

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3) Freedom of Speech

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Teacher Free Speech

1. Matter of public concern?
2. Performing official duties?

DPI: Immoral Conduct?

Melissa Darlingh
Photo courtesy of Wisconsin Institute of Law & Liberty

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Student Free Speech (on campus)

1. Substantial Disruption Test
2. School-Sponsored Speech

Photo courtesy of Bettman/ Getty Images

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Student Free Speech (off campus)

BongHits4Jesus (2007)

F***Cheer (2021)

Clay Good / Zuma Press

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4) Teacher Religious Rights & Parental Rights

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Freedom of Religion for Teachers

- First Amendment
- Title VII -nondiscrimination
- Reasonable accommodation – no undue hardship.

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Parental Rights

14th Amendment

Meyer v. Nebraska
262 U.S. 390 (1923)

Pierce v. Society of Sisters
268 U.S. 510 (1925)

"It is not a right to participate in the school's management—a right inconsistent with preserving the autonomy of educational institutions, which is itself … an interest of constitutional dignity."

Crowley v. McKinney
400 F.3d 965, 971 (7th Cir. 2005)

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4) Case Studies in School Pronoun Policies

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Pronoun Policies

Types of Policies

- Teacher Signatures
- Parental Consent
- Confidentiality

Legal Issues

- Free Speech/ Expression
- Parental Rights
- Religious Rights (parents and teachers)

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Kluge v. Brownsburg Community School Corp. (7th Cir. 2023)

Seventh Circuit: Teacher not entitled to accommodation for school's pronoun policy.

30

Vesely v. Illinois School District 45 (N.D. Ill. 2023)

Dismissed for failure to state a claim

31

Doe v. Montgomery County Board of Education (D. Md. 2022)

Parents do not have fundamental right to know

Even if they did, school has compelling interest in creating school environment

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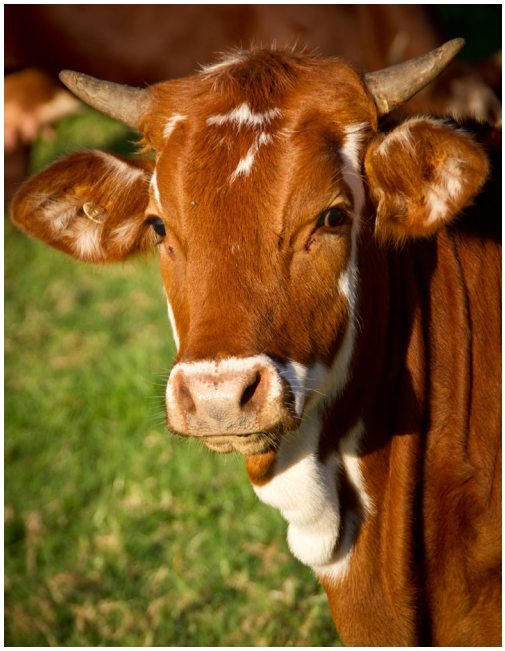
Wisconsin Challenges

Doe v. Madison Metropolitan School District
- *Dismissed for lack of standing*
- *Appeal pending*

Parents Protecting Our Children v. Eau Claire Area School District
Dismissed for lack of standing

T.F. v. Kettle Morraine School District *(pending)*



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Conclusion

- **Individual Rights** - limited in public schools
- **School Duties**– nondiscrimination
- **Policy v. Law-** issues facing LGBTQ students

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Pursuant to a Federal court order, the Departments have been preliminarily "enjoined and restrained from implementing" this document against the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. *See State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).

June 2021

Confronting Anti-LGBTQI+ Harassment in Schools

A Resource for Students and Families

Many students face bullying, harassment, and discrimination based on sex stereotypes and assumptions about what it means to be a boy or a girl. Students who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender non-conforming may face harassment based on how they dress or act, or for simply being who they are. It is important to know that discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law. It is also important that LGBTQI+ students feel safe and know what to do if they experience discrimination.

Public elementary and secondary schools, as well as public and private colleges and universities, have a responsibility to investigate and address sex discrimination, including sexual harassment, against students because of their perceived or actual sexual orientation or gender identity. When schools fail to respond appropriately, the Educational Opportunities Section of the Civil Rights Division (CRT) at the U.S. Department of Justice and the Office for Civil Rights (OCR) at the U.S. Department of Education can help by enforcing federal laws that protect students from discrimination. CRT and OCR can also provide information to assist schools in meeting their legal obligations.

Examples of the kinds of incidents CRT and OCR can investigate:

A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is "not appropriate for school." Teachers suggest that the student attend alone or bring a boy as a date.

When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates "out" him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school's administrators, they dismiss it, saying: "you can't expect everyone to agree with your choices."

A community college student discloses he's gay during a seminar discussion. Leaving class, a group of students calls him a homophobic slur, and one bumps him into the wall. A professor witnesses this, but does nothing. Over the next month, the harassment worsens. The student goes to his dean after missing several lectures out of fear. The college interviews one, but not all, of the harassers, does nothing more, and never follows up with the student.

An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student's teacher laughs when other students ask if they are "a boy or a girl" and comments that there is "only one way to find out." The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks "you have to be able to laugh at yourself sometimes."

On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

What if a Student Experiences Discrimination in School?

If you have been treated unfairly or believe a student has been treated unfairly—for example, treated differently, denied an educational opportunity, harassed, bullied, or retaliated against—because of sexual orientation or gender identity, there are a number of actions you can take:

1. **Notify a teacher or school leader** (for example, a principal or student affairs staff) immediately. If you don't get the help you need, file a formal complaint with the school, school district, college, or university. Keep records of your complaint(s) and responses you receive.

2. **Write down the details** about what happened, where and when the incident happened, who was involved, and the names of any witnesses. Do this for every incident of discrimination, and keep copies of any related documents or other information.

3. If you are not proficient in English, you have the right to **ask the school to translate or interpret information** into a language you understand. If you have communication needs because of a disability, you have the right to receive accommodations or aids and services that provide you with effective communication.

4. Counseling and other mental health support can sometimes be helpful for a student who has been harassed or bullied. **Consider seeking mental health resources** if needed.

5. **Consider filing a complaint** with the Civil Rights Division of the U.S. Department of Justice at **civilrights.justice.gov** (available in several different languages), or with the Office for Civil Rights at the U.S. Department of Education at **www.ed.gov/ocr/complaintintro.html** (to file a complaint in English) or **www.ed.gov/ocr/docs/howto.html** (to file a complaint in multiple languages).

"All students should be able to learn in a safe environment, free from discrimination and harassment. The Civil Rights Division stands with LGBTQI+ students and will fight to protect their right to an education regardless of who they are or whom they love."

- Kristen Clarke, Assistant Attorney General for Civil Rights, Department of Justice

"The Department of Education strives to ensure that all students—including LGBTQI+ students—have access to supportive, inclusive school environments that allow them to learn and thrive in all aspects of their educational experience. Federal law prohibits discrimination based on sexual orientation and gender identity, and we are here to help schools, students, and families ensure that these protections are in full force."

- Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Department of Education

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DEPARTMENT OF EDUCATION

34 CFR Chapter I

Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock* v. *Clayton County.* This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

DATES: This interpretation is effective June 22, 2021.

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, Director, Program Legal Group, Office for Civil Rights. Telephone: (202) 245–7272. Email: *Alejandro.Reyes@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background: Title IX of the Education Amendments of 1972, 20 U.S.C. 1681–1688, prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. The Department's Office for Civil Rights (OCR) is responsible for the Department's enforcement of Title IX.

OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock* v. *Clayton County,* 140 S. Ct. 1731, 590 U.S. ____ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.,* which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.

Interpretation:

Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.

Consistent with the Supreme Court's ruling and analysis in *Bostock,* the Department interprets Title IX's prohibition on discrimination ''on the basis of sex'' to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock,* this interpretation flows from the statute's ''plain terms.'' *See Bostock,* 140 S. Ct. at 1743, 1748–50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.

I. The Supreme Court's Ruling in Bostock

The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity ''requires an employer to intentionally treat individual employees differently because of their sex.'' 140 S. Ct. at 1742.[1] As the Court also explained,

[1] The Court recognized that the parties in *Bostock* each presented a definition of ''sex'' dating back to Title VII's enactment, with the employers' definition referring to ''reproductive biology'' and the employees' definition ''capturing more than anatomy[.]'' 140 S. Ct. at 1739. The Court did not adopt a definition, instead ''assum[ing]'' the definition of sex provided by the employers that the employees had accepted ''for argument's sake.'' *Id.* As the Court made clear, it did not need to adopt

Continued

when an employer discriminates against a person for being gay or transgender, the employer necessarily discriminates against that person for ''traits or actions it would not have questioned in members of a different sex.'' *Id.* at 1737.

The Court provided numerous examples to illustrate why ''it is impossible to discriminate against a person'' because of their sexual orientation or gender identity ''without discriminating against that individual based on sex.'' *Id.* at 1741. In one example, when addressing discrimination based on sexual orientation, the Court stated:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Id.

In another example, the Court showed why singling out a transgender employee for different treatment from a non-transgender (*i.e.,* cisgender) employee is discrimination based on sex:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741–42.

II. Bostock's Application to Title IX

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination ''on the basis of sex'' under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.

a. *There is textual similarity between Title VII and Title IX.*

Like Title VII, Title IX prohibits discrimination based on sex.

Title IX provides, with certain exceptions: ''No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .'' 20 U.S.C. 1681(a).

Title VII provides, with certain exceptions: ''It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[ ] . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[ ] . . . .'' 42 U.S.C. 2000e–2(a). (Title VII also prohibits discrimination based on race, color, religion, and national origin.)

Both statutes prohibit sex discrimination, with Title IX using the phrase ''on the basis of sex'' and Title VII using the phrase ''because of'' sex. The Supreme Court has used these two phrases interchangeably. In *Bostock,* for example, the Court described Title VII in this way: ''[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.'' 140 S. Ct. at 1737 (emphasis added); *id.* at 1742 (''[I]ntentional discrimination *based on sex* violates Title VII . . . .'' (emphasis added)); *see also Jackson* v. *Birmingham Bd. of Educ.,* 544 U.S. 167, 174 (2005) (''[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' '*on the basis of* sex,' in violation of Title IX.'' (second emphasis added)); *Meritor Sav. Bank* v. *Vinson,* 477 U.S. 57, 64 (1986) (''[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' *on the basis of sex.*'' (emphasis added)).

In addition, both statutes specifically protect *individuals* against discrimination. In *Bostock,* 140 S. Ct. at 1740–41, the Court observed that Title VII ''tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals.'' The Court made a similar observation about Title IX, which uses the term *person,* in *Cannon* v. *University of Chicago,* 441 U.S. 677, 704 (1979), stating that ''Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide *individual* citizens effective protection against those practices.'' *Id.* (emphasis added).

Further, the text of both statutes contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity. As the Court stated in *Bostock,* ''when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.'' 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: ''[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.'' *N. Haven Bd. of Ed.* v. *Bell,* 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower Federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g., Franklin* v. *Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 75 (1992); *Jennings* v. *Univ. of N.C.,* 482 F.3d 686, 695 (4th Cir. 2007); *Frazier* v. *Fairhaven Sch. Comm.,* 276 F.3d 52, 66 (1st Cir. 2002); *Gossett* v. *Oklahoma ex rel. Bd. of Regents for Langston Univ.,* 245 F.3d 1172, 1176 (10th Cir. 2001).

Moreover, the Court in *Bostock* found that ''no ambiguity exists about how Title VII's terms apply to the facts before [it]''—*i.e.,* allegations of discrimination in employment against several individuals based on sexual orientation or gender identity. 140 S. Ct. at 1749. After reviewing the text of Title IX and Federal courts' interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities. The Department also has concluded for the reasons described in this document that, to the extent other interpretations may exist, this is the best interpretation of the statute.

In short, the Department finds no persuasive or well-founded basis for declining to apply *Bostock's* reasoning—discrimination ''because of

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either definition to conclude that discrimination ''because of . . . sex'' encompasses discrimination based on sexual orientation and gender identity. *Id.* (''[N]othing in our approach to these cases turns on the outcome of the parties' debate . . . .''). Similar to the Court's interpretation of Title VII, the Department's interpretation of the scope of discrimination ''on the basis of sex'' under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here.

. . . sex'' under Title VII encompasses discrimination based on sexual orientation and gender identity—to Title IX's parallel prohibition on sex discrimination in federally funded education programs and activities.

b. Additional case law recognizes that the reasoning of Bostock *applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm.*

Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g., Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied,* 976 F.3d 399 (4th Cir. 2020), *petition for cert filed,* No. 20–1163 (Feb. 24, 2021); *Adams* v. *Sch. Bd. of St. Johns Cnty.,* 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending,* No. 18–13592 (Aug. 28, 2020); *Koenke* v. *Saint Joseph's Univ.,* No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe* v. *Univ. of Scranton,* No. 3:19–CV–01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

The Department also concludes that the interpretation set forth in this document is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm. *See, e.g., Grimm,* 972 F.3d at 617–18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams,* 968 F.3d at 1306–07 (describing ''emotional damage, stigmatization and shame'' experienced by a transgender boy as a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.,* 858 F.3d 1034, 1044–46, 1049–50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds* v. *U.S. Dep't of Educ.,* 845 F.3d 217, 221–22 (6th Cir. 2016) (describing ''substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old'' transgender girl from denial of equal treatment); *Doe,* 2020 WL 5993766, at **1–3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington* v. *City of Attleboro,* No. 15–CV–12769–DJC, 2018 WL 475000, at **6–7 (D. Mass. Jan. 17, 2018) (describing '' 'wide-spread peer harassment' and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation'').

c. The U.S. Department of Justice's Civil Rights Division has concluded that Bostock*'s analysis applies to Title IX.*

The U.S. Department of Justice's Civil Rights Division issued a Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), *https://www.justice.gov/crt/page/file/1383026/download.*

The memorandum stated that, after careful consideration, including a review of case law, ''the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation.'' Indeed, ''the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly.''

III. Implementing This Interpretation

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual, *www.ed.gov/ocr/docs/ocrcpm.pdf.*[2]

Where a complaint meets applicable requirements and standards as just described, OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity. OCR carefully reviews allegations from anyone who files a complaint, including students who identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.

While this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation.

This interpretation supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity. This interpretation does not reinstate any previously rescinded guidance documents.

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit

[2] Educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets. *See* 20 U.S.C. 1681(a)(3).

your search to documents published by the Department.

Suzanne B. Goldberg,

Acting Assistant Secretary for Civil Rights.

[FR Doc. 2021–13058 Filed 6–21–21; 8:45 am]

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 11

[Docket No.: PTO–C–2013–0042]

RIN 0651–AC91

Changes to Representation of Others Before the United States Patent and Trademark Office; Correction

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; correction.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) is correcting an earlier final rule, ''Changes to the Representation of Others Before the United States Patent and Trademark Office,'' that appeared in the **Federal Register** on May 26, 2021 and which takes effect on June 25, 2021. This document corrects a minor error. No other changes are being made to the underlying final rule.

DATES: This rule is effective June 25, 2021.

FOR FURTHER INFORMATION CONTACT: William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, at 571–272–4097.

SUPPLEMENTARY INFORMATION: This document corrects an error pertaining to revisions to definitions made in the final rule. Specifically, the Office intended to change the listed definition of ''Roster'' to ''Roster or register.'' The Code of Federal Regulations editors informed the Office that the original **Federal Register** instruction to ''revise'' the definition was incorrect. Rather, the correct instruction should be to ''remove and add'' the intended definition. This document corrects that instruction.

In FR Doc. 2021–10528, appearing on page 28442 in the **Federal Register** of Wednesday, May 26, 2021, the following correction is made:

§ 11.1 [Corrected]

■ On page 28452, in the first column, in part 11, correct amendatory instruction 4 to read as follows:

■ 4. Amend § 11.1 by:

■ a. Revising the definitions of ''Conviction or convicted'' and ''Practitioner;''

■ b. Removing the entry for ''Roster'' and adding, in alphabetical order, an entry for ''Roster or register;'' and

■ c. Revising the definitions for ''Serious crime'' and ''State.''

The revisions and addition read as follows:

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2021–13145 Filed 6–21–21; 8:45 am]

BILLING CODE 3510–16–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201, 202, 203, 210, and 370

[Docket No. 2021–3]

Technical Amendments Regarding the Copyright Office's Organizational Structure

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: This final rule makes technical changes to the U.S. Copyright Office's regulations pertaining to its organizational structure in light of the agency's recent reorganization. It reflects recent structural changes, updates certain of the Office's division names, and adds a new section for the Copyright Claims Board established by the Copyright Alternative in Small-Claims Enforcement Act of 2020.

DATES: Effective July 22, 2021.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* Kevin R. Amer, Deputy General Counsel, by email at *kamer@copyright.gov,* or Joanna R. Blatchly, Attorney-Advisor, by email at *jblatchly@copyright.gov* or by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION: The Copyright Office is publishing this final rule pursuant to its May 2021 reorganization. This effort is intended to accomplish two goals: (1) Rename divisions and realign certain reporting structures to improve the Office's effectiveness and efficiency; and (2) reflect the agency structure for the new copyright small-claims tribunal established by the Copyright Alternative in Small-Claims Enforcement (''CASE'') Act of 2020.[1] The Register has determined that these changes will optimize business processes and aid in the administration of her functions and duties as Director of the Copyright Office.[2]

Operational reorganization. The reorganization reduces the number of direct reports to the Register of Copyrights and is expected to create administrative and cost efficiencies by consolidating operational organizations currently headed by senior-level positions. The reorganization brings the Office of the Chief Financial Officer (renamed the Financial Management Division) and the Copyright Modernization Office (renamed the Product Management Division) under the supervision of the Chief of Operations (renamed the Assistant Register and Director of Operations (''ARDO'')). Realigning these divisions under the ARDO consolidates operational support elements under one senior manager, in line with operational structures across the Library of Congress. This consolidation is expected to facilitate Office coordination with centralized Library services, and with similar functional elements of other service units. It is also expected to allow the Office to increase the effectiveness of communications across areas of operational responsibility, in alignment with strategic objectives.

The reorganization renames certain organizational elements and senior positions for purposes of greater clarity and consistency. The Office of Public Records and Repositories is renamed the Office of Copyright Records. As noted above, the Office of the Chief of Operations is renamed the Office of the Director of Operations. The following subordinate offices are also renamed: The Copyright Acquisitions Division (''CAD'') is renamed Acquisitions and Deposits (''A&D''); the Administrative Services Office (''ASO'') is renamed the Administrative Services Division (''ASD''); and the Receipt Analysis and Control Division (''RAC'') is renamed the Materials Control and Analysis Division (''MCA''). The Copyright Modernization Office (''CMO'') is renamed the Product Management Division (''PMD'').

Further, the Office of the Chief Financial Officer (''CFO'') is renamed the Financial Management Division (''FMD'') and work units under this division are also renamed, including by

[1] Public Law 116–260, sec. 212, 134 Stat. 1182, 2176 (2020).

[2] *See* 17 U.S.C. 701(a).

Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking[*]

Issue	The Title IX NPRM
Prohibiting All Forms of Sex Discrimination (Proposed § 106.10)	The proposed regulations would prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (Proposed § 106.10)
Defining Sex-Based Harassment (Proposed § 106.2)	The proposed regulations would define sex-based harassment as including sexual harassment; harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity; and other sex-based conduct that meets requirements described immediately below. (Proposed § 106.2) The proposed regulations would continue to cover quid pro quo harassment—when an employee or other person authorized by a recipient[†] to provide an aid, benefit, or service explicitly or impliedly conditions that aid, benefit or service on a person's participation in unwelcome sexual conduct, and incidents of sexual assault, dating violence, domestic violence, and stalking. (Proposed § 106.2) The proposed regulations would also cover harassment that creates a hostile environment—unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity. (Proposed § 106.2) *The current regulations prohibit unwelcome sex-based conduct only if it is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."* *The current regulations cover sexual harassment but do not address other forms of sex-based harassment. (Current § 106.30)*
Addressing Off-Campus Conduct that Creates or Contributes to a Hostile Environment in a	Title IX requires recipients to address all sex discrimination in their education programs or activities. Under the proposed regulations, conduct that occurs in a recipient's education program or activity includes: • Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. (Proposed § 106.11)

[*] For the complete set of proposed regulations, please see the Department's Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, which is available here.

[†] Recipients are elementary schools and secondary schools, postsecondary institutions, and other recipients of Federal funds.

Issue	The Title IX NPRM
Recipient's Education Program or Activity (Proposed § 106.11)	• Conduct that occurs off-campus when the respondent[‡] is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority. (Proposed § 106.11) Under the proposed regulations, a recipient would be required to address a sex-based hostile environment in its education program or activity, including when sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United Students. (Proposed § 106.11) This coverage follows from Title IX's text, which provides that no person shall be subjected to discrimination under an education program or activity receiving Federal financial assistance. *The current regulations do not require a recipient to address a sex-based hostile environment in its education program or activity in the United States if the hostile environment results from sex-based harassment that happened outside of the recipient's education program or activity, or outside of the United States. (Current § 106.44(a))*
Responding to Sex Discrimination (Proposed § 106.44(a))	Title IX requires all recipients to operate their education programs or activities free from prohibited sex discrimination at all times. To fulfill this requirement, the proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. (Proposed § 106.44(a)) *The current regulations only require a recipient to respond to possible sexual harassment when it has "actual knowledge" of the harassment (i.e. notice of sexual harassment or alleged sexual harassment). At postsecondary institutions, only employees with authority to institute corrective measures can have actual knowledge; in elementary schools and secondary schools, the actual knowledge requirement applies to all employees.* *A recipient that has actual knowledge of sexual harassment must respond only in a manner that is not deliberately indifferent. (Current §§ 106.30 and 106.44(a))*
Ensuring recipients learn of possible sex discrimination (Proposed § 106.44(c))	The proposed regulations require that recipients require certain employees to notify the recipient's Title IX Coordinator of conduct that may constitute sex discrimination under Title IX. This would ensure that recipients learn of possible sex discrimination so they can operate their education programs or activities free from prohibited sex discrimination as Title IX requires. (Proposed § 106.44(c)) • Any employee at an elementary school or secondary school who is not a confidential employee would be obligated to notify the Title IX Coordinator. (Proposed § 106.44(c)(1)) (Please note that elementary school

[‡] A respondent is a person who is alleged to have violated the recipient's prohibition on sex discrimination. (Proposed § 106.2).

Issue	The Title IX NPRM
	and secondary school employees may have additional obligations under Federal, State or local law to report sex-based misconduct.) • An employee at a postsecondary institution or other recipient who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity, would be obligated to notify the Title IX Coordinator. (Proposed § 106.44(c)(2)(i)-(ii)) • All other employees at a postsecondary institution or other recipient would be obligated to notify the Title IX Coordinator or provide an individual with the Title IX Coordinator's contact information and information about reporting, except that confidential employees would not be obligated to notify the Title IX Coordinator about possible sex discrimination. Confidential employees would be obligated only to provide an individual with the Title IX Coordinator's contact information and information about reporting. (Proposed § 106.44(c)(2)(i)-(ii); § 106.44(d)(2))
Respecting Complainant Autonomy (Proposed §§ 106.2, 106.8(d), 106.44(a) –(e))	To ensure that a recipient's education program or activity is free from sex discrimination while also respecting complainant autonomy, the proposed regulations would require recipients to provide clear information and training (proposed § 106.8(d)) on (1) when their employees must notify the Title IX Coordinator about possible sex discrimination (proposed § 106.44(c)) and (2) how students can report sex discrimination for the purpose of seeking confidential assistance only (proposed § 106.44(d)) or for the purpose of asking a recipient to initiate its grievance procedures. (Proposed § 106.45(a)(2)) A complainant would also be protected in their right to file a complaint about sex discrimination they experienced even if they have chosen to leave the recipient's education program or activity as a result of that discrimination or for other reasons. (Proposed §§ 106.2 and 106.45(a)(2)) Under the proposed regulations, a recipient also would require its Title IX Coordinator to monitor for barriers to reporting information about conduct that may constitute sex discrimination under Title IX. The recipient would then need to take steps reasonably calculated to address barriers the Title IX Coordinator identifies. (Proposed § 106.44(b)) Together, these requirements in the proposed regulations would ensure that: • Employees and students have information about the identity and role of a recipient's confidential employees. • Employees and students at elementary schools and secondary schools know that all employees must notify the Title IX Coordinator of possible sex discrimination.

Issue	The Title IX NPRM
	• Employees and students at postsecondary institutions know that certain employees have a duty to notify the Title IX Coordinator of possible sex discrimination and other employees must instead provide them information about how to contact the recipient's Title IX Coordinator and report sex discrimination. • Students (and parents, guardians and other authorized legal representatives of elementary and secondary school students) know how to make a complaint to initiate a recipient's grievance procedures and also how to seek information about supportive measures and other resources without making a complaint. • Recipients know to honor a complainant's request not to proceed with a complaint investigation whenever possible, as long as doing so does not prevent the recipient from ensuring equal access to its education program or activity. *The current regulations provide that the decision to file a complaint of sexual harassment is for the complainant or Title IX Coordinator to make, depending on the circumstances, but they do not permit complaints under Title IX by former students or employees who are not participating or attempting to participate in the recipient's education program or activity. (Current § 106.30(a))*
Title IX Coordinator Response to Sex Discrimination (Proposed § 106.44(f)-(g))	Under the proposed regulations, a recipient would be required to take prompt and effective action to end any sex discrimination in its education program or activity. The proposed regulations would require a recipient to ensure that its Title IX Coordinator takes the following steps upon being notified about possible sex discrimination: • Treat the complainant and respondent equitably at every stage of the recipient's response. (Proposed § 106.44(f)(1)) • Notify the complainant of the recipient's grievance procedures and, if a complaint is made, notify the respondent of the grievance procedures and notify the parties of the informal resolution process, if any. (Proposed § 106.44(f)(2)) • Offer and coordinate supportive measures, as appropriate, to the complainant and respondent. (Proposed § 106.44(f)(3)) • In response to a complaint, initiate the recipient's grievance procedures or informal resolution process. (Proposed § 106.44(f)(4)) • In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity. (Proposed § 106.44(f)(6)) • Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur in the recipient's education program or activity, in addition to providing remedies to an individual complainant. (Proposed § 106.44(f)(7))

Issue	The Title IX NPRM
	The proposed regulations require recipients to offer supportive measures as appropriate to the complainant and/or respondent to the extent necessary to restore or preserve that person's access to the recipient's education program or activity. Supportive measures may include, for example, counseling, extension of deadlines, restrictions on contact between the parties, and voluntary or involuntary changes in class, work, or housing. (Proposed § 106.44(g)) *The current regulations require only that a recipient treat a complainant and respondent equitably by providing remedies to a complainant when it has determined that sexual harassment has occurred and by following a grievance process before imposing disciplinary sanctions or other actions on a respondent. (Current § 106.45(b)(1))* *The current regulations do not permit a recipient to offer an informal resolution process unless a formal complaint has been filed. (Current § 106.45(b)(9))*
Grievance Procedures for All Sex Discrimination Complaints under Title IX ***(Proposed § 106.45)***	Since 1975, the Title IX regulations have required a recipient to adopt and publish grievance procedures that provide for the prompt and equitable resolution of sex discrimination complaints. The current regulations include detailed requirements for grievance procedures only for complaints of sexual harassment. The proposed regulations adapt the current regulations to apply to all complaints of sex discrimination with specific changes that would take into account the age, maturity, and level of independence of students in various educational settings, the particular contexts of employees and third parties, and the need to ensure that recipients adopt grievance procedures that include basic and essential requirements for fairness and reliability for all parties that are well suited to implementing Title IX's nondiscrimination guarantee in their respective settings. Under the proposed regulations, all recipients would be required to adopt grievance procedures in writing (proposed § 106.45(a)(1)) that incorporate the requirements of proposed § 106.45, including the following: • General requirements: o Equitable treatment of complainants and respondents. (Proposed § 106.45(b)(1)) o Title IX Coordinator, investigators, and decisionmakers must not have conflicts of interest or bias. (Proposed § 106.45(b)(2)) o Decisionmaker may be the same person as the Title IX Coordinator or investigator. (Proposed § 106.45(b)(2)) o A presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures. (Proposed § 106.45(b)(3)) o Reasonably prompt timeframes for all major stages. (Proposed § 106.45(b)(4)) o Reasonable steps to protect privacy of parties and witnesses. (Proposed § 106.45(b)(5))

Issue	The Title IX NPRM
	○ Objective evaluation of relevant and not otherwise impermissible evidence. (Proposed § 106.45(b)(6)-(7)) • Notice of the allegations to the parties. (Proposed § 106.45(c)) • Dismissals permitted in certain circumstances, but not required. (Proposed § 106.45(d)) • Consolidation permitted for complaints arising out of the same facts or circumstances. (Proposed § 106.45(e)) • Investigation requirements: (Proposed § 106.45(f)) ○ Burden is on the recipient to gather sufficient evidence. (Proposed § 106.45(f)(1)) ○ Equal opportunity for all parties to present relevant fact witnesses and other evidence. (Proposed § 106.45(f)(2)) ○ Determination by the decisionmaker of what evidence is relevant and what evidence is impermissible. (Proposed § 106.45(f)(3)) ○ A description provided to the parties by the recipient of the relevant and not otherwise impermissible evidence, as well as a reasonable opportunity to respond. (Proposed § 106.45(f)(4)) • A process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant. (Proposed § 106.45(g)) • Clear processes for the determination of whether sex discrimination occurred, including (proposed § 106.45(h)): ○ Determining whether sex discrimination occurred using the preponderance of the evidence standard of proof, unless the clear and convincing evidence standard is used in all other comparable proceedings, including other discrimination complaints, in which case that standard may be used in determining whether sex discrimination occurred. (Proposed § 106.45(h)(1)) ○ Notifying parties of the outcome of the complaint and any opportunity to appeal. (Proposed § 106.45(h)(2)) ○ When there is a determination that sex discrimination occurred, the Title IX Coordinator provides and implements remedies for the complainant or others whose access to the recipient's education program or activity has been limited or denied by sex discrimination, and takes other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur. (Proposed § 106.45(h)(3)) ○ The grievance procedures are completed before imposing any sanctions. (Proposed § 106.45(h)(4)) ○ A recipient is prohibited from disciplining a party, witness, or other participant for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sex discrimination occurred. (Proposed § 106.45(h)(5)) • Parties are permitted to choose to participate in an informal resolution process if one is provided by the recipient. (Proposed § 106.45(j))

Issue	The Title IX NPRM
	• Grievance procedures must describe the range of possible supportive measures and a range or list of disciplinary sanctions and remedies for sex-based harassment complaints. (Proposed § 106.45(k)) A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties. (Proposed § 106.45(i)) *The current regulations include specific requirements for grievance procedures for complaints of sexual harassment that apply to all recipients (except that hearings and cross-examination by a party's representative are required only in postsecondary institutions). (Current § 106.45) Many of those requirements are also in proposed § 106.45. Some are in proposed § 106.46, discussed below, which would apply only to postsecondary institutions in response to complaints of sex-based harassment involving a student complainant or student respondent.*
Additional Requirements for Grievance Procedures for Sex-Based Harassment Complaints Involving a Postsecondary Student ***(Proposed § 106.46)***	A postsecondary institution's prompt and equitable written grievance procedures for complaints of sex-based harassment involving a student-complainant or student-respondent would include all of the requirements of proposed § 106.45, described above, and the following additional requirements under proposed § 106.46: • Written notice to the parties of allegations, dismissal, delays, meetings, interviews, and hearings. (Proposed § 106.46(c), 106.46(d), 106.46(e)(1) and 106.46(e)(5)) • Opportunity to have an advisor of the party's choice at any meeting or proceeding. (Proposed § 106.46(e)(2)-(3)) • Equitable access to relevant and not otherwise impermissible evidence or to a written report summarizing the evidence. (Proposed § 106.46(e)(6)) • A process to assess credibility of parties and witnesses, when necessary, that includes either: o Allowing the decisionmaker to ask relevant and not otherwise impermissible questions in a meeting or at a live hearing, and allowing the parties to propose relevant and not otherwise impermissible questions for the decisionmaker or investigator to ask during a meeting or live hearing. (Proposed § 106.46(f)(1)(i)). o Allowing an advisor for each party to ask relevant and not otherwise impermissible questions to other parties and any witnesses during a live hearing. (Proposed § 106.46(f)(1)(ii)) • Permitting, but not requiring, a live hearing. When a live hearing is permitted, a recipient must allow the parties, on request, to participate from separate locations using technology. (Proposed § 106.46(g)) • Not permitting questions that are unclear or harassing of the party being questioned. (Proposed § 106.46(f)(3)) • Not relying on a statement of a party that supports that party's position if the party does not respond to questions related to their credibility, and not drawing an inference about whether sex-based harassment

Issue	The Title IX NPRM
	occurred based solely on a party's or witness's refusal to respond to questions related to their credibility. (Proposed § 106.46(f)(4)) • Providing written notice of the determination that includes a description of the allegations, information about the policies and procedures used to evaluate the allegations, the decisionmaker's evaluation of the relevant evidence and determination of whether sex-based harassment occurred, disciplinary sanctions and remedies if relevant, and information about appeal procedures. (Proposed § 106.46(h)) • Providing an opportunity to appeal based on procedural irregularity, new evidence, and conflict of interest or bias, as well as any other bases offered equally to the parties by the recipient. (Proposed § 106.46(i)) *The current regulations include many of these requirements for all recipients (except that hearings are optional at non-postsecondary recipients) but only for complaints of sexual harassment. (Current § 106.45)*
Informal Resolution ***(Proposed § 106.44(k))***	The proposed regulations would permit a recipient to offer an informal resolution process if appropriate whenever it receives a complaint of sex discrimination or has information about conduct that may constitute sex discrimination under Title IX in its education program or activity. • Participation in informal resolution must be voluntary. • Informal resolution is not permitted in situations in which an employee is accused of sex discrimination against a student. (Proposed § 106.44(k)) *The current regulations permit informal resolution only if a formal complaint alleging sexual harassment has been filed. (Current § 106.45(b)(9))*
Retaliation ***(Proposed §§ 106.2, 106.71)***	The proposed regulations would clarify that Title IX protects a person from retaliation, including peer retaliation, and that protection against retaliation is necessary to fulfill Title IX's requirement that recipients operate their education programs or activities free from sex discrimination. (Proposed § 106.71) • Retaliation would be defined as intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a recipient's Title IX process. (Proposed § 106.2) • A recipient would be prohibited from taking action against a student or employee under its code of conduct for the purpose of intimidating, threatening, coercing, or discriminating against someone because they provided information or made a complaint regarding sex discrimination. (Proposed § 106.71(a)) • Peer retaliation, which would be defined as retaliation by one student against another student, would also be prohibited. (Proposed §§ 106.2, 106.71(b)) *The current regulations prohibit retaliation; they do not include definitions of either "retaliation" or "peer retaliation." (Current § 106.71)*

Issue	The Title IX NPRM
Discrimination Based on Pregnancy or Related Conditions ***(Proposed § 106.2, 106.21(c), 106.40, 106.57)***	The proposed regulations would clarify that recipients must protect students and employees from discrimination based on pregnancy or related conditions (defined in proposed § 106.2), including by providing reasonable modifications for students, (proposed § 106.40(b)(3)(ii) and (b)(4)), reasonable break time for employees for lactation (proposed § 106.57(e)(1)), and lactation space for both students and employees (proposed §§ 106.40(b)(3)(iv) and 106.57(e)(2)). The proposed regulations would also modernize and clarify Title IX's longstanding prohibition against treating parents differently on the basis of sex, including by defining "parental status" to include, e.g., adoptive or stepparents, or legal guardians). (Proposed § 106.2) Under the proposed regulations, a recipient would be required ensure that when a student (or a student's parent, guardian, or authorized legal representative) tells a recipient's employee of the student's pregnancy or related conditions, the employee must provide information on how to contact the Title IX Coordinator for further assistance. (Proposed § 106.40(b)(2)). Once a student or the student's representative notifies the Title IX Coordinator, the Title IX Coordinator must: • Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient's education program or activity. (Proposed § 106.40(b)(3)(ii) and (b)(4)) • Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return. (Proposed § 106.40(b)(3)(iii)) • Provide the student a clean, private space for lactation. (Proposed § 106.40(b)(3)(iv)) A recipient would be required to provide its employees with reasonable break time for lactation, as well as a clean and private lactation space. (Proposed § 106.57(e)(1)-(2)) *The current regulations prohibit discrimination against students, employees, and applicants based on pregnancy, childbirth, and recovery. The current regulations also prohibit recipients from adopting rules that treat parents differently on the basis of sex. (Current §§ 106.21(c)(2), 106.40(a)-(b), and 106.57(a)-(b))*
Discrimination Based on Sexual Orientation, Gender Identity, and Sex Characteristics	The proposed regulations would make clear that Title IX prohibits all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, and sex characteristics. (This proposed provision also addresses discrimination based on sex stereotypes and pregnancy or related conditions.) (Proposed § 106.10)

Issue	The Title IX NPRM
(Proposed §§ 106.10, 106.31(a)(2), 106.41(b)(2))	The proposed regulations would address discrimination based on sexual orientation, gender identity, and sex characteristics by: • Prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient's education program or activity consistent with their gender identity. This rule would not apply in contexts in which a particular practice is otherwise permitted by Title IX, such as admissions practices of traditionally single-sex postsecondary institutions or when permitted by a religious exemption. (Proposed § 106.31(a)(2)) The Department will engage in a separate rulemaking to address Title IX's application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students' eligibility to participate on a particular male or female athletic team. (See discussion of § 106.41.)

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SUPREME COURT OF WISCONSIN

CASE NO.: 2020AP1032

COMPLETE TITLE: John Doe 1, Jane Doe 1, Jane Doe 3 and Jane Doe 4,
Plaintiffs-Appellants-Petitioners,
John Doe 5 and Jane Doe 5,
Plaintiffs-Appellants,
John Doe 6, Jane Doe 6, John Doe 8 and Jane Doe 8,
Plaintiffs,
v.
Madison Metropolitan School District,
Defendant-Respondent,
Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School and Gender Sexuality Alliance of Robert M. LaFollette High School,
Intervenors-Defendants-Respondents.

REVIEW OF DECISION OF THE COURT OF APPEALS
Reported at 399 Wis. 2d, 963 N.W.2d
PDC No:2021 WI App 60 - Published

OPINION FILED: July 8, 2022
SUBMITTED ON BRIEFS:
ORAL ARGUMENT: May 24, 2022

SOURCE OF APPEAL:
COURT: Circuit
COUNTY: Dane
JUDGE: Frank D. Remington

JUSTICES:
HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. ROGGENSACK, J., filed a dissenting opinion, in which ZIEGLER, C.J., and REBECCA GRASSL BRADLEY, J., joined.
NOT PARTICIPATING:

ATTORNEYS:

For the plaintiffs-appellants-petitioners, there were briefs filed by *Richard M. Esenberg, Luke N. Berg, Anthony F.*

LoCoco, *Roger G. Brooks* and *Wisconsin Institute for Law & Liberty*, Milwaukee, and *Alliance Defending Freedom*, Scottsdale. There was an oral argument by *Luke N. Berg*.

For the defendant-respondent and interevenors-defendants-respondents, there was a brief filed by *Emily M. Feinstein*, *Adam R. Prinsen*, *Sarah A. Zylstra*, *Sarah J. Horner*, and *Quarles & Brady LLP*, Madison, and *Boardman & Clark LLP*, Madison. There was an oral argument for the defendant-respondent by *Sarah A. Zylstra* and an oral argument for the intervenors-defendants-respondents by *Adam R. Prinsen*

An amicus curiae brief was filed by *Frederick W. Claybrook, Jr.*, *Matthew M. Fernholz*, and *Claybrook LLC*, Washington, D.C., and *Cramer, Multhauf & Hammes, LLP*, Waukesha for Wisconsin Family Action, Illinois Family Institute, Minnesota Family Council, Delaware Family Policy Council, Nebraska Family Alliance, Hawaii Family Forum, The Family Foundation, Minnesota-Wisconsin Baptist Convention, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Concerned Women for America, Ethics & Public Policy Center, National Legal Foundation, and Pacific Justice Institute.

An amicus curiae brief was filed by *Tamara B. Packard* and *Pines Bach LLP*, Madison, for Madison Teachers Inc.

An amicus curiae brief was filed by *Eric G. Pearson*, *Morgan J. Tilleman*, *Megan C. Isom*, and *Foley & Lardner LLP*, Milwaukee for the American Academy of Child and Adolescent Psychiatry and the Wisconsin Council of Child and Adolescent Psychiatry.

An amicus curiae brief was filed by *Victoria L. Davis Dávila*, *Robert Theine Pledl*, *Shannon Minter*, *Asaf Orr*, and *Davis*

& Pledl, Milwaukee, and *National Center for Lesbian Rights*, San Francisco, for Professors of Psychology & Human Development.

An amicus curiae brief was filed by *Daniel R. Suhr* and *Liberty Justice Center*, Chicago, for the Liberty Justice Center.

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NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2020AP1032
(L.C. No. 2020CV454)

STATE OF WISCONSIN : IN SUPREME COURT

John Doe 1, Jane Doe 1, Jane Doe 3 and Jane Doe 4,

Plaintiffs-Appellants-Petitioners,

John Doe 5 and Jane Doe 5,

Plaintiffs-Appellants,

John Doe 6, Jane Doe 6, John Doe 8 and Jane Doe 8,

Plaintiffs,

v.

Madison Metropolitan School District,

Defendant-Respondent,

Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School and Gender Sexuality Alliance of Robert M. LaFollette High School,

Intervenors-Defendants-Respondents.

FILED

JUL 8, 2022

Sheila T. Reiff
Clerk of Supreme Court

HAGEDORN, J., delivered the majority opinion of the Court, in which ANN WALSH BRADLEY, DALLET, and KAROFSKY, JJ., joined. ROGGENSACK, J., filed a dissenting opinion, in which ZIEGLER, C.J., and REBECCA GRASSL BRADLEY, J., joined.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 BRIAN HAGEDORN, J. This case involves a constitutional challenge by parents to a school district policy. The substantive issues, however, remain pending before the circuit court and are not properly before us. This is an appeal contesting the circuit court's decision to seal and protect the parents' identities from the public and the school district, but not from the attorneys defending the school district's policy. Rather than follow our current law governing confidential litigation, the parents ask us to modify our approach in Wisconsin and adopt new standards modeled after federal law. We decline to do so. Applying Wisconsin law, we determine the circuit court did not erroneously exercise its discretion by requiring disclosure of the parents' identities to opposing attorneys, while allowing the parents to keep their names sealed and confidential as to the public and the district.

¶2 The parents further ask this court to issue an injunction against the underlying policy. But a preliminary injunction motion on this very issue remains pending in the circuit court, has not been decided, and therefore has not been appealed. We are not aware of any procedure by which we could properly address that motion in this court absent an extraordinary exercise of our superintending authority, which the petitioners did not request. What remains is an appeal of the circuit court's decision to grant in part and deny in part a temporary injunction pending appeal, a decision the court of

appeals affirmed. However, our decision today ends the appeal of the circuit court's decision regarding parent confidentiality. Therefore, any decision addressing the temporary injunction pending appeal is now moot. Accordingly, we do not opine on the merits of the parents' request for temporary injunctive relief. We affirm the court of appeals' decision and remand to the circuit court for further adjudication of the parents' claims.

I. BACKGROUND

¶3 In April 2018, the Madison Metropolitan School District (the District) adopted a document entitled, "Guidance & Policies to Support Transgender, Non-binary & Gender Expansive Students" (the Policy). The Policy contains multiple provisions that animate the parents' claims in this case. We highlight several for context.

- "Students will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in [District] systems."
- "All [District] staff will refer to students by their affirmed names and pronouns. Staff will also maintain confidentiality and ensure privacy. Refusal to respect a student's name and pronouns is a violation of the [District] Non-discrimination policy."
- "School staff shall not disclose any information that may reveal a student's gender identity to others, including parents or guardians and other school staff, unless legally required to do so or unless the student has authorized such disclosure."

- "All staff correspondence and communication to families in regard to students shall reflect the name and gender documented in [the District system] unless the student has specifically given permission to do otherwise. (This might involve using the student's affirmed name and pronouns in the school setting and their legal name and pronouns with family)."

- "To avoid harmful misgendering or misnaming, teachers should ensure that all information shared with substitute teachers is updated and accurate. For example, make sure attendance rosters, shared include accurate student names and pronouns, keeping in mind that not all students have their affirmed names and genders updated in [the District system]."

¶4 In February 2020, a group of parents sued the District alleging the Policy violated their right to parent their children, citing Article I, Section 1 of the Wisconsin Constitution,[1] and their right to exercise their religious beliefs under Article I, Section 18 of the Wisconsin Constitution.[2] Contemporaneous with filing their complaint, the

[1] Article I, Section 1 of the Wisconsin Constitution provides: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

[2] Article I, Section 18 of the Wisconsin Constitution states:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the

parents moved to proceed using pseudonyms. The parents also sought a preliminary injunction pursuant to Wis. Stat. § 813.02 (2019-20).[3] They asked the circuit court[4] to prohibit the District from:

> (1) enabling children to socially transition to a different gender identity at school by selecting a new "affirmed named and pronouns," without parental notice or consent;
>
> (2) preventing teachers and other staff from communicating with parents that their child may be dealing with gender dysphoria, or that their child has or wants to change gender identity, without the child's consent; and
>
> (3) deceiving parents by using different names and pronouns around parents than at school.

¶5 The District moved to dismiss the complaint and asked the circuit court to postpone the hearing on the injunction until the court decided the motion to dismiss. The circuit court agreed. After hearing argument, the circuit court denied the motion to dismiss.[5]

> treasury for the benefit of religious societies, or religious or theological seminaries.

[3] All subsequent references to the Wisconsin Statutes are to the 2019-20 version unless otherwise indicated.

[4] The Honorable Frank D. Remington of the Dane County Circuit Court presided.

[5] The circuit court also granted intervention to the Gender Equity Association of James Madison Memorial High School, the Gender Sexuality Alliance of Madison West High School, and the Gender Sexuality Alliance of Robert M. La Follette High School.

We refer to the District and the Intervenors-Defendants collectively as the District.

¶6 The circuit court also granted in part the parents' motion to proceed anonymously. The court agreed with the risks presented by the parents and found "sufficient need to keep the Plaintiffs' names sealed and confidential from the public." The court concluded the parents made a "demonstrable factual showing that . . . would their names be disclosed, they would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly functioning of the court case." It held, however, that the parents "must disclose their identities to the Court and attorneys for the litigants." The circuit court ordered the parents to file, under seal, an amended complaint listing the names and addresses of the parents accessible to the court and opposing attorneys. And it instructed the parents to circulate a draft protective order, the terms of which were to be negotiated. The parents initially circulated a draft protective order which would limit the disclosure of their names to attorneys of record, excluding their staff and other attorneys at their firms. However, the circuit court concluded this was too narrow and directed the preparation of a protective order that other attorneys at the respective law firms and their staff would sign as well.

¶7 The parents sought an interlocutory appeal challenging the order to disclose their identities to the attorneys and moved to stay the order to file an amended complaint under seal. The circuit court granted the stay, and the court of appeals granted the petition for interlocutory appeal.

¶8 While the petition for interlocutory appeal was pending before the court of appeals, the parents sought an injunction pending appeal with the circuit court under Wis. Stat. § 808.07(2). This motion asked for the same relief requested in the parents' original preliminary injunction motion. Two months after the court of appeals granted interlocutory appeal, the circuit court granted in part and denied in part the parents' motion for an injunction pending appeal. The circuit court enjoined the District

> from applying or enforcing any policy, guideline, or practice reflected or recommended in its document entitled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school.

The circuit court added that its "injunction does not create an affirmative obligation to disclose information if that obligation does not already exist at law and shall not require or allow District staff to disclose any information that they are otherwise prohibited from disclosing to parents by any state or federal law or regulation." The circuit court denied the other injunctive relief requested by the parents. It reasoned that the parents had not demonstrated they were likely to succeed on appeal and, without knowing any specifics about the parents bringing the claim, the parents were unable to demonstrate they would suffer irreparable harm.

¶9 Having not received all they hoped for from the circuit court, the parents turned to the court of appeals. They moved for injunctive relief under Wis. Stat. § 808.07(2)(a) and cited Wis. Stat. § (Rule) 809.12, the ordinary authority for appealing the denial of a motion for relief pending appeal. In the alternative, they also sought injunctive relief under the general temporary injunction statute, Wis. Stat. § 813.02, along with Wis. Stat. § (Rule) 809.14, which specifies how to move an appellate court for relief.

¶10 The court of appeals denied the parents' motion for injunctive relief pending appeal, concluding the circuit court did not erroneously exercise its discretion. The parents then sought relief from this court on their motion for relief pending appeal while the court of appeals was still considering the merits of the confidentiality question. We denied the petition for review. Several months later, the court of appeals issued a decision on the confidentiality issue affirming the circuit court. Doe 1 v. Madison Metro. Sch. Dist., 2021 WI App 60, 399 Wis. 2d 102, 963 N.W.2d 832. The parents then turned to this court again, and we granted their petition for review.

II. CONFIDENTIALITY

¶11 The main question before us is a narrow one: Did the circuit court err in ordering the parents to file a sealed complaint with their names and addresses which would be viewed by the court and attorneys alone? The parents' argument rests largely on its request that we reexamine, overrule, and

reformulate the law on anonymous litigation in Wisconsin to more closely resemble their description of the approach in federal courts. We decline to do so. We begin with the relevant law as it now exists.

A. Legal Standards

¶12 The ordinary rule in Wisconsin and everywhere is that those availing themselves of the legal system should do so openly. See, e.g., State ex rel. La Crosse Trib. v. Cir. Ct. for La Crosse Cnty., 115 Wis. 2d 220, 241-42, 340 N.W.2d 460 (1983); Doe v. Village of Deerfield, 819 F.3d 372, 376-77 (7th Cir. 2016); 67A C.J.S. Parties §§ 173-74 (2022). While we protect certain vulnerable legal participants, such as children and crime victims, the business of courts is public business, and as such is presumed to remain open and available to the public. See Wis. Stat. § 757.14 ("The sittings of every court shall be public and every citizen may freely attend the same . . . except if otherwise expressly provided by law."); Wis. Stat. § (Rule) 809.81(8) ("Every notice of appeal or other document that is filed in the court and that is required by law to be confidential shall refer to individuals only by one or more initials or other appropriate pseudonym or designation."); Wis. Stat. § (Rule) 809.86 (directing that, in certain types of cases, the identity of crime victims should not be disclosed). Openness is the rule; confidentiality is the exception.

¶13 This principle plays out from the commencement of a lawsuit. Litigation in Wisconsin begins with the filing of a

summons and complaint, which must contain "the names and addresses of the parties to the action, plaintiff and defendant." Wis. Stat. § 801.09(1). These documents are filed with the clerk of the circuit court, who is required to "open to the examination of any person all books and papers required to be kept in his or her office and permit any person so examining to take notes and copies of such books, records, papers, or minutes therefrom." Wis. Stat. § 59.20(3)(a). We have described this as "a legislative declaration granting those persons who properly come under its umbrella 'an absolute right of inspection subject only to reasonable administrative regulations.'" State ex rel. Bilder v. Township of Delavan, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983) (quoting State ex rel. J. Co. v. Cnty. Ct. for Racine Cnty., 43 Wis. 2d 297, 308, 168 N.W.2d 836 (1969)) (interpreting Wis. Stat. § 59.14(1) (1979-80), predecessor to § 59.20(3)(a)). This reflects "a basic tenet of the democratic system that the people have the right to know about operations of their government, including the judicial branch." Id. at 553.

¶14 In Bilder, we identified three exceptions to the right codified in Wis. Stat. § 59.20(3)(a). First, documents may be closed to the public when another statute so requires or authorizes. Id. at 554. Second, the same applies if disclosure would infringe on a constitutional right. Id. at 555. And third, "when the administration of justice requires it," a court may employ its inherent power under the constitution "to preserve and protect the exercise of its judicial function of

presiding over the conduct of judicial proceedings." Id. at 556.

¶15 With respect to the court's inherent power, many of the cases, including Bilder, focus on the public records nature of requests for confidentiality. See WISC-TV—Channel 3/Madison v. Mewis, 151 Wis. 2d 122, 442 N.W.2d 578 (Ct. App. 1989); Krier v. EOG Env't, Inc., 2005 WI App 256, 288 Wis. 2d 623, 707 N.W.2d 915. But the court's ability "to preserve and protect the exercise of its judicial function of presiding over the conduct of judicial proceedings" is not limited to public records requests. Bilder, 112 Wis. 2d at 556. Instead, the inherent authority of courts includes those powers "necessary for the courts to function as courts." State v. Schwind, 2019 WI 48, ¶12, 386 Wis. 2d 526, 926 N.W.2d 742. We see no reason why the inherent authority of courts would not also reach other interests implicated by the openness of judicial proceedings, including the potential for threats and harassment alleged in this case. These interests go to the core of the judiciary's duty to preside over and conduct judicial proceedings, as the circuit court recognized.

¶16 Seven years ago, this court adopted by rule a set of procedures governing the redaction and sealing of documents. See Wis. Stat. § 801.21; S. Ct. Order 14-04, 2015 WI 89 (issued Aug. 27, 2015, eff. July 1, 2016). While not enacted in the same way as other laws, the legislature has prescribed that our rules function as statutes. See Rao v. WMA Sec., Inc., 2008 WI 73, ¶35, 310 Wis. 2d 623, 752 N.W.2d 220. The underlying

assumption of § 801.21 is that court filings are public. The procedures we adopted provide a mechanism for protecting certain documents or information in these otherwise public records.

¶17 The basic procedure we created was to require a "party seeking to protect a court record" to "file a motion to seal part or all of a document or to redact specific information in a document."[6] Wis. Stat. § 801.21(2). Sealing and redacting are different. "'Seal' means to order that a portion of a document or an entire document shall not be accessible to the public." § 801.21(1)(b). "'Redact' means to obscure individual items of information within an otherwise publicly accessible document." § 801.21(1)(a). A party filing a motion under § 801.21 can file the material under temporary seal until a court rules on the motion, and the movant is required to "specify the authority for asserting that the information should be restricted from public access." § 801.21(2).

¶18 The circuit court then determines "whether there are sufficient grounds to restrict public access according to applicable constitutional, statutory, and common law." Wis. Stat. § 801.21(4). Section 801.21 does not provide substantive reasons to protect a document; that law is found elsewhere. For example, Wis. Stat. § 801.19 defines protected information that must be omitted or redacted from circuit court records—— including passport and social security numbers. § 801.19(1)(a).

[6] We also specified that the court may act on its own initiative to "order sealing or redaction of any part of the court record or transcript." Wis. Stat. § 801.21(6).

And Wis. Stat. § 801.20(1) requires the director of state courts to "maintain a list of commonly-filed documents made confidential by statutes, court rules and case law." When the law provides grounds for redacting or sealing a document, the court must "use the least restrictive means that will achieve the purposes of this rule and the needs of the requester." § 801.21(4). A comment to the rule stresses this "section is intended to make it clear that filing parties do not have the unilateral right to designate any filing as confidential and that permission from the court is required." S. Ct. Order 14-04, § 7.

¶19 In sum, Wisconsin law has a strong presumption in favor of openness for judicial proceedings and records. But it can be overcome by specific statutory or constitutional rights, and in some circumstances, by the inherent power the constitution vests in the judicial branch. The general procedure this court has adopted involves redacting or sealing documents or portions of documents, and any restriction on public access must use the least restrictive means possible.

B. Analysis

¶20 Here, the circuit court concluded the parents may file their complaint under seal protecting their names and identities from the public. It did so after finding the risks to the parents and their children were legitimate. The court also ordered that the sealed, unredacted complaint would be accessible only to the circuit court and to defense counsel

following the adoption of a signed protective order. Essentially, the narrow question in this case centers on the parents' argument that granting defense counsel access to the sealed complaint should be reversed. They assert that they and their children face a serious risk of harm, their identities are irrelevant to their legal claims, and disclosing their identities to opposing counsel could result in that information being leaked. At bottom, the parents want to litigate with total anonymity, except with respect to the circuit court, or alternatively, with respect to the circuit court and a small subset of attorneys at one of the firms defending the District's policy.

¶21 Perhaps recognizing the weakness of their argument under existing law, the parents come with a bigger ask. Drawing on federal case law, they ask us to adopt a new multifactor balancing test. The parents focus our attention on several factors with an established history of relevance in federal courts: the plaintiffs are parents of minor children; the case implicates deeply held beliefs likely to provoke an intense emotional response; and release of their identities poses significant risks of harassment and retaliation.[7] They further ask us to conduct our review de novo, giving no deference to the circuit court.

[7] Reference to federal law in this area is not improper. Wisconsin courts have looked to federal cases for guidance on sealing documents. See WISC-TV—Channel 3/Madison v. Mewis, 151 Wis. 2d 122, 134-35, 442 N.W.2d 578 (Ct. App. 1989).

¶22 In response, the District argues that none of these concerns would warrant withholding the parents' identities from attorneys in the case, each of whom would be duty-bound by court order to keep the parents' identities confidential. Defense counsel says their strategy and ability to litigate these claims could shift depending on each parent's unique circumstances. This would impact, they assert, legal defenses they might advance, as well as the scope of any temporary or permanent relief ordered. The parents disagree, and say their identities are irrelevant to their claims.

¶23 We begin with the standard of review. The court of appeals in this case and in prior cases has held that the circuit court's order should be reviewed for an erroneous exercise of discretion. Doe 1, 399 Wis. 2d 102, ¶18, (citing Krier, 288 Wis. 2d 623, ¶23). We agree. Under that standard, a court must still determine whether the appropriate standard of law was applied. Thus, a court incorrectly construing a statute to support sealing a document could be reversed for applying an improper standard of law. Krier, 288 Wis. 2d 623, ¶23 ("An erroneous exercise of discretion occurs if . . . the trial court applied the wrong legal standards."). But once the proper law is identified and employed, the judgment call in determining

whether to keep information confidential is rightly within the circuit court's discretion.[8] Id.

¶24 In this case, the circuit court's decision to withhold the parents' identities from the public and the District, but not the District's attorneys, was well within its discretion. As the District identified, resolving the parents' claims through the courts could depend on a number of significant legal questions which can be evaluated only if the District's attorneys know the parents' identities.

¶25 Of no minor importance, the District's attorneys stressed their independent ethical responsibilities under our rules. For example, attorneys must avoid conflicts of interest. See, e.g., SCR 20:1.7(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). Among other circumstances, a conflict of interest arises if "the representation of one client will be directly adverse to another client," or if the representation involves "the assertion of a claim by one client against another client represented by the lawyer." SCR 20:1.7(a)(1), (b)(3). At oral argument, the District expressed concern that its attorneys cannot know if their representation of the District creates a conflict of interest with any of the parents without knowing who the parents are. Already in this case two of the parents

[8] We observe that discretionary review appears to be the standard approach in federal courts as well. See, e.g., Doe v. Village of Deerfield, 819 F.3d 372, 376 (7th Cir. 2016) (reviewing "a motion for leave to proceed anonymously" "for abuse of discretion only").

voluntarily withdrew from the suit because the parents' counsel determined their participation created a conflict of interest for the District's attorneys. The parents suggest they can police any potential conflicts, but our rules of ethics place that independent responsibility on the attorneys representing the District. See ABA Comment [2] SCR 20:1.7 (noting that resolving a conflict of interest problem "requires the lawyer" to take certain steps); ABA Comment [4] SCR 20:1.7 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from representation, unless the lawyer has obtained the informed consent of the client . . . ."). At the very least, this is a significant consideration regarding the parents' request to proceed without revealing their identities to opposing counsel. The circuit court exercised its discretion in this case in a way that facilitates the District's attorneys' ability to follow their ethical duties.

¶26 The parents' identities may also have implications for the substantive issues in this case. Although the parents' bring a facial challenge against the Policy, arguing it is unconstitutional in every circumstance, facts specific to the parents or their children could influence the availability and scope of judicial relief. For example, the parents raise a free exercise of religion claim under Article I, Section 18 of the Wisconsin Constitution. But without knowing the parents' identities, how can the District's attorneys inquire whether the parents have a sincerely held religious belief regarding this

aspect of their children's upbringing? Individual parents in this case might also have differing beliefs which could affect the evaluation of their claims. Additionally, it could be that various factual wrinkles alter the nature of the alleged violation of the right to parent one's child as well as the scope of relief the parents could be entitled to. For example, it is unclear if the constitutional right asserted would apply in the same way to a parent whose child has turned 18 but is still attending District schools. The same could be true of a parent whose parental rights have been terminated by a court or a parent who has ceded certain decisions to another parent pursuant to a custody arrangement. If there is an Individualized Educational Program in place for the child, that could again complicate whether a particular parent is entitled to relief. See Wis. Stat. § 115.787. Finally, the District noted other legal defenses——including ripeness, mootness, and lack of standing——which it asserts it cannot advance without knowing the parents' identities. Each of these variables may influence whether the parents are entitled to judicial relief, or how far such relief should extend.[9]

¶27 The parents make an earnest plea that the risk of harassment and retaliation is real. The problem with their argument is that the circuit court agreed and protected their

[9] We do not decide that any of these considerations should or will impact the claims. Rather, based on this briefing, we conclude these concerns could impact the arguments the District might reasonably make. And therefore, they weigh in favor of affirming the circuit court's exercise of discretion.

identities. Therefore, the crux of the parent's continued worry is their fear that the attorneys on the other side will intentionally or unintentionally violate the court's protective order and expose them to the risks they identify. Attorneys are duty-bound to follow court orders, however. We have no evidence that any of the law firms defending the District's policy have violated a protective order in the past or that there is any risk of them doing so now. In fact, counsel for the parents conceded to the circuit court that there was "no reason to doubt that the lawyers in this case will make every effort to preserve the plaintiffs' anonymity and follow a court order." Nevertheless, the parents essentially make an unfounded accusation that the attorneys on the other side will risk their law licenses, through carelessness or otherwise. This pure speculation lacks merit. Each attorney is an officer of the court subject to strict ethical rules in the maintenance of confidential information. Each would need to agree to a protective order——the specifics of which have not yet been negotiated. The parents present no reason to think the order to keep their identities private as to the District and the general public will not be followed.

¶28 Furthermore, we observe the circuit court's exercise of discretion was a proper application of the statutory test. Wisconsin Stat. § 801.21(4) directs that if "there are sufficient grounds to restrict public access" to court records, "the court will use the least restrictive means that will achieve the purposes of this rule and the needs of the

requester." The circuit court concluded some protection for the parents' identities was warranted and decided to shield their names from public view and the District's view. But the court did not see the same danger in disclosing the parents' names to the District's attorneys. We see no error in this conclusion.

¶29 Although the parents frame their arguments around whether Wisconsin permits totally anonymous litigation, we do not decide that question because we need not. We leave for another day whether a future litigant can proceed anonymously in a case. Instead, we conclude that the circuit court's decision to allow the parents to proceed pseudonymously, but not to prevent opposing attorneys from knowing their identity, was well within the circuit court's discretion.

III. INJUNCTION

¶30 Finally, the parents ask us to provide injunctive relief on the underlying Policy. As best we can tell, this request stems from two different statutory bases——Wis. Stat. § 808.07(2)(a) and Wis. Stat. § 813.02——following several motions the parents filed with the circuit court and court of appeals. Given the posture of this case, it is not appropriate to grant the parents' requested temporary relief.

¶31 We first address the request for temporary injunctive relief under Wis. Stat. § 808.07(2)(a). That statute provides: "During the pendency of an appeal" circuit courts and appellate courts are permitted to: "1. Stay execution or enforcement of a judgment or order; 2. Suspend, modify, restore or grant an

injunction; or 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered." § 808.07(2)(a). Notably, any injunctive relief granted under § 808.07(2)(a) lasts only "[d]uring the pendency of an appeal." Once an appeal ends, an injunction issued under § 808.07(2)(a) terminates. In addition, Wis. Stat. § (Rule) 809.12 requires that any "person seeking relief under s. 808.07 shall" file the motion in circuit court first unless impractical. Accordingly, in the ordinary course, an appellate court reviews a circuit court's decision on a motion seeking relief pending appeal under an erroneous exercise of discretion standard. Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977). The appellate court does not conduct the analysis anew; it looks for a reasonable basis to sustain a circuit court's discretionary decision. State v. Rhodes, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850.

¶32 Here, the circuit court granted in part and denied in part the parents' motion for a temporary injunction pending appeal under Wis. Stat. § 808.07(2)(a).[10] The court of appeals concluded the circuit court properly exercised its discretion and declined to grant any further relief. Doe 1 v. Madison

[10] As previously noted, the court enjoined the district "from applying or enforcing" the policy "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school."

Metro Sch. Dist., No. 2020AP1032, unpublished order (Wis. Ct. App. Nov. 9, 2020). This is an appeal of the circuit court's confidentiality decision, however, which this opinion resolves—thereby ending the appeal. Even if we thought the lower courts erred, any decision to provide further injunctive relief pending appeal would immediately be a dead letter by virtue of this decision. Therefore, the motion for relief pending appeal is moot. See PRN Assocs. LLC v. DOA, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."). Addressing these matters now would constitute an advisory opinion on an issue that is, albeit in a different posture, still pending in the circuit court below. See State ex rel. Collison v. City of Milwaukee Bd. of Rev., 2021 WI 48, ¶46, 397 Wis. 2d 246, 960 N.W.2d 1 (declining to "depart from our general practice that this court will not offer an advisory opinion"). Accordingly, we decline to provide any relief under § 808.07(2)(a).

¶33 The parents also appear to ask us for injunctive relief under Wis. Stat. § 813.02. That section provides in relevant part:

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending

> to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

§ 813.02(1)(a). The parents assert that they can bring such a motion directly to an appellate court under Wis. Stat. § (Rule) 809.14, which sets forth the procedure for filing motions in appellate courts. See § (Rule) 809.14(1) ("A party moving the appellate court for an order or other relief in a case shall file a motion for the order or other relief.").

¶34 The parents first moved for injunctive relief under Wis. Stat. § 813.02 in the circuit court. That motion remains before the circuit court pending resolution of this appeal. The parents now seem to suggest the circuit court erred by failing to address their § 813.02 motion. As best we can tell from the record, the circuit court reasoned that it could not address the parents' claim for irreparable harm——a central component of the temporary injunction standard——without additional information gleaned from disclosure of their identities (while still concealing that information from the public). Once the parents appealed the circuit court's confidentiality decision, the circuit court did not believe it had the necessary information to decide the motion.

¶35 We decline to address whether the circuit court's decision to wait to adjudicate this motion was erroneous. The parents have not developed any arguments for how this court should determine whether the circuit court erred or whether this would be the proper vehicle to address a circuit court's non-decision. Beyond complaining that the motion has not been

decided yet, the parents jump right into the merits of their plea for injunctive relief, never developing an argument that the circuit court committed procedural error. As we have said many times, "We do not step out of our neutral role to develop or construct arguments for parties; it is up to them to make their case." Serv. Emps. Int'l Union, Loc. 1 v. Vos, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35. With the appeal resolved, we expect the circuit court will address the pending motion and all other matters put on hold by virtue of this appeal.

¶36 The parents also sought a temporary injunction under Wis. Stat. § 813.02 from the court of appeals. In that motion, the parents stated that they believed there was no meaningful difference from the relief they could receive under either § 813.02 or Wis. Stat. § 808.07. The court of appeals addressed this motion in a footnote, stating that its decision to uphold the circuit court's injunction and not grant any further relief would be the same under either statute.[11] Doe 1, No. 2020AP1032, unpublished order at 6 n.4. But the court of appeals also noted

[11] The parents' procedural arguments are difficult to track, but for the reasons we explain below, it's not clear the court of appeals was correct that the analysis would be the same. We understand the parents to be seeking a separate injunction under Wis. Stat. § 813.02. If so, and if that is a new, independent motion, it presumably would not come with the same deference the court of appeals properly gave to the circuit court's decision on the parents motion for relief pending appeal under Wis. Stat. § 808.07(2)(a).

"the parents do not explain why this court would have authority to grant injunctive relief under § 813.02."[12] Id.

¶37 We observe, as the court of appeals did, that the parents provide no authority to support the notion that we should decide a motion for temporary injunction under Wis. Stat. § 813.02 in the first instance. This is especially true when such a motion is pending and unresolved before the circuit court. Allowing this procedural leap-frog would render nugatory the discretionary review appellate courts apply when reviewing any form of temporary injunctive relief granted or denied by the circuit court. A litigant could simply seek the same injunctive relief at each level by filing a new motion under § 813.02, and thereby sidestep the deferential standard of review appellate courts apply in this context.[13] While we cannot say such a

[12] At oral argument, the parents' counsel stated that the circuit court on remand would be bound by the court of appeals' decision on the Wis. Stat. § 813.02 motion. We disagree. The court of appeals declined to address the parents' motion as a de novo matter under § 813.02, instead appearing to view its role as reviewing the circuit court's exercise of discretion. On remand, the circuit court can, in the first instance, address the parents' motion for a temporary injunction filed under § 813.02.

[13] See Wis. Ass'n of Food Dealers v. City of Madison, 97 Wis. 2d 426, 429, 293 N.W.2d 540 (1980) ("The denial of a temporary injunction under [Wis. Stat. § 813.02(1)] is a matter within the discretion of the trial court, and the sole issue on appeal is whether the trial court abused its discretion."); Browne v. Milwaukee Bd. of Sch. Dirs., 83 Wis. 2d 316, 336, 265 N.W.2d 559 (1978) ("The power to grant a temporary injunction lies within the discretion of the trial court. The trial court's decision concerning an injunction will not be reversed unless the discretion has been abused."); Codept, Inc. v. More-Way N. Corp., 23 Wis. 2d 165, 171, 127 N.W.2d 29 (1964) ("It is an elementary rule of law that the granting or refusal of a

motion would never be appropriate, we are unable to find any support for the proposition that addressing a new motion for injunctive relief under § 813.02 would be proper at this juncture.

¶38 The original preliminary injunction motion under § 813.02 remains pending in circuit court. Following the ordinary rules of litigation and appellate procedure dictates allowing the circuit court to address the matter. If authority exists for the procedural process advocated by the parents, they have not provided it. It seems that the only way this court could do what we are being asked to do would be a dramatic and unprecedented invocation of our superintending authority over lower courts. We were not asked to rely on these extraordinary powers, and we will not construct such an argument for the parents. See Vos, 393 Wis. 2d 38, ¶24.

¶39 The parents also indicate that the injunction arguments would be the same in a subsequent appeal, and propose that we should just step in and settle the matter now. This is a troubling suggestion. As an initial matter, we do not know how arguments may develop as this case proceeds or how the circuit court's decision could affect them. But even if the

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temporary injunction is a matter lying within the discretion of the trial court, and its determination in regard thereto will not be upset on appeal unless an abuse of discretion is shown."); Gimbel Bros. v. Milwaukee Boston Store, 161 Wis. 489, 497, 154 N.W. 998 (1915) ("We conclude that it was within the sound discretion of the trial court to refuse the injunction prayed for.").

arguments remained identical, that does not provide a foundation for us to opine on legal issues not properly before us. Litigation rules and processes matter to the rule of law just as much as rendering ultimate decisions based on the law. Ignoring the former to reach the latter portends of favoritism to certain litigants and outcomes. We do not suggest the constitutional claims here are inconsequential. But our adjudication of them must be rooted in applying the same rules to everyone. Our rules of judicial process matter, and we will follow them.[14]

¶40 In sum, we decline the parents' request for temporary injunctive relief under Wis. Stat. § 808.07(2)(a) because any relief we could grant would immediately become moot. We also decline the request for temporary injunctive relief under Wis. Stat. § 813.02. Such a motion remains pending in the circuit court, and the parents have provided no authority to support the notion that we can or should grant injunctive relief under § 813.02 in this procedural context. We do not reach the merits of the injunction motion at this preliminary stage of the litigation.

[14] The dissent does not claim that the parents' temporary injunction request is something we can address in the normal course. Instead, it advocates an extraordinary constitutional intervention not even argued by the parents, and suggests failure to follow its lead constitutes an abdication of the court's responsibility. We reject the dissent's sense of judicial duty.

IV. CONCLUSION

¶41 This is an appeal of a circuit court's decision to allow parents challenging the District's Policy to remain confidential, but not as to the attorneys for those defending the Policy. We conclude the circuit court did not erroneously exercise its discretion in drawing this line. The parents further ask this court to grant temporary injunctive relief on the underlying Policy. But the request for relief pending appeal is moot by virtue of this decision, and the underlying preliminary injunctive relief sought remains pending before the circuit court. Addressing the parents' request for injunctive relief is therefore not proper for a case at this preliminary stage. We affirm the court of appeals and remand to the circuit court to proceed with the adjudication of the parents' claims.

By the Court.——The decision of the court of appeals is affirmed and the cause is remanded to the circuit court.

¶42 PATIENCE DRAKE ROGGENSACK, J. *(dissenting).* Today the majority opinion abdicates the court's responsibility, once again, by choosing not to address the critical issue on which this case turns: the constitutional right of parents to raise their children as they see fit.[1] Today, parents' constitutional rights, the high burden of proof required to intervene in parents' parenting decisions, and the presumption that parents act in the best interests of their children are all upended by the majority opinion's silence. It fails parents, fails to uphold the constitution, and fails to provide parents with due process before Madison Metropolitan School District (MMSD), acting behind closed doors, overtakes parents' constitutional right to parent their own children.

¶43 The John Doe plaintiffs (hereinafter the parents) have children in the MMSD. They sue on behalf of all parents with children in MMSD, not on behalf of any particular parent-child

[1] This court, in a series of recent decisions, has shown an unwillingness to resolve significant legal issues presented to us for decision. Hawkins v. Wis. Elections Comm'n, 2020 WI 75, ¶¶29-83, 393 Wis. 2d 629, 948 N.W.2d 877 (Ziegler, J. dissenting); Trump v. Biden, 2020 WI 91, ¶62, 394 Wis. 2d 629, 951 N.W.2d 568 (Roggensack, C.J. dissenting); Gymfinity, Ltd. v. Dane Cnty., No. 2020AP1927-OA, unpublished order (Wis. Dec. 21, 2020); Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. Dec. 3, 2020); Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, (Wis. Dec. 4, 2020); Mueller v. Jacobs, No. 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020); Zignego v. Wis. Elections Comm'n, No. 2019AP2397, unpublished order (Wis. Jan. 13, 2021); Stempski v. Heinrich, No. 2021AP1434-OA, unpublished order (Wis. Aug. 27, 2021); Gahl v. Aurora Health Care, Inc., No. 2021AP1787, unpublished order (Wis. Oct. 25, 2021); State ex rel. Robin Vos v. Cir. Ct. for Dane Cnty., No. 2022AP50-W, unpublished order (Wis. Jan. 11, 2022).

relationship. As such, any individual parent's name is irrelevant to the constitutional analysis. They assert that a MMSD guidance policy that affirms a child's gender transition to a sexual designation different from the child's sex at birth and deceives the child's parents about that choice violates their fundamental constitutional rights as parents contrary to Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment of the United States Constitution. The parents seek to enjoin MMSD from continuing to usurp their constitutional right to direct the upbringing and education of their children by requiring MMSD to immediately disclose a child's gender-identity concerns to the parents and by preventing MMSD from enabling their children to change gender-identity without parental consent. They also seek to go forward in this case using pseudonyms.

¶44 A majority of this court blocks all relief for parents by restructuring the pending dispute. The majority says: "The main question before us is a narrow one: Did the circuit court err in ordering the parents to file a sealed complaint with their names and addresses which would be viewed by the court and attorneys alone?"[2] We accepted more than the question of using pseudonyms when we accepted review.

¶45 The majority opinion's restructuring of the controversy denies all parents who have children in a MMSD school a forum in which to litigate MMSD's usurpation of their constitutional right to direct the upbringing of their children.

[2] Majority op., ¶11.

Both the United States Constitution and the Wisconsin Constitution support the conclusion that MMSD's Policies cannot deprive parents of their constitutional rights without proof that parents are unfit, a hearing, and a court order, in other words, without according parents due process. Instead, the majority keeps MMSD as the decision-maker of basic healthcare choices that may involve gender-identity for children who attend a MMSD school. And finally, the majority's non-decision, decision participates in MMSD's ability to hide from parents what MMSD actually has been doing behind closed schoolhouse doors.

¶46 The circuit court erred when it concluded that it could not permit parents to employ pseudonyms in this lawsuit. The court of appeals erred in affirming that decision, even while noting that the circuit court did have the power to permit the use of pseudonyms, contrary to the circuit court's decision.

¶47 Furthermore, I conclude that we can and should employ our constitutional supervisory authority to decide this constitutional controversy because it cries for judicial resolution. This court, as a court of last resort, should act to affirmatively grant parents' request for a temporary injunction that enjoins MMSD from: (1) enabling children to socially transition to a different gender-identity without parental consent; (2) preventing teachers and other staff from telling parents that their child may have gender-identity concerns; and (3) deceiving parents by using different names and pronouns in front of parents than are used at school. For the

reasons set out below, I conclude that the circuit court erred in not granting the temporary injunction that was requested in February of 2020. Because the majority opinion chooses not to decide the constitutional controversy that was presented, I respectfully dissent.

I. BACKGROUND

¶48 The parents filed this action for Declaratory Judgment in Dane County Circuit Court on February 18, 2020, seeking declaration that MMSD violated their constitutional right to direct the upbringing of their children through employment of MMSD's "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" (hereinafter MMSD Policies). They filed this case anonymously, using pseudonyms due to the sensitive nature of their claims. They sought to protect the identity of minor children and to protect parents and their children from retaliation or harassment for raising a controversial issue.

¶49 The parents also sought a temporary injunction prohibiting MMSD from enabling children to socially transition to a different gender-identity at school by selecting a new "affirmed name and pronouns" without parental notice and consent. MMSD moved to dismiss the complaint because parents had not provided their names and addresses.

¶50 The circuit court did not rule on the parents' request for a temporary injunction. However, the circuit court found:

> [A]s a factual matter, I believe the plaintiffs have satisfied the court of the need to preserve their confidentiality and, in particular, when analyzed against the backdrop of the relevance or irrelevance

> of their identity on their ability to challenge the policy in question. . . . "[A]s a factual matter, would their names be disclosed, they would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly functioning of the [circuit] court case.[3]

¶51 Although the circuit court denied MMSD's motion to dismiss, the circuit court also required the parents to file an amended complaint containing their names and addresses, which would be accessible to the circuit court and "attorneys for the litigants." Because the circuit court found that the parents and their children would be subjected to harassment due to their positions on the MMSD gender-identity policy, the circuit court ordered that the amended complaint was to be filed under seal.

¶52 The parents appealed the circuit court's requirement of identity disclosure, and the court of appeals affirmed. The parents petitioned us for review, which we granted. In their petition, the parents asked us to review whether they may sue anonymously in Wisconsin courts, and they also asked us to review whether the circuit court erred by declining to temporarily enjoin MMSD's Policies that infringe parents' constitutional right to parent their children, which motion for a temporary injunction the parents filed on February 19, 2020, the day after they filed this action.

II. DISCUSSION

A. Standard of Review

¶53 We review the circuit court's decision that it lacked authority to permit the parents to use pseudonyms in this

[3] Circuit Ct. Decision, May 26, 2020, 22.

litigation for an erroneous exercise of discretion. State v. Schwind, 2019 WI 48, ¶2, 386 Wis. 2d 526, 926 N.W.2d 742. Whether the circuit court actually lacked such authority presents as a question of law that is subject to our independent review. State v. Henley, 2010 WI 97, ¶29, 328 Wis. 2d 544, 787 N.W.2d 350. A court erroneously exercises its discretion when it applies an incorrect standard of law to the question presented. Krier v. EOG Env't, Inc., 2005 WI App 256, ¶23, 288 Wis. 2d 623, 707 N.W.2d 915.

¶54 We review independently whether MMSD's Policies interfere with the parents' constitutional right to raise their children as they see fit such that their request for a temporary injunction should have been granted. State v. Lavelle W., 2005 WI App 266, ¶2, 288 Wis. 2d 504, 708 N.W.2d 698. Whether this court should employ its superintending authority to address the parents' request for a temporary injunction is a discretionary decision subject to our independent review. State v. Green, 2022 WI 30, ¶3, 401 Wis. 2d 542, 973 N.W.2d 770.

B. Pseudonyms in Litigation

¶55 The circuit court was asked to permit parents' use of pseudonyms in this litigation. The parents made their motion based on concerns that they and their children would be harassed and the litigation disrupted if the parents' names were known. The circuit court found that their concerns were valid. The circuit court said:

> I agree with the plaintiff, Mr. Berg, in terms of the factual basis they've demonstrated on the legitimacy and sincerity of their concern over the release of their identities. And so as a factual

> matter, I believe the plaintiffs have satisfied the court of the need to preserve their confidentiality and, in particular, when analyzed against the backdrop of the relevance or irrelevance of their identity on their ability to challenge the policy in question.[4]

However, the circuit court precluded the use of pseudonyms because it concluded that it did not have the authority to authorize their use. The circuit court explained:

> I'm bound by Wisconsin law, both in terms of what the statutes set forth and the Wisconsin common law as established by the Supreme Court. There is no precedent for what the plaintiff is asking for in the current published appellate case law.[5]

¶56 Here, the circuit required disclosure of the parents' names to the court and to all parties' attorneys in the litigation. The parents do not object to filing an amended complaint that discloses their names for review by the circuit court. However, they do object to permitting review by the parties' attorneys. They contend that a leak of their identities is multiplied by the number of people who have that information. Once the parents' identities are disclosed, there is no way of undoing that disclosure, and as the circuit court found, harassment of the parents and their children and disruption of this litigation likely will follow.

¶57 The circuit court concluded that allowing the parties' attorneys to view the amended complaint was acceptable because the attorneys could be expected to keep the parents' identities confidential. The circuit court did not assess whether any

[4] Circuit Ct. Hr'g Tr., May 26, 2020, at 22.

[5] Id.

remedy could be provided to the parents and their children when their identities were disclosed.

¶58 Litigation conducted anonymously has been permitted in very similar circumstances in federal district courts. It has been approved by the Fifth, Sixth, Seventh, and Ninth Circuits. For example, in Doe ex rel. Doe v. Elmbrook Sch. Dist., 658 F.3d 710, 721-24 (7th Cir. 2011), the court concluded that the district court carefully considered detailed affidavits supporting the request to proceed anonymously. Therefore, it affirmed the district court's decision.

¶59 The United States Supreme Court has approved the use of pseudonyms in litigation, explaining, "Our decision in Roe v. Wade, establishes [] that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state." Doe v. Bolton, 410 U.S. 179, 187 (1973), abrogated by Dobbs v. Jackson Women's Health Org., No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). However, we do not need to adopt federal standards in order to permit litigation by pseudonyms in Wisconsin. As I explain below, Wisconsin courts have that authority.

¶60 When justice has required it, we have approved limiting public access to judicial records. For example, in State ex rel. Bilder v. Delavan Twp., 112 Wis. 2d 539, 334 N.W.2d 252 (1983), we explained:

> The circuit court under its inherent power to preserve and protect the exercise of its judicial function of presiding over the conduct of judicial proceedings has the power to limit public access to judicial records when the administration of justice requires it.

Id. at 556. We also have recognized that "the inherent power of the courts 'in many respects goes beyond those conferred by statute.'" Id. The party seeking "to close court records bears the burden of demonstrating, with particularity, that the administration of justice requires that the court records be closed." Id. at 556-57.

¶61 The command, "when administration of justice so requires" is at the core of Wisconsin courts' power to proceed as an independent judiciary. This power may require protection of some who are involved in Wisconsin's judicial system. Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶58, 376 Wis. 2d 147, 897 N.W.2d 384 (explaining that "a concern about possible re-traumatization of victims influenced our decision permitting the Department of Justice to withhold requested public records" in the administration of justice). In Wisconsin, the administration of justice permits a court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" including closing court records. State ex rel. Mitsubishi Heavy Indus. Am., Inc. v. Cir. Ct. for Milwaukee Cnty., 2000 WI 16, ¶40, 233 Wis. 2d 1, 605 N.W.2d 868.

¶62 The court of appeals, in its review of the circuit court's order that permitted review of the parents names by the attorneys for all parties to this litigation, disagreed with the circuit court's assessment of its own power. It concluded that the circuit court had the power to permit the parents to use pseudonyms in this litigation rather than requiring their actual

names. Doe v. Madison Metro. Sch. Dist., 2021 WI App 60, ¶31 n.8, 399 Wis. 2d 102, 963 N.W.2d 823. It said, "Wisconsin circuit courts have the power to enter as restrictive a protective order as is warranted, taking into account the facts and circumstances of a particular case and the public interest or the administration of justice." Id.

¶63 However, the court of appeals nevertheless "decline[d] to adopt" the use of pseudonyms rather than the statutory procedure set out in Wis. Stat. § 801.21(2). Id., ¶31. The court of appeals did not evaluate whether a remedy could be provided to the parents and their children when a disclosure of their identities occurred. It seemed to presume that no such leak would occur.

¶64 The circuit court and the court of appeals appear not to have realistically considered what likely will occur with regard to the parents' identities in today's tell-all world. Even the United States Supreme Court, an institution that has historically demanded the highest levels of integrity and confidentiality, has been subject to unauthorized leaks. These leaks have consequences. One need look no further than this case for examples. Following the leak of the Supreme Court's draft opinion in regard to abortion, Wisconsin Family Action, an amicus in this case, had its offices vandalized and attacked with Molotov cocktails.[6] Here, the circuit court found that the

[6] Press Release, Wisconsin Family Action, Historical Mothers' Day 2022 Attack on Wisconsin Family Action, https://wifamilyaction.org/mothers-day-attack-wfa.

parents and their children likely would be subjected to harassment if parental identities were disclosed.[7]

¶65 The judicial system has no remedy for a violation of the confidentiality of an amended complaint that identifies the parents when filed under seal as the circuit court ordered. Unnecessary harm will be inflicted on parents and minor children. There is no compelling reason to ignore the very real possibility of a leak of the parents' identities and the inability of the court to fashion a remedy for the disclosure. In the interests of the administration of justice, the circuit court should have permitted the use of pseudonyms. Gabler, 376 Wis. 2d 147, ¶58; Bilder, 112 Wis. 2d at 556; Mitsubishi Heavy Indus. Am., 233 Wis. 2d 1, ¶40.

¶66 I agree with the conclusion of the court of appeals that the circuit court erred when it applied the wrong legal standard to the parents' motion to proceed by pseudonyms. In so doing, the circuit court erroneously exercised its discretion. Krier, 288 Wis. 2d 623, ¶23. The circuit court had the power to permit the use of pseudonyms, as the court of appeals explained. Doe 1, 399 Wis. 2d 102, ¶31 n.8. I conclude the circuit court erred, and the court of appeals did so as well, in requiring the parents to disclose their identities to the attorneys for the other parties to the litigation. Neither court evaluated or appreciated that there is no remedy for leaks of parental identities. Both courts acknowledged that disclosure of identities likely would lead to harassment of the parents and

[7] Circuit Ct. Decision, May 26, 2020, 22.

their children and disruption of this litigation, but they neglected to recognize or evaluate how that would affect the administration of justice. Stated otherwise, their neglect affected the core of our independence as courts: the administration of justice. It was error to fail to evaluate the effect on the parents and the minor children were identities disclosed.

C. Constitutional Right to Parent

¶67 The constitutional right of parents to direct the raising of their children is at the heart of this lawsuit. It is that constitutional right that the majority opinion intentionally disregards.[8] Schools do not have the right to parent our children on gender-identity issues. Yet, a majority of this court greets parents' pleas to temporarily enjoin MMSD with silence, which silence permits schools to make gender-identity decisions for children in a MMSD school without parental knowledge or consent.

¶68 Furthermore, as we consider the constitutional right to parent that is raised in the Petition for Review, it is important to note that a part of the problem we face here is of the circuit court's own making. On February 19, 2020, the parents moved for Temporary Injunction to enjoin MMSD's Policies while this litigation is pending. They sought to prohibit MMSD from:

[8] "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." Marbury v. Madison, 1 Cranch 137, 177 (1803).

> (1) enabling children to socially transition to a different gender identity at school by selecting a new "affirmed named and pronouns," without parental notice or consent; (2) preventing teachers and other staff from communicating with parents that their child may be dealing with gender dysphoria, or that their child has or wants to change gender identity, without the child's consent; and (3) deceiving parents by using different names and pronouns around parents than at school.

The parents asserted in their motion that some of the "policies violate parents' constitutional rights to direct the upbringing of their children." They asserted that "[w]hether a child with gender dysphoria should socially transition to a different gender identity is a significant and controversial healthcare decision that falls squarely within parental decision-making authority."

¶69 More than two years have passed without a decision by the circuit court on the parents' motion for a Temporary Injunction. If the circuit court had addressed the pending motion, the losing party could have appealed that decision years ago. The litigation could have returned to the circuit court to decide whether the identities of the parents were irrelevant, as the parents contend because they sue on behalf of all parents to raise their children as they see fit, or relevant identities, as MMSD alleges. The administration of justice is affected by the circuit court's non-decision because by not deciding, the circuit court has effectively denied the motion for a temporary injunction and the circuit court also has denied the parents' opportunity to appeal an adverse ruling.

¶70 The Petition for Review, raised the issue of temporary injunction standards, contending that "the lower courts'

decisions are directly 'in conflict with' this Court's 'controlling' precedents as to proper application of the temporary injunction standards . . . ."[9] The Petition for Review did so, recognizing that the circuit court and court of appeals had decided motions for injunction pending appeal, and also recognizing that the standard for whether to grant a temporary injunction, Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977), and a stay pending appeal, State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), employ similar tests.

¶71 The parents moved for an injunction pending appeal pursuant to Wis. Stat. § 808.07(2)(a), which the majority opinion denied because its decision ends the appeal and therefore any injunction pending appeal that it would grant would also end with its decision.[10] The parents also renewed their request for a temporary injunction pursuant to Wis. Stat. § 813.02.

¶72 The majority opinion ignores this part of the Petition for Review, claiming that the parents have not provided a legal theory by which the majority could reach the failure of the circuit court to address the motion for a temporary injunction that has been pending for more than two years.[11] By its decision, the majority opinion chooses to duck the significant question of constitutional law that was raised in the Petition

[9] Petition for Review, Aug. 13, 2021, 3.

[10] Majority op., ¶40.

[11] Id., ¶¶38, 39.

for Review, which I address below. The majority opinion also chooses to ignore the circuit court's failure to meet its obligations under SCR 70.36(1)(b),[12] which required a decision on the motion for a temporary injunction within 180 days. The majority opinion does so as it also chooses to ignore our obligation to supervise all Wisconsin courts. Wis. Const. art. VII, § 3.[13]

¶73 As I begin, I remind the reader that under our constitutional supervisory authority, we have the power to decide whether parts of MMSD's Policies should be enjoined, as was requested in the Petition for Review. This court is vested with "superintending and administrative authority over all courts." Koschkee v. Evers, 2018 WI 82, ¶8, 382 Wis. 2d 666, 913 N.W.2d 878 (quoting Wis. Const. art. VII, § 3). This superintending authority is "as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." Id. (quoting In re Kading, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975)). Further, this power is not

[12] Supreme Court Rule 70.36 requires circuit court judges to "decide each matter submitted for decision within 90 days of the date on which the matter is submitted to the judge in final form." Judges may file for extensions with the chief judge of the judicial administrative district. However, even this extension, which must be requested and granted within five days of the overrunning the original 90 day timeline, is available for "one additional period of 90 days." SCR 70.36(1)(a). Any further extension must be granted by the Supreme Court and will be done only "for specific matters as exigent circumstances may require." SCR 70.36(1)(b).

[13] Article VII, Section 3 of the Wisconsin Constitution provides: "The supreme court shall have superintending and administrative authority over all courts."

strictly limited to situations in which it was previously used, continuing supervision is required in response to changing needs and circumstances. Koschkee, 382 Wis. 2d 666, ¶8.

¶74 In Koschkee, we considered our authority over the practice of law, in and out of court as connected with the exercise of judicial power and the administration of justice. Id., ¶9. We employed our supervisory authority because we concluded that the "necessities of justice" required us to do so. Id., ¶12. We used it to conclude that "Evers and DPI are entitled to counsel of their choice and are not required to be represented by DOJ." Id. Here, we should exercise our supervisory authority over a circuit court's failure to decide a motion that has been pending for more than two years contrary to SCR 70.36 and contrary to the administration of justice.

¶75 The pending motion is for a temporary injunction. In Wisconsin, courts may grant a temporary injunction to restrain a party's actions:

> When it appears from a party's pleading that the party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure the party, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual.

Wis. Stat. § 813.02(1)(a). The motion for temporary injunction should have been decided years ago. In its present undecided state, there is no decision from which to appeal, and yet the circuit court's failure to decide the pending motion for a temporary injunction stands in the way of the administration of

justice in this litigation. This is so because by failing to decide the pending motion, the circuit court effectively denied it and also denied the parents the opportunity to appeal an unfavorable ruling.

¶76 In order to fully understand this dissent, it is important to appreciate the fundamental constitutional right upon which these proceedings are grounded. Therefore, a review of long-standing protections for the relationship of parent and child will be helpful.

¶77 For hundreds of years, parents' right to direct the upbringing and education of their children has been a fundamental and protected right under Article I, Section 1 of the Wisconsin Constitution and the Due Process Clause of the Fourteenth Amendment. Michels v. Lyons, 2019 WI 57, ¶15, 387 Wis. 2d 1, 927 N.W.2d 486; Jackson v. Benson, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998); Wis. Indus. Sch. for Girls v. Clark Cnty., 103 Wis. 651, 668-70, 79 N.W. 422 (1899).

¶78 As many Supreme Court decisions have shown, the Due Process Clause of the Fourteenth Amendment of the United States Constitution protects parents' right to decide the upbringing of their own children. Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (concluding that parents possessed the right to direct whether their children would study German in elementary school under the Fourteenth Amendment); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925) (concluding that the state requirement that children must attend public schools was contrary to the parents' Fourteenth Amendment

liberty interest of directing the upbringing and education of their children).

¶79 The United States Supreme Court has continually reinforced the primacy of parents when making decisions concerning the upbringing of their children, considering the right as "established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); see also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). When it comes to a decision on "whether to expose their child[] to certain . . . ideas[,]" the parents, not the government, "should be the ones to choose." In re Custody of Smith, 969 P.2d 21, 31 (Wash. 1998), aff'd sub nom. Troxel v. Granville, 530 U.S. 57 (2000).

¶80 Serving as a foundation of this right is the presumption that parents "possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." Parham v. J.R., 442 U.S. 584, 602 (1979). Furthermore, natural bonds of affection "lead parents to act in the best interests of their children." Id. (citing 1 W. Blackstone, Commentaries, at *447.). Of course, this presumption may be rebutted. However, "[t]he state's power to displace parental discretion is limited . . . and must be justified on a case-by-case basis." Schleifer by Schleifer v.

City of Charlottesville, 159 F.3d 843, 861 (4th Cir. 1998) (Michael, J., dissenting).

¶81 In Troxel v. Granville, which involved a Washington statute that permitted visitation rights "at any time" if visitation was in the "best interests of the child[,]" the Supreme Court held the statute was an unconstitutional interference with the fundamental right of parents to rear their children. Troxel, 530 U.S. at 67-78. The court explained that "[t]he liberty interest at issue in this case——the interest of parents in the care, custody, and control of their children——is perhaps the oldest of the fundamental liberty interests recognized by this Court." Id. at 65. The court reasoned that "there is a presumption that fit parents act in the best interests of their children" and providing grandparents greater access to grandchildren, despite the decision of the parent, is an unconstitutional interference with parental rights. Id. at 68.

¶82 Recently, courts in other jurisdictions have addressed the same subject matter as MMSD's incursion on parental rights in the matter before us. In Eknes-Tucker v. Marshall, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *4 (M.D. Ala. May 13, 2022), the District Court for the Northern Division of Alabama decided that parents, not the state, are the proper decision-makers for medical treatment their child may receive involving gender-identity and transgender treatment. Id. There, the parents of transgender children challenged and sought to enjoin enforcement of a newly-passed "Vulnerable Child Compassion and Protection

Act" (the Act), which banned certain medical procedures used for the treatment of gender dysphoria in minors.[14]

¶83 Parent plaintiffs claimed that the Act violated "their constitutional right to direct the medical care of their children under the Due Process Clause of the Fourteenth Amendment." Id. at *7. In determining whether enforcement of the Act should be enjoined during the lawsuit, the court concluded that parents had a high likelihood of success on the merits of their constitutional claim under the Fourteenth Amendment. Id. The court reiterated that a "parent's right 'to make decisions concerning the care, custody, and control of their children' is one of 'the oldest of the fundamental liberty interests' recognized by the Supreme Court." Id. at *7 (quoting Troxel, 530 U.S. at 65–66). Furthermore, "[e]ncompassed within this right is the more specific right to direct a child's medical care." Eknes-Tucker, 2022 WL 1521889, at *7 (citing Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990) (recognizing "the right of parents to generally make decisions concerning the treatment to be given to their children").

¶84 Against this backdrop, the court reasoned that parents likely would succeed on the merits of their claim because the Act "prevents Parent Plaintiffs from choosing that course of treatment for their children by criminalizing the use of

[14] Gender dysphoria "is a clinically diagnosed incongruence between one's gender identity and assigned gender. If untreated, gender dysphoria may cause or lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide." Eknes-Tucker v. Marshall, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *1 (M.D. Ala. May 13, 2022).

transitioning medications to treat gender dysphoria in minors, even at the independent recommendation of a licensed pediatrician." Eknes-Tucker, 2022 WL 1521889, at *7.

¶85 When a government action "directly and substantially implicates a fit parent's fundamental liberty interest in the care and upbringing of his or her child, [governmental action] is subject to strict scrutiny review." Michels, 387 Wis. 2d 1, ¶22. "Ordinarily, where a fundamental liberty interest protected by the substantive due process component of the Fourteenth Amendment is involved, the government cannot infringe on that right 'unless the infringement is narrowly tailored to serve a compelling state interest.'" Johnson v. City of Cincinnati, 310 F.3d 484, 502 (6th Cir. 2002) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The MMSD has identified no compelling state interest upon which MMSD contends the Policies are based.

¶86 The parents renewed their request for a temporary injunction in their Petition for Review, and they ask us to grant them relief. The pending status of the parents' motion before the circuit court is not a deterrent to our superintending authority, which is grounded in our constitutional obligation to supervise all Wisconsin courts. In the exercise of our superintending authority and in order to afford the administration of justice in this litigation, we should grant the temporary injunction under the undisputed facts and the law presented herein.

¶87 I begin by noting that the granting of a temporary injunction required the parents to show: "(1) a reasonable probability of success on the merits; (2) a lack of an adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction." Wisconsin Legislature v. Evers, No. 2020AP608-OA, unpublished order (Wis. Apr. 6, 2020) (order granting leave to commence an original action and enjoining Executive Order No. 74); see also Kocken v. Wis. Council 40, 2007 WI 72, ¶22, 301 Wis. 2d 266, 732 N.W.2d 828 (listing requirements for injunctive relief to be a "finding a likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy at law."); Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 157 Wis. 2d 298, 306, 459 N.W.2d 581 (Ct. App. 1990) (explaining a movant must show a reasonable probability of success on the merits, an inadequate remedy at law, and irreparable harm); Grootemaat, 89 Wis. 2d at 520.

¶88 The administration of justice often requires significant judicial effort. But that is what the people of Wisconsin elected us to provide. We are expected not to shirk our responsibilities when hard legal disputes are presented. This case is grounded in the contention that MMSD has usurped fundamental parental rights, some of which relate to healthcare decisions for their children. The administration of justice requires that we not ignore the parents' plea for a judicial decision, as the majority opinion has done.

¶89 The parents satisfy each factor necessary to success on their motion for a temporary injunction. First, they have shown a strong likelihood of success on the merits of their claim that MMSD's Policies interfere with their constitutional right to raise their children as they think best. The lack of a temporary injunction also keeps MMSD in charge of enabling healthcare choices without parental consent for children who have gender-identity issues. The constitutional presumption is that parents will act in the best interest of their child. Troxel, 530 U.S. at 69. Allowing a school to reassign a child's gender, flips this constitutional presumption on its head by assuming that parents will not act in their child's best interest. Both the United States Constitution and the Wisconsin Constitution support the conclusion that MMSD's Policies cannot deprive parents of their constitutional rights without proof that parents are unfit, a hearing, a court order, and without according parents due process. Instead, under MMSD's explicit guidelines, parents are affirmatively excluded from decision-making unless their child consents.[15]

[15] MMSD's Policies affirmatively hide information from parents that relates to their children. For example, "School staff shall not disclose any information that may reveal a student's gender identity to others, including parents or guardians and other school staff, unless legally required to do so or unless the student has authorized such disclosure." MMSD Policies, 9. "Staff will respect student confidentiality throughout the investigation, be careful not to 'out' students while communicating with family/peers, and involve the targeted student throughout the intervention process." Id., 11. "In MMSD with the permission of our students, we will strive to include families along the journey to support their LGBTQ+ youth." Id., 16. "Students will be called by their affirmed name and pronouns regardless of parent/guardian permission to

¶90 Parents have the constitutional right to direct the upbringing and education of their children. Article I, Section 1 of the Wisconsin Constitution provides fundamental protection for that parental right. Jackson, 218 Wis. 2d at 879 (explaining that "Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children."). We have interpreted Article I, Section 1 of the Wisconsin Constitution as affording the same protections as are provided by the Fourteenth Amendment. Mayo v. Wis. Injured Patients & Families Comp. Fund, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678. The right of parents to decide on the upbringing of their children has been so long established as "beyond debate as an enduring American tradition." Yoder, 406 U.S. at 232-33.

¶91 What is occurring in Wisconsin schools has been occurring in other schools around the country. Parents are bringing their concerns to court, and courts around the country have confirmed that parental constitutional rights are violated when they are prevented from being involved in gender-identity concerns of their children. Eknes-Tucker, 2022 WL 1521889, at *7. Accordingly, I conclude that parents have shown a strong likelihood of success on the merits of their claim.

¶92 Second, parents have no remedy at law. Without an injunction to temporarily enjoin MMSD from implementing its policies, MMDS will continue to enforce them. Parents will not be told that their child is socially transitioning to a sex

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change their name and gender in MMSD systems." Id., 18.

different from that noted at birth without the child's consent, yet social transitioning is a healthcare choice for parents to make. Without an injunction, the parents have no way of becoming involved in such a fundamental decision.

¶93 Third, without an injunction the parents will suffer irreparable harm. The MMSD Policies are on-going and continue to invade parents' constitutional right to parent their children. Many courts consider the on-going infringement of a constitutional right enough and require no further showing of irreparable injury. See e.g., Awad v. Ziriax, 670 F.3d 1111, 1131 (10th Cir. 2012). We should do so as well.

¶94 Fourth, the balance of equities favors the parents, who are ready, willing and able to parent their children. The public interest is served by validation of parental constitutional rights and any harm alleged by MMSD from parental involvement in decision-making for their children runs directly contrary to the presumption that parents act in the best interests of their children. Troxel, 530 U.S. at 69. Furthermore, because MMSD's Policies are carried out by school officials who are state actors, whose conduct described in the MMSD Policies infringes on the parents' constitutional right to make important choices for their children, the school officials must yield to the constitution. Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) (explaining that "[i]t is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights.").

¶95 The parents brought a motion for a temporary injunction to enjoin MMSD from: (1) enabling children to socially transition to a different gender-identity without parental consent; (2) preventing teachers and other staff from telling parents that their child may have gender-identity concerns; and (3) deceiving parents by using different names and pronouns in front of parents than are used at school. The parents have satisfied all the necessary criteria for a temporary injunction.

III. CONCLUSION

¶96 In conclusion, to be clear, although I address the question of pseudonym use, the heart of this case is the fundamental, constitutional presumption that parents have the right to raise their children according to their beliefs of what is in the child's best interests. Parental names are not relevant to vindicating that constitutional right. Here, the circuit court erred when it concluded that it could not permit the parents to employ pseudonyms in this lawsuit. The court of appeals erred in affirming that decision, even while noting that the circuit court did have the power to permit the use of pseudonyms. The majority opinion errs by concluding that there is no authority for anonymous litigation in Wisconsin.[16]

¶97 Furthermore, I conclude that we can and should employ our constitutional supervisory authority to decide this constitutional controversy because it cries for judicial resolution. This court, as a court of last resort, should act

[16] Majority op., ¶¶15-20.

affirmatively to grant the parents' request for a temporary injunction that enjoins MMSD from: (1) enabling children to socially transition to a different gender-identity without parental consent; (2) preventing teachers and other staff from telling parents that their child may have gender-identity concerns; and (3) deceiving parents by using different names and pronouns in front of parents than are used at school.

¶98 The majority opinion defends abdication of its responsibility to address parents' constitutional arguments by attacking the dissent's support of parental rights. For the reasons set out above, I conclude that the circuit court erred in not granting the temporary injunction that was requested in February of 2020. Because the majority opinion chooses not to decide the controversy presented, I respectfully dissent.

¶99 I am authorized to state the Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice REBECCA GRASSL BRADLEY join this dissent.

BY THE COURT:

DATE SIGNED: June 1, 2022

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

T.F., et. al.,

Plaintiffs,

vs.

Case: 2021CV1650

KETTLE MORAINE SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER

The Complaint alleges that the Kettle Moraine School District (hereinafter "Kettle Moraine") violated parental rights by adopting a policy to allow, facilitate, and affirm a minor student's request to transition to a different gender identity at school without parental consent and even over the parents' objection. *(See Doc. #2, ¶1)* Kettle Moraine responds that there is no justiciable controversy as one set of plaintiffs (T.F. and B.F.) are no longer in the district and the other set of plaintiffs (P.W. and S.W.) do not currently have a child for which the policy would have a current application and therefore they do not have standing or a claim which is ripe for determination. *(See Doc. #19, p. 3)*

RELEVANT BACKGROUND

In December of 2020, T.F. and B.F.'s daughter, then twelve years old, began questioning her gender identity. Her parents temporarily pulled her from school to get her professional counseling. After some counseling, she expressed to her parents and District staff that she wanted to adopt a new male name and male pronouns when she returned to school. *(See Doc. #2, ¶¶ 28–32)* Her parents determined that an immediate transition would not be in her best interest. They wanted her to take more time to explore and process the cause of these feelings before taking such a profound and fraught step. *(See id. ¶ 32)* Shortly before their daughter returned to school, T.F. and B.F. informed the Kettle Moraine of their decision that school officials should refer to their daughter by her legal name and female pronouns. *(See id. ¶ 33)* Kettle Moraine

responded, however, that pursuant to District policy, the school would not follow their decision, but would instead refer to their daughter using whatever name and pronouns she wanted. *(See id. ¶¶ 34–35)* In light of this decision, and to avoid the potential damage that being addressed by teachers and staff with a male name and pronouns could do to their daughter, B.F. and T.F. withdrew her from school and sought a different therapist that would help their daughter process her feelings. *(See id. ¶¶ 36–37)* After just two weeks of this different environment, their daughter changed her mind about her identity, telling her parents that "affirmative care really messed [her] up" and that the rush to affirm that she was really a boy added to her confusion. *(See id. ¶¶ 38–40)* Although they would have stayed in Kettle Moraine, but for the policy, B.F. and T.F. then enrolled their daughter in another district. *(See id. ¶¶ 41–42)* Plaintiffs, P.W. and S.W., have two children currently enrolled in Kettle Moraine and their children are subject to the policy. *(See id. ¶¶ 45–46)*

LEGAL STANDARD

Wisconsin's current pleading standard requires that all pleadings contain both: "a short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief," and "a demand for judgment for relief the pleader seeks." *Wis. Stat. §* 802.02 (1) (2019-20); *See also* Fed. R. Civ. P. 8 (a).

"A motion to dismiss tests the legal sufficiency of the complaint." *Ladd v. Uecker*, 2010 WI App 28, ¶ 7, 323 Wis. 2d 798, 780 N.W.2d 216. In reviewing a motion to dismiss, the Court accepts as true "all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. The Court also liberally construes the complaint in favor of the plaintiff and in favor of stating a claim. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981). However, the Court may not consider facts outside the complaint "in the process of liberally construing the complaint." *Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180. And legal conclusions are insufficient to survive a motion to dismiss. *Data Key*, 2014 WI 86, ¶ 19. Ultimately, a motion to dismiss should not be granted, unless "it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations." *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979).

The Wisconsin Supreme Court in *Data Key* adopted the heightened plausibility pleadings standard, where a plaintiff must "allege facts that, if true, plausibly suggest a violation of applicable law." *Data Key*, 2014 WI 86, ¶ 21. Further, the sufficiency of the complaint depends on the underlying law of the claims, which also determines what facts must be pled. *Data Key*, 2014 WI 86, ¶ 31 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The facts must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Data Key*, 2014 WI 86, ¶ 25 (citing *Twombly*, 550 U.S. 544, 555). Factual assertions describe the "who, what, where, when, why, and how" of the claim. *Data Key*, 2014 WI 86, ¶ 173 n.9 (citing *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433). For example, in *Voters with Facts v. City of Eau Claire*, the Wisconsin Supreme Court held that when the complaint only establishes the possibility of entitlement to relief and lacking any further evidence, the complaint fails to meet the plausibility

required to survive a motion to dismiss. 2018 WI 63, ¶ 55, 382 Wis. 2d 1, 913 N.W.2d 131. Whether a complaint raises a justiciable controversy is appropriately determined on a motion to dismiss. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 410, 466 N.W.2d 227, 230 (Ct. App. 1991)

DISCUSSION

Kettle Moraine argues that there exists no justiciable controversy between the parties as the Plaintiffs lack standing to bring their claims, their claims are not ripe for determination, and the claims are moot.

In order bring an equitable claim for declaratory or injunctive relief in Wisconsin pursuant to *Wis. Stat. §§* 806.04 and 813.01, there must exist a justiciable controversy. That is, the plaintiff must demonstrate:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
> (2) The controversy must be between persons whose interests are adverse.
> (3) The party seeking declaratory relief must have a legal interest in the controversy-that is to say, a legally protectible interest.
> (4) The issue involved in the controversy must be ripe for judicial determination.

Vill. of Slinger v. City of Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 865-66, 650 N.W.2d 81, 83-84. These requirements are statutory. *See Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 35, 244 Wis. 2d 333, 627 N.W.2d 866. "Failure to fulfill any of these prerequisites is fatal to a claim for declaratory relief." *Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 465, 431 N.W.2d 685 (Ct. App. 1988).

I. T.F. and B.F. have standing to pursue their claim

It is clear in Wisconsin that this Court is construe standing "liberally," not "narrowly or restrictively, e.g., *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶38, 333 Wis. 2d 402, 797 N.W.2d 789, and that even a "trifling interest" can suffice. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. The purpose of the standing inquiry is simply to ensure that the "the issues and arguments presented will be carefully developed and zealously argued." *Id.* at ¶16. There are only two basic requirements for standing—"plaintiffs must show [1] that they suffered or were threatened with an injury [2] to an interest that is legally protectable." *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112.

For purposes of a motion to dismiss, T.F. and B.F.'s allegations are that they were forced to withdraw their daughter from Kettle Moraine to protect her and preserve their parental role when Kettle Moraine refused to honor their decision about what was best for their daughter. *(See Doc. #2, ¶¶ 32-40)* Wisconsin courts recognize that parents have a right to make "decisions regarding the education and upbringing of their children," "free from government intervention." *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 43, 426 N.W.2d 329 (1988); *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998); *Barstad v. Frazier*, 118 Wis. 2d 549, 567, 348

N.W.2d 479 (1984); *Matter of Visitation of A. A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486. T.F. and B.F. allege that Kettle Moraine violated their right to make decisions regarding the upbringing of their daughter when they were told by Kettle Moraine that the school would not honor the parent's request to not refer to their daughter by a male name or pronouns.

This allegation, viewed in the light most favorable to T.F. and B.F., demonstrates a potential violation of their rights as parents to direct the upbringing of their child and is sufficient to survive a motion to dismiss on the issue of standing.

II. T.F. and B.F.'s claims are not moot.

Kettle Moraine argues that T.F. and B.F.'s claims are moot due to the fact that their daughter no longer attends the district. The heart of T.F. and B.F.'s claims are a declaratory judgment that their constitutional rights as parents were violated when Kettle Moraine refused to honor T.F. and B.F.'s judgment for their daughter due to the school's policy. Now that their daughter is no longer enrolled in Kettle Moraine, T.F. and B.F. do not face continuing potential harm from Kettle Moraine's policy, but it does not change that T.F. and B.F. allege that they have already suffered a harm. T.F. and B.F. need only show nominal damages to sustain a claim. ". . .[N]ominal damages suffice for the vindication of a legal title or right." *Dahlman v. City of Milwaukee*, 131 Wis. 427, 111 N.W. 675, 677 (1907). *See also, Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

When viewed in the light most favorable to T.F. and B.F., the claim of at least nominal damages for a potential violation of their rights as parents to direct the upbringing of their child and is sufficient to survive a motion to dismiss on the issue of mootness.

III. P.W. and S.W., like any other parent, may petition for declaratory relief.

Plaintiffs, P.W. and S.W., have two children currently enrolled in Kettle Moraine and their children are subject to the policy. *(See Doc. #2. ¶¶ 45–46)* Unlike T.F. and B.F., P.W. and S.W. do not allege that they have a child grappling with gender dysphoria or that they have already suffered harm from the current Kettle Moraine policy. P.W. and S.W. simply allege that by virtue of the fact that they have children at Kettle Moraine, they may challenge a policy of the district that they believe interferes with their parental rights.

Kettle Moraine argues that to have standing a party must have a personal stake in the outcome of a case and must be directly affected by the issues in controversy. *Vill. of Slinger*, 2002 WI App 187, ¶ 9. They further argue that a plaintiff's complaint "must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 2317, 138 L.Ed.2d 849, 858 (1997). Kettle Moraine argues that "[m]erely being a parent in a school district and disagreeing with an alleged policy is insufficient to confer standing as a matter of law." *See Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶23, 259 Wis.2d 107. Generally, Kettle Moraine's view is correct – a party must have a personal stake in the outcome of a case, but what Kettle Moraine confuses is that injury is necessary to claim a personal stake.

P.W. and S.W. seek declaratory relief that Kettle Moraine's policy infringes on their parental rights. "A plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief." *Putnam v. Time Warner Cable of SE Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶ 44. The Declaratory Judgment Act's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Wis. Stat. §* 806.04(12). The Act "is primarily anticipatory or preventative in nature." *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307 (1976). It is expressly designed to "allow courts to … resolve identifiable, certain disputes between adverse parties … prior to the time that a wrong has been threatened or committed." *Putnam*, 2002 WI 108, ¶ 43. The Act itself says it "is to be liberally construed and administered," *Wis. Stat. §* 806.04(12), such that declaratory relief is appropriate "wherever it will serve a useful purpose." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42.

The Wisconsin Supreme Court has provided guidance on how to analyze standing and ripeness in declaratory judgment actions. *See Milwaukee District Council 48 v. Milwaukee County*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866. In that case, a union preemptively challenged Milwaukee County's process for denying vested pension benefits to employees who were terminated for cause. *Id.*, ¶¶ 2–3. The Court held that the union had standing and that its claim was ripe, emphasizing that the same would be true for "the vast majority of individual employees," even though "[v]ery few individuals [were] in a position to assert that their termination for 'cause' [was] imminent and that their loss of pension [was] imminent." *Id.*, ¶¶ 45–46. "Waiting until both events actually occur," the Court explained, "would defeat the purpose of the declaratory judgment statute." *Id.*, ¶ 46. The union's goal was to establish "the decision-making process in which an employee is discharged," and both "judicial economy and common sense dictate[d]" that the union could seek a declaration preemptively to avoid the "potential denial of [its members'] pensions," *Id.*, ¶¶ 44–45, 47 (emphasis added).

Like the individual employees in *Milwaukee District Council 48*, P.W. and S.W. need not wait for potential harm from Kettle Moraine's policy to occur for their children before they are entitled to seek declaratory relief on whether the policy violates their parental rights. This is different than the conclusion drawn in *Lake Country Racquet & Athletic Club, Inc.* In that case, the Court concluded Lake Country failed "to bring forth any facts demonstrating any pecuniary loss or the risk of any substantial injury to its interests." *Lake Country Racquet & Athletic Club, Inc.*, 2002 WI App 301, ¶17. [emphasis added] P.W. and S.W. allegation of an infringement on their fundamental right to parent their children is a risk of substantial injury to their interests and is sufficient to survive a motion to dismiss.

IT IS HEREBY ORDERED,

1) Kettle Moraine's motion to dismiss is DENIED.
2) Kettle Moraine shall have 20 days from the date of this Order to file an Answer to the Complaint.
3) The Court shall set this matter for a scheduling conference.

Document (1)

1. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 2022 U.S. Dist. LEXIS 149021*
   Client/Matter: -None-

John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.

United States District Court for the District of Maryland, Southern Division

August 18, 2022, Decided; August 18, 2022, Filed

Case No. 8:20-3552-PWG

Reporter
2022 U.S. Dist. LEXIS 149021 *; 2022 WL 3544256

JOHN AND JANE PARENTS 1, et al., Plaintiffs, v. MONTGOMERY COUNTY BOARD OF EDUCATION, et al., Defendants.

Subsequent History: Appeal filed, 10/03/2022

Core Terms

Guidelines, gender, transgender, nonconforming, public school, rights, privacy, regulations, private right of action, fundamental rights, motion to dismiss, parental rights, confidential, minor child, disclosure, decisions, cases, constitutional right, federal statute, pregnancy, custody, courts, protections, counseling, disclose, matters, records, schools, applied challenge, school personnel

Counsel: **[*1]** For John and Jane Parents 1, John Parent 2, Plaintiffs: Frederick W. Claybrook , Jr., Claybrook LLC, Washington, DC; James Alan Davids, Steven Werner Fitschen, PRO HAC VICE, The National Legal Foundation, Chesapeake, VA.

For Montgomery County Board of Education, Defendant: Alan E Schoenfeld, Simon B Kress, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY; Bruce M Berman, PRO HAC VICE, Alexandra Tucker Stewart, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Shebra L. Evans, individually and in their official capacity as Member of the Montgomery County Board of Education, Brenda Wolff, individually and in their official capacity as Member of the Montgomery County Board of Education, Jeanette E. Dixon, individually and in their official capacity as Member of the Montgomery County Board of Education, Judith Docca, individually and in their official capacity as Member of the Montgomery County Board of Education, Patricia B. O'Neill, individually and in their official capacity as Member of the Montgomery County Board of Education, Karla Silvestre, individually and in their official capacity as Member of the Montgomery County Board of Education, Rebecca Smondrowski, individually **[*2]** and in their official capacity as Member of the Montgomery County Board of Education, Jack R. Smith, individually and in their official capacity as Member of the Montgomery County Board of Education and Montgomery County Superintendent of Schoools, Defendants: Alan E Schoenfeld, Simon B Kress, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY; Bruce M Berman, PRO HAC VICE, Alexandra Tucker Stewart, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For PFLAG Metro DC, FreeState Justice, MoCo Pride Center, The Center for LGBTQ Health Equity - Chase Brexton Health Care, Rainbow Youth Alliance, SMYAL, Whitman-Walker, Inc. / dba Whitman-Walker Health, Amicuss: David Edward Mills, LEAD ATTORNEY, Cooley LLP, Washington, DC; Asaf Orr, PRO HAC VICE, National Center for Lesbian Rights, San Francisco, CA; Jeffrey M Gutkin, Reece Trevor, Ryan O'Hollaren, PRO HAC VICE, Cooley LLP, San Francisco, CA; Paul David Castillo, PRO HAC VICE, LAMBDA Legal Defense and Education Fund, Inc., Dallas, TX.

Judges: Paul W. Grimm, United States District Judge.

Opinion by: Paul W. Grimm

Opinion

MEMORANDUM OPINION

In this action, three parents of Montgomery County Public School ("MCPS") students allege that MCPS's 2020-2021 **[*3]** Guidelines for Student Gender Identity in Montgomery County Public Schools (the "Guidelines") violate their state and federal constitutional rights as parents, as well as various state and federal statutes

and regulations. ECF No. 7, Complaint. Pending before me is the Motion to Dismiss filed by Defendant Montgomery County Board of Education ("MCBE") and its members. ECF No. 32, Defendants' Motion to Dismiss ("Motion"). The Motion has been fully briefed,[1] and an Amicus Brief has been filed in support of MCBE's Motion.[2] I have reviewed the Parties' filings and find that no hearing is necessary. Local Rule 105.6 (D. Md. 2021). For the reasons outlined in this Memorandum Opinion, the Defendants' Motion to Dismiss is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs in this matter, who have filed their claims anonymously, are the adult parents of minor children who presently attend high school in the Montgomery County Public School system ("Parents" or "Plaintiff Parents"). Compl. ¶¶ 3-4. All three Parents also have younger children, who they intend to enroll in MCPS "at some time during their elementary and secondary education." *Id.* The Parents filed this action against MCBE and its members in the **[*4]** Circuit Court for Montgomery County, Maryland, on October 20, 2020, and MCBE removed it to this Court. *Id.*; ECF No. 1, Notice of Removal.

The Parents allege in their Complaint that MCBE has adopted a "Policy," *i.e.*, the Guidelines, "expressly designed to circumvent parental involvement in a pivotal decision affecting" their children's "care, health education, and future." Compl. ¶ 2. The Parents allege that the Guidelines enable school "personnel to evaluate minor children about sexual matters and allow[] minor children, of any age, to transition socially to a different gender identity at school without parental notice or consent." *Id.* The Parents complain that the Guidelines "further require[] school personnel to enable this transition, including by using pronouns other than those consistent with the child's" sex assigned at birth.[3] *Id.* The Complaint contains no specific allegations regarding the application of the Guidelines in counseling their own children, and the Parents do not allege that their own children are transgender or gender nonconforming. *See generally id.*

A. The Guidelines

The Parents attach a copy of the Guidelines, in their entirety, as Exhibit 1 to their Complaint. **[*5]** ECF 7-1, Guidelines. The first substantive page of the Guidelines includes the following introduction:

> Montgomery County Public Schools [] is committed to a safe, welcoming school environment where students are engaged in learning and are active participants in the school community because they feel accepted and valued. To this end, all students should feel comfortable expressing their gender identity, including students who identify as transgender or gender nonconforming. It is critical that all MCPS staff members recognize and respect matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality. To assist in these efforts, MCPS has developed the following guidelines for student gender identity that are aligned with the Montgomery County Board of Education's core values, guidance from the Maryland State Department of Education, and the Montgomery County Board of Education Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency*, which prohibits discrimination, stigmatization, and bullying based on gender identity, as well as sex, gender, gender expression, and sexual **[*6]** orientation, among other personal characteristics. These guidelines cannot anticipate every situation which might occur. Consequently, the needs of each student must be assessed on a case-by-case basis.

Id. at 3.

Immediately following that introduction, the Guidelines identify the following "Goals":

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[1] ECF No. 53, Plaintiffs' Opposition ("Opposition"), and ECF No.54, Defendants' Reply (Reply).

[2] ECF No. 46, Brief of Amici Curiae PFLAG Metro DC; Freestate Justice; The Center for LGBTQ Health Equity - Chase Brexton Health Care; MoCo Pride Center; Rainbow Youth Alliance; SMYAL; and Whitman-Walker, Inc. / DBA Whitman-Walker Health in Support of Defendants' Motion to Dismiss ("Amicus Brief").

[3] I endeavor in this Opinion to use language that is consistent with the terminology provided in Appendix 1 of the American Psychological Association's Guidelines for Psychological Practice With Transgender and Gender Nonconforming People, available at https://www.apa.org/practice/guidelines/transgender.pdf . *See also* the Human Rights Campaign's Glossary of Terms, available at https://www.hrc.org/resources/glossary-of-terms.

• Support students so they may participate in school life consistent with their asserted gender identity;
• Respect the right of students to keep their gender identity or transgender status private and confidential;
• Reduce stigmatization and marginalization of transgender and gender nonconforming students;
• Foster social integration and cultural inclusiveness of transgender and gender nonconforming students;
• Provide support for MCPS staff members to enable them to appropriately and consistently address matters of student gender identity and expression.

Id.

As informed by that backdrop, the Guidelines go on to provide guidance and instructions on how MCPS personnel can provide support and resources to transgender and gender nonconforming students enrolled in Montgomery County Public Schools. The Guidelines address topics including: establishing a gender support plan; protecting student privacy; **[*7]** using the appropriate names and pronouns for transgender and gender nonconforming students; maintaining school records; dress code; participation in gender-based activities including physical education and school-based athletics; dealing with bullying and/or harassment of transgender and gender nonconforming students; and providing transgender and gender nonconforming students with designated safe spaces in their school buildings. Guidelines at 3-5.

Portions of the Guidelines explicitly anticipate parental involvement in developing a gender-support plan for transgender and nonconforming students. Other portions advise MCPS personnel to avoid disclosing a student's gender identity to their parents without the student's consent, particularly if the student has not yet disclosed their gender identity to their parents, or if the student either expects or knows their parents to be unsupportive. Those are the portions of the Guidelines that are primarily at issue in this case. They are reproduced below:

• GENDER SUPPORT PLAN:

○ The principal (or designee), in collaboration with the student and the student's family (if the family is supportive of the student), should develop a plan to ensure **[*8]** that the student has equal access and equal opportunity to participate in all programs and activities at school and is otherwise protected from gender-based discrimination at school. The principal, designee, or school-based mental health professional (e.g., school psychologist or school counselor) should use MCPS Form 560-80, *Intake Form: Supporting Students, Gender Identity*, to support this process and assist the student in participating in school. The completed form must be maintained in a secure location and may not be placed in the student's cumulative or confidential files. While the plan should be consistently implemented by all school staff, the form itself is not intended to be used or accessed by other school staff members. *Id.* at 4.

• COMMUNICATION WITH FAMILIES:

○ Prior to contacting a student's parent/guardian, the principal or identified staff member should speak with the student to ascertain the level of support the student either receives or anticipates receiving from home. In some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be **[*9]** complex and may involve familial conflict. If this is the case, and support is required, the Office of School Support and Improvement or the Office of Student and Family Support and Engagement (OSFSE) should be contacted. In such cases, staff will support the development of a student-led plan that works toward inclusion of the family, if possible, taking safety concerns into consideration, as well as student privacy, and recognizing that providing support for a student is critical, even when the family is nonsupportive. *Id.*

• PRIVACY AND DISCLOSURE OF INFORMATION:

○ All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the *federal Family Educational Rights and Privacy Act (FERPA)*.

Id.

- Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with **[*10]** whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose a student's status to others, including parents/guardians and other school staff members, unless legally required to do so or unless students have authorized such disclosure. It is inappropriate to ask transgender or gender nonconforming students more questions than are necessary to support them at school. *Id.*

• STAFF COMMUNICATION:

- Unless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, MCPS school staff members should use the student's legal name and pronoun that correspond to the student's sex assigned at birth. *Id.* at 5.

Appended to the Guidelines is a copy of MCPS Form 560-80, *Intake Form: Supporting Students, Gender Identity* ("Intake Form"), which is provided by MCPS's Office of Student and Family Support and Engagement. *Id.* at 9-10. The Intake Form indicates that the "school administrator, counselor, or psychologist should complete [the] form with the student," and that the Intake Form is to be kept confidential as part **[*11]** of the process of establishing support for transgender and gender nonconforming students. The Intake Form states:

> Parents/guardians may be involved if the student states that they are aware of and supportive of the student's gender identity. This form should be kept in a secure, confidential location. See distribution Information on Page 2. This form is not to be kept in the student's cumulative or confidential folders.[4] All plans should be evaluated on an ongoing basis and revised as needed.

Id.

The Intake Form also includes a section captioned "Support/Safety for Student," which asks the student: (1) whether their parents are aware of their gender identity; (2) to rank the level of support they have at home on a scale of one to ten; and (3) what considerations should be accounted for if parental support is low or lacking. *Id.*

B. The Complaint

The Plaintiff Parents object to the Guidelines because, they argue, they inappropriately instruct MCPS schools to withhold information from parents regarding their children's gender identity as expressed at school. *See generally* Compl. The Parents assert seven causes of action in their Complaint. *Id.* In Count I, the Parents claim that the Guidelines **[*12]** violate "Maryland Family Law" by interfering with the Parents' statutory right and responsibility to provide their children with "support, care, nurture, welfare, and education." Compl. ¶¶ 44-49 (citing *Md. Code, § 5-203* of the Family Law Article). In Count II, they allege that the Guidelines violate provisions of the Maryland Code of Regulations that require schools to maintain student records and to make those records available for parental review upon request. *Id.* ¶¶ 50-56. The Parents specifically allege that the Guidelines' instruction to keep the Intake Form confidential violates those provisions. *Id.* Count III asserts that the Guidelines violate the Parents' fundamental rights under the Maryland Declaration of Rights to "direct the care, custody, education, welfare, safety, and control of their minor children." *Id.* ¶¶ 57-66. In Count IV, the Parents allege that MCBE's policy "of withholding records from Plaintiff Parents with respect to their children's" gender identity violates the *Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g* ("FERPA"), as incorporated by Maryland law. *Id.* ¶¶ 67-73. In Count V, the Parents allege that by "questioning a student about gender identity and filling out [the Intake Form]" without parental consent," MCBE violates **[*13]** the Protection of Pupil Rights Amendment, *20 U.S.C. § 1232h* ("PPRA"). *Id.* ¶¶ 74-84. In Count VI, the Parents assert that the Guidelines violate the Parents' fundamental right "to direct the care, custody, education, and control of their minor children" under the *Fourteenth Amendment to the United States Constitution*. *Id.* ¶¶ 85-90. And finally, in Count VII, the Parents seek injunctive, declaratory, and monetary relief under *42 U.S.C. 1983*, based on the constitutional and statutory violations they allege in Counts I-VI. *Id.* ¶¶ 91-95; Opp. at 29-30.

Additional facts will be provided below as needed.

[4] In an apparent contradiction, the distribution information on Page 2 states that a copy of the Intake Form *should* be placed in the "School Confidential folder (in principal's office)."

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6) provides that a complaint must be dismissed if it "fails to state a claim upon which relief can be granted." The purpose of the rule is to test the sufficiency of the complaint, not to address its merits. Presley v. City of Charlottesville, 464 F.3d 480, 483 (4th Cir. 2006). To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The claim for relief must be plausible, and "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678-79.

When reviewing a motion to dismiss, the Court must accept the well pleaded facts in the operative complaint, and also may "consider documents **[*14]** attached to the complaint, as well as documents attached to the motion to dismiss, if they are integral to the complaint and their authenticity is not disputed." Sposato v. First Mariner Bank, No. CCB-12-1569, 2013 U.S. Dist. LEXIS 45806, 2013 WL 1308582, at *2 (D. Md. Mar. 28, 2013) (citing Philips v. Pitt County Memorial Hosp., 572 F.3d 176, 180 (4th Cir. 2009)). Significantly, when there is a conflict between the allegations of the complaint and an attached written instrument, "the exhibit prevails." Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991).

DISCUSSION

I. Constitutional claims

A. The nature of the right asserted

The core claims in this action relate to the alleged violation of the Plaintiff Parents' substantive rights under the Due Process Clause of the Fourteenth Amendment to "direct the care, custody, education, and control of their minor children." Compl. ¶ 62. The Fourteenth Amendment's Due Process Clause protects the rights specifically enumerated in the first eight amendments to the United States Constitution, as well as "some rights that are not mentioned in the Constitution" but that are "deeply rooted in this Nation's history and tradition" and that are "implicit in the concept of ordered liberty." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 213 L. Ed. 2d 545, 2022 WL 2276808, at *7 (U.S. 2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)).

"The first (and often last) issue" when a plaintiff raises a substantive due process challenge under the Fourteenth Amendment "is the proper characterization of the individual's asserted right," and the determination of whether that right is fundamental. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 393 (6th Cir. 2005). Government actions that infringe on fundamental constitutional rights are subject to strict scrutiny and **[*15]** must be narrowly tailored in furtherance of a compelling government interest to pass constitutional muster. Bostic v. Schaefer, 760 F.3d 352, 377 (4th Cir. 2014). Government actions that do not implicate a fundamental right need only clear the significantly lower hurdle of bearing a "rational" relationship to a "legitimate" government interest. Cap. Associated Indus., Inc. v. Stein, 922 F.3d 198, 210 (4th Cir. 2019).

To identify the nature of the Parents' asserted right, I must look to the Guidelines themselves. The Plaintiff Parents claim that the Guidelines instruct MCPS employees to "withhold[] information from parents with respect to their children's" gender identity, and that they implicitly "encourage children to distrust their parents" by asking children whether they wish to disclose their gender identities to their parents, and whether they anticipate receiving parental support. Opp. at 14. The Parents appear, moreover, to argue that the Guidelines reveal that MCBE has an agenda. Specifically, the Parents argue that the Guidelines require school personnel to "hide relevant information from parents because [] they do not want parents to have input on the topic [of gender identity] with their children" and that, in so doing, "MCBE has adopted a very definite position on this sensitive topic." Opp. at **[*16]** 17.

Having read the Guidelines carefully, I conclude that the Plaintiffs' reading is unsupported by the Guidelines' plain language for several reasons.

First, the language of the Guidelines makes clear that they are not intended to be inflexibly applied to every transgender and gender nonconforming student. Quite to the contrary, the Guidelines' introduction explicitly states that they "cannot anticipate every situation which might occur" and that "consequently, the needs of each student must be assessed on a case-by-case basis." Guidelines at 3. On the next page, they state again that

"each student's needs should be evaluated on a case-by-case basis, and all [gender support] plans should be evaluated on an ongoing basis and revised as needed." *Id.* at 4. The Intake Form reiterates that "all plans should be evaluated on an ongoing basis and revised as needed." *Id.* at 4. This repeated language demonstrates that the Guidelines are designed to apply flexibly in varied and evolving circumstances which, given the complexity and sensitivity of issues surrounding gender identity, are not conducive to a one size fits all approach.[5] Far from commanding the alleged interference with the parental rights **[*17]** that the Plaintiffs describe, the Guidelines carefully balance the interests of both the parents and students, encouraging parental input when the student consents, but avoiding it when the student expresses concern that parents would not be supportive, or that disclosing their gender identity to their parents may put them in harm's way. Put another way, to borrow from MCBE's Motion, "the Guidelines are just that—Guidelines." Motion at 14.

Second, the Guidelines cannot fairly be read to adopt a policy of excluding parents, inasmuch as they actively encourage familial involvement in the development and implementation of a transgender or gender nonconforming student's "Gender Support Plan" whenever possible. The Guidelines advise, for example, that the "principal (or designee), ***in collaboration with the student and the student's family (if the family is supportive of the student)***, should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school[.]" Guidelines at 4 (emphasis added). It is true that the Guidelines advise speaking with transgender and gender nonconforming students before **[*18]** contacting their families "to ascertain the level of support the student either receives or anticipates receiving from home," but it is also clear that familial involvement is preferred and encouraged, unless a student indicates that their family is not supportive of their gender identity. *Id.* The Guidelines caution that "in some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance." *Id.* Even in those cases, the Guidelines provide that "staff will support the development of a student-led plan that ***works toward inclusion of the family***, if possible, taking safety concerns into consideration, as well as student privacy, and recognizing that providing support for a student is critical, even when the family is nonsupportive." *Id.* (emphasis added). The Guidelines recognize that "matters of gender identity can be complex and may involve familial conflict," and advise providing additional resources in such cases. *Id.* ("If this is the case, and support is required, the Office of School Support and Improvement or the Office of Student and Family Support and Engagement (OSFSE) should be contacted."). **[*19]** In sum, the Guidelines neither mandate nor encourage the exclusion or distrust of parents, but aim to include parents and other family in the support network they are intended to create.

Finally, the language that the Plaintiff Parents find objectionable must be read in the context of the Guidelines as a whole. The Guidelines were developed in furtherance of MCPS's commitment "to a safe and welcoming school environment where students are engaged in learning and are active participants in the school community because they feel accepted and valued." *Id.* at 3. To that end, the Guidelines state that "all students should feel comfortable expressing their gender identity" and that it "is critical that all MCPS staff members recognize and respect matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality." The Guidelines' purpose of maintaining the comfort, privacy, and safety of transgender and gender nonconforming students must inform how they are read and how they can reasonably be expected to be implemented. And that includes those portions of the Guidelines that advise obtaining **[*20]** a transgender or gender nonconforming student's consent before disclosing their gender identity to their parents.

My review of the Guidelines reveals that the Plaintiff Parents' argument is based on a selective reading that distorts the Guidelines into a calculated prohibition against the disclosure of a child's gender identity that aims to sow distrust among MCPS students and their families. In reality, the Guidelines instruct MCPS staff to keep a student's gender identity confidential until the student consents to the disclosure out of concern for the

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[5] This is further evidenced by the absence of definitive language in the portions of the Guidelines that address confidentiality, *i.e.*, "a student's transgender status, legal name, or sex assigned at birth ***may*** constitute confidential medical information . . . The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose a student's status to others, including parents/guardians and other school staff members, ***unless*** legally required to do so or ***unless*** students have authorized such disclosure . . . MCPS school staff members ***should*** use the student's legal name . . . ." (emphasis added).

student's well-being, and as a part of a more comprehensive gender support plan that anticipates and encourages eventual familial involvement whenever possible.

Accordingly, in assessing the constitutionality of the Guidelines, I must consider whether the Plaintiffs constitutional rights as parents encompasses a fundamental right to be promptly informed of their child's gender identity, when it differs from that usually associated with their sex assigned at birth, regardless of their child's wishes or any concerns regarding the detrimental effect the disclosure may have on that child. As explained below, there is no such fundamental right **[*21]** under the *Due Process Clause of the Fourteenth Amendment*.

B. The Guidelines are subject to rational basis review, which they satisfy

The Supreme Court has long held that a parent's right to make decisions regarding the care, custody, and control of their children is a "fundamental liberty interest," which includes the right to "direct the upbringing and education of children under their control." *Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)*; *Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15* ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). "The Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education," but "it is clear that the right is neither absolute nor unqualified." *Bailey v. Virginia High Sch. League, Inc., 488 F. App'x 714, 716 (4th Cir. 2012)* (quoting *C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3rd Cir.2005)*).

The Supreme Court first recognized a parent's right to direct the education of their children in *Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)*. In *Meyer*, the Court concluded that parents are constitutionally entitled to seek out a specific kind of education (in *Meyer*, German language instruction) under the *Fourteenth Amendment's Due Process Clause*. Two years later, in *Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)*, the Supreme Court applied *Meyer* and held that a state law **[*22]** requiring parents to send their children to public school was unconstitutional because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce, 268 U.S. at 534* (citing *Meyer, 262 U.S. at 390*).

The Plaintiff Parents rely heavily on the broad language in *Meyer* and *Pierce* in support of their argument that strict scrutiny should apply in this case.[6] But subsequent Supreme Court decisions have emphasized that the rights identified in *Meyer* and *Pierce* are limited. The Court has noted, for example, that *Pierce* "len[ds] no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." *Runyon v. McCrary, 427 U.S. 160, 177, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)* (quoting *Yoder, 406 U.S. at 239* (White, J. concurring)). Instead, *Pierce* "held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools." *Id.* In another subsequent

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[6] The Plaintiff Parents also cite to the Supreme Court's more recent opinion in *Troxel v. Granville, 530 U.S. at 65*. *Troxel* is a plurality opinion, which was decided in a very different context. In *Troxel*, the Court was asked to review what Justice O'Connor characterized as a "breathtakingly broad" statute that allowed "any person" to petition a court for visitation rights, and permitted the court to order visitation with any such person if it was deemed to serve the child's best interests. *Id.* In other words, *Troxel* is a decision related to parent's fundamental right to direct their child's "care, custody, and control," — it has nothing to do with a parent's right to dictate the actions or inactions of a public school system. At least two federal circuits have distinguished *Troxel* on that basis. *See Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008)* ("*Troxel* is not so broad as plaintiffs assert. The cases cited by the Court in *Troxel* as establishing this parental right pertain either to the custody of children, which was also the issue in dispute in *Troxel*, or to the fundamental control of children's schooling, as in *Yoder*."); *Leebaert v. Harrington, 332 F.3d 134, 141-42 (2d Cir. 2003)* ("But there is nothing in *Troxel* that would lead us to conclude from the Court's recognition of a parental right in what the plurality called 'the care, custody, and control' of a child with respect to visitation rights that parents have a fundamental right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach[.]"). Furthermore, the plurality in *Troxel* did not identify the level of constitutional scrutiny they applied in concluding that the challenged statute violated the parent's due process rights. *Troxel, 530 U.S. at 80* (Thomas, J., concurring in the judgment) ("The opinions of the plurality . . . recognize such a right, but curiously none of them articulates the appropriate standard of review.").

decision, the Court again "stressed the 'limited scope of *Pierce*'" as "simply 'affirm[ing] the right of private schools to exist and to operate." *Id.* (quoting *Norwood v. Harrison, 413 U.S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1972)*).[7]

The Fourth Circuit has recognized the limitations on the parental **[*23]** rights established in *Meyer* and *Pierce* and has rejected the application of strict scrutiny to claims regarding a parent's right to direct a child's education that do not include a religious element. The Fourth Circuit explored the relevant law in detail in *Herndon v. Chapel Hill-Carrboro Board of Education, 89 F.3d 174 (4th Cir. 1996)* and concluded that the Supreme Court had never expressly determined the appropriate standard of constitutional review for claims involving parental rights in the educational context.[8]*Herndon v. Chapel Hill-Carrboro Board of Education, 89 F.3d 174 (4th Cir. 1996)*. The closest the Supreme Court had come, the Fourth Circuit found, was in *Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)*, in which the Supreme Court "overturned convictions of Amish parents for removing their children from school before age sixteen." *Herndon, 89 F.3d at 178*. *Yoder* reaffirmed that "parental rights are among the liberties protected by the Constitution," and held that "when those rights combine with *First Amendment* free exercise concerns . . . they are fundamental." *Herndon, 89 F.3d at 178*. It did not, however, determine "whether the parental rights standing alone, in nonreligious contexts, are 'fundamental' in the constitutional sense[.]" *Id.*

Herndon went on to note that both *Yoder* and the Supreme Court's later decision in *Runyon v. McCrary* contain "instructive dicta" indicating that rational basis is the appropriate standard of constitutional review for claims that involve a parent's **[*24]** right to direct their child's public school education in the absence of a related Free Exercise concern.[9] *Id.* (citing *Yoder, 406 U.S. at 215* ("We must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to *reasonable* state regulation of education if it is based on purely secular considerations.") (emphasis provided in *Herndon*); *Runyon, 427 U.S. at 163* ("The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by *reasonable* government regulation.") (emphasis provided in *Herndon*). The Fourth Circuit summarized the collective effect of the Supreme Court authority on the subject as follows:

> From *Meyer* to *Runyon*, the Supreme Court has stated consistently that parents have a liberty interest, protected by the *Fourteenth Amendment*, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with **[*25]** equal consistency that reasonable regulation by the state is permissible even if it conflicts with that interest. **That is the language of rational basis scrutiny**.

Id. at 178 (emphasis added).

Other federal circuits have likewise concluded that the *Meyer-Pierce* line of cases do not establish a "fundamental right" for parents to dictate the nature of their children's education in public schools that requires the application of strict scrutiny. The Sixth Circuit, in rejecting a constitutional challenge to a school dress code, stated:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school

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[7] *See also* *Leebaert v. Harrington, 332 F.3d 134, 140 (2d Cir. 2003)* (explaining that *Meyer* "protected 'the subject matter ... taught at... private school' and that [] [*Pierce*] established a parental right to 'send ... children to a particular private school rather than a public school.'").

[8] The Fourth Circuit noted that *Meyer* and *Pierce* were both decided in the 1920s, and that the now-familiar "tiered framework" was not articulated until 1961, and "was not expressly embraced by a majority of the [Supreme] Court until 1971." *Id.* (citing *Poe v. Ullman, 367 U.S. 497, 548, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961)* (Harlan, J., dissenting); *Graham v. Richardson, 403 U.S. 365, 375, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971)*).

[9] There has been "a great deal of discussion and disagreement" among the Circuits Courts regarding "hybrid" claims that allege both an infringement on a parental right and a Free Exercise claim. *Parker, 514 F.3d at 97-99*. Here, the Plaintiff Parents allude to religious concerns but do not raise a Free Exercise claim. *See* Opp. at 26-27.

> discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395-96 (6th Cir. 2005) (emphasis in original).

The Second Circuit similarly rejected a parent's claim that he was constitutionally **[*26]** entitled to exempt his child from a mandatory health education class and found that "*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught. . . . [The] recognition of such a fundamental right . . . would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children." *Leebaert, 332 F.3d at 141*. And the Ninth Circuit, affirming the dismissal of a *§ 1983* action against a public school district for distributing a survey to elementary aged students that included questions about sex, held that "there is no fundamental right of parents to be the ***exclusive*** provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it. We also hold that parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." *Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1200 (9th Cir. 2005)*.

Discussion of the above-summarized cases is conspicuously **[*27]** absent from the Plaintiff Parents' Opposition. Most notably, the Plaintiff Parents make no attempt to distinguish *Herndon*, which MCBE explicitly, and correctly, cites as controlling authority in this case. Instead, the Plaintiff Parents cite the Eleventh Circuit's decision in *Arnold v. Board of Education of Excambia County, Alabama, 880 F.2d 305 (11th Cir. 1989)* as the case "most analogous" to this one. Opposition at 6-7. The *Arnold* Court summarized the relevant facts as follows:

> On March 10, 1986, Jane Doe and John Doe discovered that Jane was pregnant. On March 27, 1986, Kay Rose summoned Jane to her office for counseling. After speaking with Jane, Rose summoned John Doe to her office where he admitted paternity. At the expense of the school board, Rose procured a pregnancy test for Jane which proved positive. Rose informed [Vice Principal] Powell of Jane's pregnancy on April 2, 1986.
>
> The counselors then allegedly coerced the children to agree to abort the child. Because the children were financially unable to afford the medical services attendant to an abortion, the school officials paid Jane and John to perform menial tasks for them. On May 8, 1986, Powell allegedly gave $20.00 to the individual who drove the children to the medical facility in Mobile, Alabama where Jane obtained **[*28]** the abortion.
> The complaint alleges that Rose and Powell "coerced" the children "in diverse respects and so fundamentally imposed their wills upon the children that the children were unable to exercise any freedom of choice with regard to the decision whether or not to agree to the termination of the pregnancy." Further, the plaintiffs allege that the school officials "coerced these children to refrain from notifying their parents regarding the matter" and "to maintain the secrecy of their plan" to obtain an abortion for Jane.

Id at 308-09.

Based on those extreme facts (entirely absent here), the Eleventh Circuit concluded that "a parent's constitutional right to direct the upbringing of a minor is violated when the minor is **coerced** to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion; a decision which touches fundamental values and religious beliefs parents wish to instill in their children." *Id. at 312* (emphasis added).

Arnold clearly is distinguishable from this case. Here, the Parents allege no specific facts regarding the application of the Guidelines to a particular student, but argue that they nevertheless rise to the same level of coercive interference with **[*29]** the parent-child relationship and familial privacy as a school counselor actively discouraging students from disclosing their pregnancy, coercing them to obtain an abortion, and assisting them in raising the funds to finance it. The plain language of the Guidelines belies the Parents' position, particularly given that the Guidelines actively ***encourage*** parental participation in developing a student's gender support plan. ***See*** Section A, ***above***.

Furthermore, the Plaintiff Parents ignore critical language in the *Arnold* opinion that directly undermines

their argument. Far from mandating parental notification, the Eleventh Circuit in *Arnold* took pains to emphasize that the decision to notify the parents of the pregnancy rested with the student herself. In other words, the constitutional issue in *Arnold* arose out of school personnel coercing the students not to notify their parents, not from their failure to notify the parents themselves (regardless of the students' wishes). Equally noteworthy is the failure of the Plaintiff Parents to acknowledge the Eleventh Circuit's recognition of the importance of the minor student's own discretion regarding whether to seek parental involvement:

> **[W]e are not, as appellees [*30] argue, constitutionally mandating that counselors notify the parents of a minor** who receives counseling regarding pregnancy. We hold merely that the counselors must not coerce minors to refrain from communicating with their parents. **The decision whether to seek parental guidance, absent law to the contrary, should rest within the discretion of the minor**. As a matter of common sense, **not constitutional duty**, school counselors should encourage communication with parents regarding difficult decisions such as the one involved here.

Arnold, 880 F.2d at 314.

The Plaintiff Parents also cite as analogous the Third Circuit's decision in *Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000)*. Like *Arnold, Gruenke* involves an extreme example of school personnel becoming unduly involved in a student's pregnancy. In *Gruenke*, a high school swim coach forced one of his seventeen-year-old team members to take a pregnancy test, and went on to spread rumors about her pregnancy in the school community, all without informing the teen's parents. *Id. at 308-09*. A guidance counselor was aware of the situation, but did not encourage the swim coach to disclose the pregnancy to the student's parents, and did not inform the parents herself. The Third Circuit, citing *Arnold*, noted it had "considerable doubt about **[*31]** [the school counselor's] right to withhold information of this nature from the parents," and went on to conclude that the swim coach's actions established "an unconstitutional interference" with familial relations and privacy, noting specifically that the coach "was not a counselor whose guidance was sought by a student, but instead, someone who was acting contrary to her express wishes that he mind his own business." *Id.* In that context, the Third Circuit noted:

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. Public schools must not forget that "in loco parentis" does not mean "displace parents."
>
> It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the [Supreme] Court's admonitions that "[t]he child is not the mere creature of the State," *Pierce, 268 U.S. at 535*, and that it is the parents' responsibility **[*32]** to inculcate "moral standards, religious beliefs, and elements of good citizenship." *Yoder, 406 U.S. at 233*.

Id.

The Third Circuit's point regarding the primacy of the parents over educators in counseling their children is well taken, but *Gruenke* bears little factual resemblance to this case. Although the Plaintiff Parents claim that the Guidelines "cut [] parents out of the action systemically if they are deemed unsupportive," the Guidelines themselves contain no such rigid policy, and the Parents have not alleged any facts that suggest that any member of MCPS staff has applied them in that way, let alone that anyone at MCPS either "coerced" a transgender or gender nonconforming student to withhold information from their parents, or "affirmatively interfered with" any parent's constitutional rights.[10]

This Opinion should not be read to foreclose the possibility that, under some circumstances, a school actor may impermissibly interfere with the parental role in counseling a transgender or gender nonconforming child. One can envision a scenario in which interference by school personnel **[*33]** might rise to the level

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[10] *See Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health, 503 F.3d 256, 266 (3d Cir. 2007)* ("We recognized in *Gruenke* that '[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children....' **However, that recognition does not extend to circumstances where there is no manipulative, coercive, or restraining conduct by the State**.") (emphasis added).

described in *Arnold* or *Gruenke*. But due to the nature of the Guidelines, and because the Plaintiff Parents challenge the Guidelines on their face, this case bears a much closer resemblance to those addressing curricular challenges and other public school policy decisions, which are subject to rational basis review.

Additionally, despite the Parents' assertion that they "are not attempting to dictate a curriculum about transgenderism or to change MCBE bullying guidelines," the Plaintiff Parents' Opposition strongly suggests that their objections to the Guidelines are not limited to the portions addressing parental disclosure. The Opposition states that the Guidelines "assume that transgenderism is a normal, and normative, condition," and offers as a counterpoint various "scientific," "philosophical," "medical," and "religious" bases in support of the Plaintiffs' presumably contrary view. But it is clear in the case law that parents do not have a constitutional right to dictate a public school's curriculum or its approach to student counseling, for any of those reasons. *See, e.g., Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008)* (finding no violation of parental rights, privacy rights, or free exercise rights when a public **[*34]** school district included books depicting same sex relationships in its curriculum); *Blau, 401 F.3d at 395-96*. As the Ninth Circuit explained in the context of a challenged sexual education curriculum:

> Neither *Meyer* nor *Pierce* provides support for the view that parents have a right to prevent a school from providing any kind of information—sexual or otherwise—to its students. . . . *Meyer* and *Pierce* do not encompass [the] broad-based right [the parent-plaintiffs seek] *to restrict the flow of information* in the public schools. Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District—whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be **[*35]** impossible to satisfy.

Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist., 447 F.3d 1187 (9th Cir. 2006)*.[11]

Accordingly, in light of the authority summarized above, I conclude that MCBE correctly argues that rational basis review applies to this claim regarding the Guidelines' alleged violation of the Plaintiff Parents' right to direct their children's education. And because the Guidelines are subject to rational basis review, the Guidelines need only "bear some rational relationship to a legitimate state interest" to pass constitutional muster. *Herndon, 89 F.3d at 179* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 32, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973)*.

MCBE easily meets that standard. MCBE certainly has a legitimate interest in providing a safe and supportive environment for all MCPS students, including those who are transgender and gender nonconforming. And the Guidelines are certainly rationally related to achieving that result.

Even assuming momentarily that the Guidelines *were* subject to strict scrutiny (they are not), I would conclude that they satisfy that standard as well. To survive strict scrutiny, MCBE **[*36]** would be required to demonstrate that the Guidelines are narrowly tailored in furtherance of a compelling government interest. *Bostic, 760 F.3d at 377*. MCBE argues that the Guidelines further their compelling interest in: (1) "protecting their students' safety and ensuring a 'safe, welcoming school environment where students . . . feel accepted and valued'"; (2) "not discriminating against transgender and gender nonconforming students"; and (3) "protecting student privacy." Motion at 18-20.

The law cited by MCBE supports finding that its interest is compelling. The Supreme Court has found it "evident beyond the need for elaboration that a State's interest in

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[11] *See also C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005)* ("Further, while it is true that parents, not schools, have the primary responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship, a myriad of influences surround middle and high school students everyday, many of which are beyond the strict control of the parent or even abhorrent to the parent. . . . A **parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in the family's moral or religious context**, or to supplement the information with more appropriate materials.") (emphasis added).

safeguarding the physical and psychological well-being of a minor is compelling," and as a result has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber, 458 U.S. 747, 756, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)* (internal quotations and citations omitted). More recently, the Supreme Court has held that transgender individuals are protected from discrimination under Title VII. *Bostock v. Clayton County, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)*. Guided by that conclusion, the Fourth Circuit has held that the same is true under Title IX, and held **[*37]** that a school's policy requiring a transgender student to use the bathroom based on his sex assigned at birth to be in violation of the statute. *Grimm v. Gloucester Cnty School Bd., 972 F.3d 586 (4th Cir. 2020)*. In that same decision, the Fourth Circuit also found, applying intermediate scrutiny, that the school's bathroom policy violated the student's rights under the *Equal Protection Clause*, and it recognized a school's "interest in protecting student's privacy" as "important." *Id.*; *see also* *Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health, 503 F.3d 256, 271 (3d Cir. 2007)* (recognizing that "minors are individuals who enjoy constitutional rights of privacy under substantive due process.").

Furthermore, MCBE's concerns about the safety and well-being of transgender and gender nonconforming students in particular are neither theoretical nor fanciful. Research demonstrates that transgender and gender nonconforming students are substantially more likely to be bullied or harassed than their cisgender peers. *See, e.g.*, Amicus Brief at 6 and sources cited therein.[12] The Plaintiff Parents themselves acknowledge that transgender and gender nonconforming students are at a heightened risk of suicide. Compl. ¶ 15; Motion at 26. The Maryland Department of Education noted in its 2015 "Guidelines for Gender Identity Non-discrimination," that "research indicates that **[*38]** 80 percent of transgender students feel unsafe a school because of who they are," leaving students unable to focus on their education, and leading some students to miss classes or leave school entirely.[13] And all of these concerns are compounded when a student also lacks support at home. *See* Amicus Brief at 9-13. For those reasons, I agree with MCBE that the Guidelines further a compelling state interest.

I also agree that the Guidelines are narrowly tailored in furtherance of that interest. The Guidelines do not aim to exclude parents, but rather anticipate and encourage family involvement in establishing a gender support plan. Guidelines at 4. Even where family support is lacking, the inclusion of family is identified as an eventual goal. *Id.* The Guidelines, on their face, are noncoercive, and serve primarily as a means of creating a support system and providing counseling to ensure that transgender children feel safe and well at school. And, importantly, they apply to each student on a case by case basis.[14] By advising that school personnel keep

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[12] The Fourth Circuit, too, recognizes these heightened risks. *Grimm, 972 F.3d at 597* ("77% of respondents who were known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff."). Just this week, the Fourth Circuit reiterated that individuals suffering from gender dysphoria (which, as the Fourth Circuit explains, is not the same thing as simply being transgender) are at risk of depression, substance abuse, self-harm, and suicide. *Williams v. Kincaid, No. 21-2030, 45 F.4th 759, 2022 U.S. App. LEXIS 22728, 2022 WL 3364824, at *5 (4th Cir. Aug. 16, 2022)*.

[13] These Maryland Department of Education guidelines, which MCBE's Guidelines substantially track, advise that transgender and gender nonconforming students should be permitted "to discuss and express their gender identity openly and to decide, when, with whom, and how much private information may be shared." Md. State Dep't of Educ., Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination, (2015), available at https://www.marylandpublicschools.org/about/Documents/DSFSS/SSSP/ProvidingSafeSpacesTransgendergenderNonConformingYouth012016.pdf

[14] The Parents filed a Notice of Supplemental Authority, ECF No. 58, directing my attention to the District of Kansas's decision in *Ricard v. USD 475 Geary Cnty, KS, School Board, No. 522CV04015HLTGEB, 2022 U.S. Dist. LEXIS 83742, 2022 WL 1471372 (D. Kan. May 9, 2022)*, in which the District of Kansas granted a preliminary injunction to a teacher on First Amendment grounds. The teacher in that case argued that the policy of prohibiting the disclosure of a student's gender identity at school (if it differs from that usually associated with their sex assigned at birth) absent the student's consent violated her Christian beliefs that "the Bible prohibits dishonesty and lying." *2022 U.S. Dist. LEXIS 83742, [WL] at 4*. Although the opinion was decided on First Amendment grounds, the District of Kansas noted in its analysis, citing *Troxel, 530 U.S. at 65*, that "parents have a constitutional right to control the upbringing of their children," identified that right as fundamental, and therefore concluded that "whether the [school district] likes it or not, that constitutional right includes the right of a parent to have a say in what a minor child is called and by what pronouns they are

a transgender or gender nonconforming student's gender identity confidential unless and until that student consents to disclosure, they both **[*39]** protect the student's privacy and create, as MCBE puts it "a zone of protection . . . in the hopefully rare circumstance when disclosure of [the student's] gender expression while at school could lead to serious conflict within the family, and even harm." Motion at 28. If the Guidelines mandated parental disclosure as the Plaintiff Parents urge, their primary purpose of providing transgender and gender nonconforming students with a safe and supportive school environment would be defeated. A transgender child could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes or the consequences of the disclosure. Accordingly, I find that, although they are subject only to rational basis review, the Guidelines also satisfy both prongs of the strict scrutiny analysis.

For those reasons, I conclude that the Plaintiff Parents' facial challenge under the *Due Process Clause of the Fourteenth Amendment* fails as a matter of law and must be dismissed. And because amendment would be futile, it is dismissed with prejudice.

C. The Plaintiffs have failed to plead an as applied challenge

The Plaintiff Parents allege **[*40]** in their Complaint that they challenge the Guidelines on their face and as applied. Compl. ¶ 11. As discussed above, however, both the Complaint and the Parents' Opposition to MCBE's Motion to Dismiss are devoid of any specific factual allegations that might support an as applied challenge. The closest the Parents have come to asserting facts challenging any specific application of the Guidelines relating to them is to allege in their Complaint that, "[u]pon information and belief, MCBE has instructed MCPS personnel not to make completed MCPS Form[] 560-80 [(the Intake Form)] available to the parents of minor children . . . unless the minor child consents to its disclosure to the parents" and to allege that "MCPS personnel have been trained in the MCPS Policy and have conformed their behavior and practices with the MCPS Policy, including by withholding information from parents about their child's transgender election at school if the child has not desired that information to be transmitted to the parents and by keeping such information out of the school records to which parents are given access." Compl. ¶¶ 26-28. These generalized allegations are plainly insufficient to challenge the **[*41]** Guidelines as applied.

Fed. R. Civ. P. 11(b)(3) instructs that when an attorney presents the court with a "pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it," that attorney "certifies that to the best of [their] knowledge, information, and belief, formed after reasonable inquiry under the circumstances . . . the factual contentions have evidentiary support or, ***if specifically so identified***, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" *Id.* (emphasis added). This rule "was not intended to allow naked speculation or to relieve parties from their duties to perform a pre-submission investigation. Rather, it simply recognizes that there will be times when parties 'have good reason to believe that a fact is true' but need further factfinding or discovery to assemble the supporting proof." Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure Rules and Commentary 274 (2022 Ed.) (citing *Fed. R. Civ. P. 11* advisory committee's note (1993)). "To rely on this provision, the party must specifically identify that the factual contention is being

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referred." *2022 U.S. Dist. LEXIS 83742, [WL] at 8*. But there is nothing in the MCBE Guidelines that divests parents from having a say in what a minor child is called or by what pronoun they are referred. I note as well that the court in *Ricard* specifically observed that "the Court can envision that a school would have a compelling interest in refusing to disclose information about [] names or pronouns when there is a particularized and substantiated concern that disclosure to a parents could lead to child abuse, neglect, or some other illegal conduct" and that an "appropriately tailored policy would, instead, make an individualized assessment whether there is a particularized and substantiated concern of real harm—as opposed to a generalized concern of parental disagreement—and prohibit disclosure only in those limited instances." *2022 U.S. Dist. LEXIS 83742, [WL] at 8*. The Guidelines in this case closely resemble the "appropriately tailored" policy imagined by the court in *Ricard*.

The Parents more recent Notice of Supplemental Authority, ECF No. 57, cites a dissenting opinion from the Supreme Court of Wisconsin, which is, obviously, not binding on this Court (or any other). *See* *Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, 403 Wis. 2d 369, 976 N.W.2d 584 (Wi. 2022)*. It also cites the opinion of the Middle District of Alabama in *Eknes-Tucker v. Marshall, No. 2:22-CV-184-LCB, 2022 U.S. Dist. LEXIS 87169, 2022 WL 1521889, at *4 (M.D. Ala. May 13, 2022)*, which affirmed a parent's fundamental right to direct their children's medical care and enjoined the enforcement of a statute that forbade treating transgender children with medically prescribed hormones. That issue is not before me in this case.

made on that basis." *Id.*

The Plaintiff Parents were afforded **[*42]** but declined the opportunity to amend their Complaint to address its alleged deficiencies before MCBE filed its Motion to Dismiss. ECF No. 29, Paperless Order Memorializing 1/19/21 Pre-Motion Conference. And they did not indicate either in their Complaint or their Opposition to MCBE's Motion to Dismiss that obtaining the evidentiary support for their allegations related to the application of the Guidelines would require further investigation or discovery. Accordingly, because they failed to invoke *Rule 11(b)* and failed to plead sufficient facts to support an as applied challenge, their as applied challenge must be dismissed. The Plaintiffs' as applied challenge is dismissed without prejudice, but without leave to amend. *See Britt v. DeJoy, No. 20-1620, 45 F.4th 790, 2022 U.S. App. LEXIS 22844 (4th Cir., August 17, 2022)*, *on reh'g en banc*.

D. The Plaintiffs have failed to state a claim under 42 U.S.C. § 1983

Because the Plaintiffs have failed to plead a federal constitutional violation, Count VII of the Complaint, which alleges a violation of *42 U.S.C. § 1983*, must likewise be dismissed. *Section 1983* provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United **[*43]** States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" *Section 1983* "does not confer any substantive rights; rather, it supplies a remedy for rights conferred by other federal statutes or by the Constitution." *Clear Sky Car Wash LLC v. City of Chesapeake, Va., 743 F.3d 438, 444 (4th Cir. 2014)*. In other words, *Section 1983* simply provides the "mechanism" for an injured party to recover damages from the person who, acting under color of law, violated their rights under the U.S. Constitution or federal statute. *Gonzaga Univ. v. Doe, 536 U.S. 273, 288-290, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)*. Therefore, a plaintiff seeking relief under *Section 1983* must first demonstrate the violation of the Constitution or federal statute.

The only federal claim in the Plaintiff Parents' Complaint (aside from their *Section 1983* claim) is Count VI, alleging MCBE violated the Parents' parental rights under the United States Constitution. As explained in the preceding sections, Count VI is dismissed because the Parents' facial challenge to the Guidelines fails as a matter of law, and the Parents have failed to plead an as applied challenge. Accordingly, without any violation of federal law to form the basis for a *Section 1983* claim, Count VII must also be dismissed without prejudice and without leave to amend. **[*44]** *See Britt v. DeJoy, No. 20-1620, 45 F.4th 790, 2022 U.S. App. LEXIS 22844 (4th Cir., August 17, 2022)*, *on reh'g en banc*.

E. The Guidelines do not violate the Maryland Declaration of Rights

The Plaintiff Parents argue next that Count III, which asserts a violation of the Maryland Declaration of Rights, must survive MCBE's Motion to Dismiss because Article 24 provides broader protections than the *Fourteenth Amendment's Due Process Clause*, its federal equivalent. Compl. ¶¶ 57-66; Opp. at 25-26. The Plaintiff Parents cite no law identifying the contours of Article 24's greater protections in the context of this case, but instead urge the Court to "certify the issue[] for definitive resolution by the Maryland Court of Appeals." Opp. at 2-3.

"Pursuant to Maryland law, a court of the United States may certify a question to the Court of Appeals of Maryland if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of [Maryland]." *Antonio v. SSA Sec., Inc., 749 F.3d 227, 234 (4th Cir. 2014)* (quoting *Md. Code, § 12-603* of the Courts and Judicial Proceedings Article). "It is well established that the decision to certify a question to the Court of Appeals of Maryland is not obligatory and "rests in the sound discretion of the federal court." **[*45]** *Hafford v. Equity One, Inc., No. CIV.A. AW-06-0975, 2008 U.S. Dist. LEXIS 31964, 2008 WL 906015, at *4 (D. Md. Mar. 31, 2008)*. "Only if the available state law is clearly insufficient should the court certify the issue to the state court." *Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994)*. When there is guidance available from which a federal court may make a "reasoned and principled conclusion," the federal court should decide the case itself. *Hafford, 2008 U.S. Dist. LEXIS 31964, 2008 WL 906015, at *4*.

There is no question that the scope of the protections of Article 24 is determinative of issues pending in this case. If Article 24 provides the protections urged by the Plaintiff Parents, their claims grounded in Article 24 survive MCBE's Motion to Dismiss. If Article 24 provides the same protections as the *Due Process Clause of the*

Fourteenth Amendment, they do not. The remaining question is whether there is sufficient guidance under Maryland law regarding Article 24's application in this case to decide the issue in this Court.

The Maryland Court of Appeals' "precedent states clearly that the Maryland and Federal due process provisions have been read '*in pari materia*'." Koshko v. Haining, 398 Md. 404, 921 A.2d 171, 194 (Md. 2007) (collecting cases). The Court has also been clear, though, that "this principle of reading the provisions in a like manner does not [] reduce [its] analysis to a mere echo of the prevailing Fourteenth Amendment jurisprudence." *Id.* In certain instances, Maryland's high court has, indeed, "read Maryland's due process clause more **[*46]** broadly than the federal constitution." *Id.*

MCBE acknowledges that Article 24 is not always coextensive with substantive due process under Fourteenth Amendment, but correctly observes that "Plaintiffs cite nothing establishing that Article 24 has a broader reach in *this* context, where parents seek to override the reasonable educational judgments of school authorities." Reply at 18.

The Plaintiff Parents rely on the Maryland Court of Appeals' decision in Koshko v. Haining, in which the Court of Appeals noted the broader protections of Article 24 in the context of child custody and visitation. Opp. at 35. The Parents cite no law, and I have found none, that suggest that Article 24 creates broader protections in the different context of a parent challenging matters of public school policy or curriculum. To the contrary, the Maryland Court of Appeals emphasized in *In re Gloria H.* that Maryland public school systems and boards of education "are vested with control over educational matters . . . . the local authorities are empowered to determine the educational policies within their own school districts." 410 Md. 562, 979 A.2d 710, 721 (Md. 2009) (quoting Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 458 A.2d 758 (Md. 1983)). In the same decision, although it is not itself a constitutional case, the Court of Appeals quoted with approval **[*47]** the following language from the Sixth Circuit's decision in Blau, which in turn relies on the Fourth Circuit's decision in Herndon:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally "committed to the control of state and local authorities."

Blau, 401 F.3d at 395-96 (collecting cases and citing Herndon, 89 F.3d at 176).

This case involves "how" the MCPS teaches its students, and not the issue of the Parent Plaintiffs' fundamental right to decide "whether" to send their children to public school. Further, it does not involve parental rights regarding child custody or visitation. Therefore, it falls squarely within the realm of cases where the Maryland Court of Appeals has favorably cited federal cases, thereby supporting the conclusion that the protections afforded by Article 24 are no broader **[*48]** than are afforded under the Fourteenth Amendment in this context.

Accordingly, I conclude that the fact that Article 24 provides broader protections in contexts unrelated to the issues in this case does not warrant certification and deferral of the state constitutional question in light of the well-established deference to public schools' educational decisions under Maryland law. And, because the Parent Plaintiffs' Fourteenth Amendment claims fail, so too do their Article 24 claims. They are dismissed with prejudice.

II. Statutory Claims

A. Maryland Code § 5-203 of the Family Law Article

In Count I of their Complaint, the Plaintiff Parents allege that "the MCPS Policy of withholding information from parents directly related to their minor children's support, care, nurture, welfare, and education have violated § 5-203 of the Family Article and have directly hindered Plaintiff Parents from carrying out their statutory duties under that section." Compl. ¶ 49. The Parents specifically cite the following subsection:

> (a)(1) The parents are the joint natural guardians of their minor child.
>
> ....
>
> (b) The parents of a minor child, as defined in § 1-103 of the General Provisions Article:

> (1) are jointly and severally responsible for the child's support, care, nurture, welfare, **[*49]** and education; and
> (2) have the same powers and duties in relation to the child.

Md. Code, Fam. Law § 5-203 ("FL").

Based on that language, the Parents assert that they "have the power under the statute to deal with their children's gender dysphoria and to complain when public schools take affirmative steps to restrict their right to do so." Opp. at 27. From there, the Plaintiffs reason that "Section 5-203(b) thus carries with it a common-law right of action for damages and other appropriate relief when violated, just as the parallel constitutional right does." *Id.* MCBE counters that Maryland courts have only cited Section 5-203 and the rights it memorializes in connection with child custody disputes, and "to hold parents responsible for failing to obtain necessary treatment for their children." Motion to Dismiss at 35.

Section 5-203(b) "defines globally the role of a parent," and the powers and duties identified in Section 5-203(b) are "closely associated" with the Maryland Court of Appeals' "long-standing recognition that parents are presumed to act in their children's best interests." BJ's Wholesale Club, Inc. v. Rosen, 435 Md. 714, 80 A.3d 345, 353 (Md. 2013). The Court has explained that there are "clear societal expectations" under Maryland law that "parents should make decisions pertaining to their children's welfare, and that those decisions **[*50]** are generally in the child's best interest." *Id.* Those expectations are "manifest in statutes that enable parents to exercise their authority on behalf of their minor child in the most important aspects of a child's life, including significant physical and mental health decisions" as well as "the most significant decisions pertaining to a child's education and employment." Id. at 354. Regarding those "most significant" educational decisions, the Court of Appeals stated that "parents may: choose to home school their children; and choose to defer compulsory schooling for one year if a parent determines that the child is not mature enough to begin schooling." *Id.* (citing *Md. Code § 7-301* of the Education Article). But the Court did not elaborate any further. This appears to be the closest Maryland courts have come to finding that Section 5-203(b) establishes an actionable right associated with a parent's responsibility for their children's education. The Plaintiff Parents cite no law, and I have found none, invoking Section 5-203(b) to establish a common-law right of action against a public school based on a disagreement with a school's curriculum or counseling policy.

Aside from broadly defining the role of parents, the primary function of Section 5-203 **[*51]** is to establish one parent's rights and obligations vis-à-vis the other. Subsection (a) memorializes the parents' status as "joint natural guardians of their minor child." FL § 5-203(a). Subsection (b) explains that each parent has the "same powers and duties" in relation to their child, and that they are "jointly and severally liable for the child's support, care, nurture, and welfare." FL § 5-203(b). And subsection (d) addresses child custody rights as between two parents, stating that neither is presumed to have a superior right, and that a court may award custody to either parent, or jointly to both.[15] FL § 5-203(d).

Section 5-203(b)'s function is borne out in the caselaw that cites it, which primarily concerns issues regarding child custody, child support, and a parent's obligations to attend to their children's medical needs. *See, e.g.,* Petrini v. Petrini, 336 Md. 453, 648 A.2d 1016, 1018-19 (1994) ("That both parents have a legal as well as a moral obligation to support and care for their children is well-settled in Maryland"). In light of the statutory language of section 5-203(b), its application by Maryland courts in contexts unrelated to the facts of this case, Maryland's well-established deference to public schools' educational decisions (*see* Section I.D., above), and the dearth of on point authority, there is no reason to believe that Maryland courts would read 5-203(b) so broadly as to create the common-law right that the Plaintiff Parents seek to pursue in this case.[16]

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[15] Section 5-203(c) addresses the "duties of parents of minor parents" and is not relevant to the issues presented in this case. It does note, however, that those responsibilities, too, are borne "jointly and severally." FL § 5-203(c).

[16] The Plaintiff Parents further note, without elaboration, that the "Maryland Court of Appeals has repeatedly held that medical care of minor children by their parents is included in its broad scope, *see* Garay v. Overholtzer, 332 Md. 339, 366-69, 631 A.2d 429, 442-44 (1993) (collecting cases), and there is no reason to doubt that that includes gender dysphoria." Opp. at 36. Their Opposition also notes that "[t]ransgenderism, like other medical conditions, although it may need to be addressed while the child is in school, is not part of the primary educational mission for which parents have entrusted their children to the public schools." *Id.* at 18. But the Guidelines do not address medical treatment, and the Plaintiffs do not allege that any MCPS personnel have taken any action to make medical decisions for any transgender or

Accordingly, Count I of the Parents' Complaint is dismissed, and because amendment would be futile, it is dismissed with prejudice.

B. FERPA and PPRA

Count IV of the Parents' Complaint alleges that the "MCPS Policy in withholding records from Plaintiff Parents with respect to **[*52]** their children's" gender identity "is in violation of Family Educational Rights and Privacy Act ('FERPA') and Maryland law that implements FERPA." Compl. ¶ 73. Similarly, in Count V, the Parents assert that the Guidelines are "in contravention of" the Protection of Pupil Rights Amendment ("PPRA") "and its implementing regulations and Maryland law by its incorporation through *Article 2 of the Declaration of Rights*." *Id.* ¶ 84. MCBE argues that both of these claims fail "as a matter of law because Plaintiffs have no private right of action to enforce" FERPA or PPRA under state or federal law. Motion at 22-25. The Parents concede that "FERPA does not provide a federal private right of action" but argue that they have brought their FERPA and PPRA[17] claims "under Maryland law and have sought only declaratory relief related to it." Opp. at 39.

The Parents ground their argument in *Article 2 of the Maryland Declaration of Rights*, which is Maryland's equivalent of the *Supremacy Clause of the United States Constitution*, *U.S. Const. art. VI, cl. 2*. Article 2 provides that "the Laws made . . . under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding." **[*53]** MD. DECL. RTS. art. 2. The Parents reason that Article 2 "incorporates the federal and state regulations" under FERPA and PPRA, "both of which provide rights expressly to the parents," and that because the Parents "are in the class of those directly affected or protected" by those regulations, they "have standing to complain of its violation by public officials and to seek declaratory relief" under Maryland law. Opp. at 39 (citing *Md. Code § 3-409(a)(1)* of the Courts and Judicial Proceedings Article; *Pizza di Joey, LLC v. Mayor of Balt., 470 Md. 308, 235 A.3d 873, 891 (Md. 2020)*).

The Plaintiff Parents do not cite, and I have not found, any Maryland authority that supports their position that Article 2 adopts federal law as state law and creates a private right of action where none exists under the federal statute (or, for that matter, state statute). The closest the Maryland Court of Appeals appears to have come to endorsing that theory is to note that the argument posed "an interesting question," but one that was irrelevant in the case in which it was presented. *See Thomas v. Gladstone, 386 Md. 693, 874 A.2d 434, 437 (Md. 2005)*.

MCBE relies in its Motion to Dismiss on Judge Messitte's opinion in *Bauer v. Elrich, 468 F. Supp. 3d 704 (D. Md. 2020)*, which has since been affirmed by the Fourth Circuit, *8 F.4th 291 (4th Cir. 2021)*. The plaintiffs in *Bauer* were taxpayers who took issue with Montgomery County's Emergency Assistance **[*54]** Relief Payment Program ("EARP") because it provided cash assistance to county resident's "including foreign nationals present in the country without documentation, who meet certain income requirements and do not qualify for state or federal pandemic-related aid." *8 F. 4th at 295*. The plaintiffs in *Bauer* claimed that the EARP violated a federal statute that generally prohibits undocumented persons from receiving state and local benefits. *See 8 U.S.C. § 1621(a)* ("*Section 1621*"). Undeterred by the conceded lack of a private right of action in *Section 1621*, the *Bauer* plaintiffs "styled their claim as arising under the Maryland common law doctrine of taxpayer standing, which permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin" illegal acts by state officials that are "reasonably likely to result in pecuniary loss to the taxpayer." *8 F.4th at 295*. Both this Court and the Fourth Circuit flatly rejected the plaintiffs' argument. *Id.*

The Fourth Circuit in *Bauer* concluded that the "lack of a private right of action in *Section 1621* is fatal to the plaintiffs' claim." *8 F.4th at 299*. The Court went on to explain that the power to create a private right of action with respect to a federal statute rests solely with Congress:

> Because federal law creates the substantive

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gender nonconforming student. Furthermore, the Guidelines specifically note that MCPS "will ensure that all medical information, including that relating to transgender students, is kept confidential *in accordance with applicable state, local, and federal privacy laws*." Guidelines at 4 (emphasis added).

[17] The Parents do not concede but also do not dispute that there is no private right of action under PPRA. Because they have not asserted a claim under PPRA directly, this issue is not before me. *But see Ashby v. Isle of Wight Cnty. Sch. Bd., 354 F. Supp. 2d 616, 623 n. 9 (E.D. Va. 2004)* (noting that PPRA does not "create private causes of action. . . .").

> requirement **[*55]** that the plaintiffs seek to enforce, **we look to federal law to determine whether a private remedy is authorized**. The existence of a private right of action in a federal statute is a pure question of Congressional intent. Given this exclusively legislative role, "courts may not create" a private remedy without evidence of Congress' intent to do so. . . . **The plaintiffs cannot evade this fundamental principle by invoking Maryland's taxpayer standing doctrine to excuse the lack of a Congressionally authorized right of action**. As the Supreme Court recently emphasized, "like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." State courts are not free to ignore the Congressional decision whether to couple a substantive federal requirement with a private right of enforcement; the *Supremacy Clause* binds state courts to follow Congressional directives embodied in federal statutes. **Were we to agree with the plaintiffs' view, state common law would govern whether and how a federal statute may be enforced, irrespective of Congressional intent. Such a rule not only would run afoul of common sense, but also would violate basic constitutional principles [*56]** .

Id. (citations omitted) (emphasis added).

The same is true in this case. The Plaintiff Parents concede that no private right of action is established by FERPA, and they do not pursue a claim directly under the PPRA. The Parents' attempt to invoke Article 2 to establish an implied right of action for private citizens under Maryland common law for violations of those statutes is directly at odds with the Fourth Circuit's decision in *Bauer*. *See also* *Astra USA, Inc. v. Santa Clara Cnty., Cal., 563 U.S. 110, 114, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011)*.

Accordingly, in light of the dearth of relevant Maryland authority[18] and the Fourth Circuit's decision in *Bauer*, there is simply no basis to find a common law right of action for the private enforcement of FERPA or PPRA under Maryland law. And because the Plaintiff Parents have no private right of action under those statutes, their request for declaratory relief likewise fails. *See* *Qwest Commc'ns Corp. v. Maryland-Nat'l Cap. Park & Plan. Comm'n, No. RWT 07CV2199, 2010 U.S. Dist. LEXIS 47009, 2010 WL 1980153, at *11 (D. Md. May 13, 2010)* ("The *Declaratory Judgment Act* cannot be used to circumvent Congress' intent not to provide . . . a private cause of action.).

Accordingly, Counts IV and V of the Complaint must be dismissed, and because amendment would be futile, they are dismissed with prejudice.

C. COMAR

Finally, in Count II of their Complaint, the Plaintiff Parents assert that the Guidelines violate sections of the Maryland **[*57]** Code of Regulations ("COMAR") that govern parental access to student educational records. Compl. ¶¶ 50-56. MCBE argues that the Guidelines do not violate COMAR, and furthermore that there is no private right of action to enforce the relevant regulations under Maryland law.

My review of the relevant regulations indicates that, read in the light most favorable to the Parents, the Guidelines may advise MCPS personnel to withhold student records in violation of *COMAR § 13a.08.02.04*. *COMAR § 13a.08.02.03(C)* broadly defines "student records" as those records that are "[d]irectly related to a student; and [] [m]aintained by an educational agency or institution." And *§ 13a.08.02.04* provides that "[r]ecords of a student maintained under the provisions of this title, **including confidential records**, shall be available to that student's parent or parents . . . or legal guardians in conference with appropriate school personnel." (emphasis added). Withholding the Intake Form from parents requesting access to their child's records might well violate the regulations granting parents access to confidential student records in conference with appropriate school personnel. That said, I agree with MCBE that there is no private right of action for MCBE's alleged **[*58]** violation of the COMAR provisions governing access to student records, and Count II must therefore be dismissed.

The Plaintiffs again assert that there is an "implied right of action" under Maryland law for the alleged regulatory violations. In support of that claim, the Parents cite *Fangman v. Genuine Title, LLC, 447 Md. 681, 136 A.3d 772, 779 (Md. 2016)*, in which the Maryland Court of

[18] Subject to the limitations of preemption, Maryland may be free to adopt its own version of the remedies that the Parents seek via Article 2. But I have found no indication that Maryland has done so. *See* *Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 325, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015)* (noting that the *Supremacy Clause* is "not the source of any federal rights, and certainly does not create a cause of action.").

Appeals outlined the applicable three-part test to determine whether a state *statute* contains an implied private right of action under Maryland law. *Id.* (citing *Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)*).[19] Here, though, the Plaintiff Parents do not ask me to find a right of action implied in a statute, but in a State Board of Education regulation. As MCBE points out, "state agencies do not have authority to create a private right of action." Reply at 29. In contexts in which there *is* a private right of action for the violation of Maryland regulations, that cause of action is, as it must be, created by the Maryland legislature and codified in a statute. *See, e.g.*, *Md. Code § 11-703* of the Corporations and Associations Article. The Parents have not identified, and I have not found, any Maryland statute authorizing a private right of action for the violation of the relevant regulations.

Furthermore, the Plaintiffs are **[*59]** mistaken in their claim that "judicial declaratory relief" is "the only effective relief available to vindicate the parents' rights protected by the regulation." Opp. at 38. COMAR provides that "[e]ach local school system . . . shall give parents or guardians of students . . . annual notice by such means as are reasonably likely to inform them of their right to: . . . File complaints with the United States Department of Education concerning alleged failures by the local school system . . . to comply with the requirements of [FERPA]." *COMAR 13A.08.02.10(A)(4)*. The Parents do not allege that they have pursued that administrative avenue for relief.

Accordingly, Count II of the Complaint must be dismissed, and because amendment would be futile, it is dismissed with prejudice.

CONCLUSION

For the reasons identified in this Memorandum Opinion, MCBE's Motion to Dismiss is GRANTED. A separate order will be issued contemporaneously herewith.

Dated: August 18, 2022

/s/ Paul W. Grimm

United States District Judge

ORDER

For the reasons stated in the Memorandum Opinion signed this same date, it is hereby ORDERED that:

1. Defendants' Motion to Dismiss Complaint, ECF No. 32, is GRANTED.

2. Plaintiff's Complaint, ECF No. 7, is DISMISSED: **[*60]**

a. Plaintiff's as applied challenge in Count VI of the Complaint is dismissed WITHOUT PREJUDICE and WITHOUT LEAVE TO AMEND. *See Britt v. DeJoy*, No. 20-1620, (4th Cir., August 17, 2022), *on reh'g en banc*.

b. Plaintiff's *42 U.S.C. § 1983* claim based on an as applied challenge in Count VII of the Complaint is dismissed WITHOUT PREJUDICE and WITHOUT LEAVE TO AMEND. *Id.*

c. The balance of the Plaintiff's Complaint is dismissed WITH PREJUDICE, and WITHOUT LEAVE TO AMEND. *Id.*

3. This Order constitutes a final judgment.

4. The Clerk is directed to close this case.

Dated: August 18, 2022

/s/ Paul W. Grimm

United States District Judge

End of Document

[19] In such cases, Maryland courts assess: (1) whether the statutory language confers a beneficial right on a particular class of persons; (2) whether there is any indication of legislative intent to either create or deny such a remedy; and (3) whether it would be consistent with the overall legislative scheme to imply a right of action for the plaintiff. *Id. Fangman* also provides that violations of COMAR may be used to establish the standard of care in a negligence actions. *Id.*

2023 WL 2139501
Only the Westlaw citation is currently available.
United States District Court, W.D. Wisconsin.

PARENTS PROTECTING OUR CHILDREN, UA, Plaintiff,

v.

EAU CLAIRE AREA SCHOOL DISTRICT, WISCONSIN; Tim Nordin; Lori Bica; Marquell Johnson; Phil Lyons; Joshua Clements; Stephanie Farrar; Erica Zerr; and Michael Johnson, Defendants.

22-cv-508-slc

|

Signed February 21, 2023

Synopsis

Background: Unincorporated nonprofit association of parents whose children attended schools in school district brought action against district, superintendent, and members of board of education in their official capacities, alleging that district's internal guidance on treatment of transgender, non-binary, and gender-nonconforming students violated parents' care, custody, and control of their children under due process clause and Wisconsin constitution, the free exercise of religion under First Amendment and Wisconsin constitution, and the right to obtain information and opt out of specific public school activities under the Protection of Pupil Rights Amendment (PPRA), and seeking to enjoin defendants from relying on, using, implementing, or enforcing guidance. Defendants moved to dismiss for lack of standing and failure to state a claim.

Holdings: The District Court, Stephen L. Crocker, United States Magistrate Judge, held that:

association failed to show that harm was actually occurring due to use of guidance;

allegations by association were too speculative to constitute injury-in-fact;

association lacked Article III standing to bring pre-enforcement challenge to guidance;

association lacked Article III standing under unconstitutional conditions doctrine to challenge guidance; and

association lacked information standing to challenge guidance under PPRA.

Motion granted.

Attorneys and Law Firms

Nicholas Barry, Reed Darrow Rubinstein, America First Legal Foundation, Washington, DC, Richard M. Esenberg, Luke Berg, Wisconsin Institute for Law & Liberty, Inc., Milwaukee, WI, for Plaintiff.

Ronald S. Stadler, Kopka Pinkus Dolin PC, Waukesha, WI, Jonathan Edward Sacks, Stadler Sacks LLC, Richfield, WI, for Defendants.

OPINION AND ORDER

STEPHEN L. CROCKER, Magistrate Judge

***1** Plaintiff Parents Protecting Our Children is an unincorporated association (UA) of parents whose children attend schools within defendant Eau Claire Area School District in Wisconsin. The remaining defendants are school officials who are being sued in their official capacities. Plaintiff alleges that defendants' internal guidance on the treatment of transgender, non-binary, and gender-nonconforming students violates the following constitutional and statutory rights of its members: (1) the care, custody, and control of their children under the due process clause of the Fourteenth Amendment and the Wisconsin Constitution; (2) the free exercise of religion under the First Amendment and the Wisconsin Constitution; and (3) the right to obtain information and opt out of specified public school activities under the Protection of Pupil Rights Amendment (PPRA), 20 U.S.C. § 1232h. Plaintiff seeks to enjoin defendants from relying on, using, implementing, or enforcing the guidance.

Before the court is defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of standing and under Rule 12(b)(6) for failure to state a claim. Dkt. 11. The court also has received a motion for leave to file an amicus curiae brief

submitted by the Eau Claire Area LGBTQI+ Community in support of defendants. Dkt. 10.

For the reasons stated below, I am granting defendants' motion to dismiss this case for lack of standing. I am denying the motion for leave to file an amicus curiae brief because the amicus brief does not help resolve the question of standing.

FACTUAL ALLEGATIONS

When considering a motion to dismiss for lack of standing or for failure to state a claim, the court accepts as true all material allegations of the complaint, drawing all reasonable inferences therefrom in plaintiff's favor unless standing is challenged as a factual matter. *Bria Health Services, LLC v. Eagleson*, 950 F.3d 378, 381-82 (7th Cir. 2020). Defendants do not challenge this court's reliance on the facts in the complaint for the purpose of deciding their motion, although they reserve the right to contest plaintiff's allegations in the future. Def. Br. in Support, dkt. 12, at 2, n.2. This is what plaintiff alleges:

I. The Parties

Plaintiff Parents Protecting Our Children, UA, is a group of parents who have created an unincorporated nonprofit association in accordance with Wis. Stat. § 184.01. The unidentified members of the association reside in the Eau Claire Area School District (ECASD) and have children who attend ECASD schools. Plaintiff names ECASD as a defendant, along with District Superintendent Michael Johnson and these members of the Eau Claire Area Board of Education: Tim Nordin, president; Lori Bica, vice president; Marquell Johnson, clerk/governance officer; Phil Lyons, treasurer; and members Joshua Clements, Stephanie Farrar, and Erica Zerr.

II. Gender Identity Support Guidance, Plan, and Training

ECASD has adopted a district-wide internal policy titled "Administrative Guidance for Gender Identity Support"(the Guidance), which initiates a process under which a school and its staff create a "Gender Support Plan" with a student. Attached to plaintiff's complaint is a complete copy of the guidance, a blank and fillable copy of a gender support plan, and a copy of a facilitator guide for staff training on "safe spaces." Dkt. 1-3 to 1-5. Here is a summary of the relevant portions of these documents:

A. The Guidance

***2** The first two and a half pages of the Guidance state the following purpose and process:

> **I. Purpose:**
>
> The purpose of this Guidance is: 1) to foster inclusive and welcoming environments that are free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression; and 2) to facilitate compliance with district policy.
>
> For the purpose of this Guidance, a transgender individual is an individual that asserts a gender identity or gender expression at school or work that is different from the gender assigned at birth....
>
> This Guidance is intended to be a resource that is compliant with district policies, local, state, and federal laws. They are not intended to anticipate every possible situation that may occur.
>
> **II. The Process:**
>
> The following guidelines should be used to address the needs of transgender, nonbinary, and/or gender non-conforming students:
>
> a. A transgender, non-binary, and/or gender-nonconforming student is encouraged to contact a staff member at the school to address any concerns, needs, or requests. This staff member will notify and work with the principal/designee. Parents/guardians of transgender, non-binary, and/or gender non-conforming students may also initiate contact with a staff member at school.
>
> b. When appropriate or necessary, the principal or designee will schedule a meeting to discuss the student's needs and to develop a specific Student Gender Support Plan when appropriate to address these needs. Documentation shall include date, time, location, names, and titles of participants, as well as the following information. The plan shall address, as appropriate:
>
> 1. The name and pronouns desired by the student (generally speaking, school staff and educators should inquire which terms a student may prefer and avoid terms that make the individual uncomfortable; a good

> general guideline is to employ those terms which the individual uses to describe themself
>
> 2. Restroom and locker room use
>
> 3. Participation in athletics and extracurricular activities
>
> 4. Student transition plans, if any. Each individual transitions differently (if they choose to transition at all), and transition can include social, medical, surgical, and/or legal processes
>
> 5. Other needs or requests of the student
>
> 6. Determination of a support plan coordinator when appropriate
>
> * * *
>
> Administrators and staff should respect the right of an individual to be addressed by a name and pronoun that corresponds to their gender identity. *A court-ordered name or gender change is not required, and the student need not change their official records.*

Dkt. 1-3 at 1-2 (emphasis in original).

The Guidance also discusses media and communication, official records and legal name changes, sports and extracurricular activities, dress codes, student trips and overnight accommodations, and training and professional development. Although the Guidance states that "[m]andatory permanent student records will include the legal/birth name and legal/birth gender," it provides that "to the extent that the district is not legally required to use a student's legal/birth name and gender on other school records or documents, the school will use the name and gender preferred by the student." Dkt. 1-3 at 3. "For example, Student ID cards are not legal documents, and therefore, may reflect the student's preferred name." *Id.*

***3** With respect to parents and guardians, the Guidance states that

> Some transgender, non-binary, and/or gender-nonconforming students are not "open" at home for reasons that may include safety concerns or lack of acceptance. School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian.

Dkt. 1-3 at 2.

As plaintiff points out, the Guidance does not contain a requirement to notify a student's parents or guardian that the student is or will be using a new name or gender identity, except to the extent that "ECASD will only make name changes in Skyward[1] after the completion of a Gender Support Plan and with parent/guardian permission." *Id.* at 4. However, there are no provisions mandating secrecy apart from a general provision in the media and communication section, which states that:

> Protecting the privacy of transgender, non-binary, and/or gender non-conforming students and employees must be a top priority for the spokesperson and all staff. All student and personnel information shall be kept strictly confidential as required by District policy and local, state, or federal privacy laws.

Id. at 3.

B. Gender Support Plan

The gender support plan (the Plan) makes the following statements in a separate text box at the top of the first page:

> The purpose of this document is to create shared understanding about the ways in which the student's authentic gender will be accounted for and supported at school. School staff, family, and the student should work together to complete this document.
>
> If parents are not involved in creating this plan, and student states they do not want parents to know, it shall be made clear to the student that this plan is a student record and will be released to their parents when they request it. This is a not a privileged document between the student and the school district.

Dkt. 1-4 at 1.

The form contains spaces for district staff to record a new name, pronouns, and gender for a child; select which intimate facilities (restroom, locker room, and overnight lodging on field trips) the child will use; and identify who should be told about the child's newly acquired gender identity (asking about district staff, building staff, and friends and classmates but not parents or guardians). *Id.* at 2. The Plan specifically asks if parents/guardians are aware of "their child's gender status" and "student's requests at school" with yes/no check boxes. The Plan identifies two actions to take if the "yes"

box is checked with respect to parent knowledge: walking the parents through the Skyward name process and student ID card change and identifying preferred name, pronouns, and intimate facilities. The form does not identify any actions to take if a "no" box is checked. *Id.* There are also sections for planning for use of facilities, extracurricular activities, and supporting the student and any siblings. *Id.* at 3-4.

C. Staff Training

***4** Plaintiff alleges that ECASD has conducted training sessions for its teachers on the Guidance for which it prepared a "Facilitator Guide" for "Session 3: Safe Spaces." With respect to slide 56, titled "Talk amongst yourselves!," the guide directs the facilitator to guide a discussion and reminds facilitators that

> [P]arents are not entitled to know their kids' identities. That knowledge must be earned. Teachers are often straddling this complex situation. In ECASD, our priority is supporting the student.
>
> Dkt. 1-5 at 2.

The guide also discusses slide 57, titled "Religion":

> Since Slide 56 will most likely focus on parents' religious objections to LGBTQIA+ people, it's important to take a moment and reaffirm that religion is not the problem (after all, there are millions of queer people of various faith traditions); rather, it's the weaponization of religion against queer people.
>
> *Id.* at 3.

In addition, an online training session titled "Safe Spaces Part Two" states:

> We understand and acknowledge that teachers are often put in terrible positions caught between parents and their students. But much like we wouldn't act as stand-ins for abuse in other circumstances, we cannot let parents' rejection of their children guide teachers' reactions and actions and advocacy for our students.
>
> * * *
>
> We handle religious objections too often with kid gloves.... [If the parents' have a] faith-based rejection of their student's queer identity [then the school staff] must not act as stand-ins for oppressive ideas/behaviors/attitudes, even and especially if that oppression is coming from parents.
>
> Dkt. 1, ¶¶ 38-39.

Plaintiff alleges that teachers understand the Guidance and training as a mandate to interfere with the parent–child relationship, pointing to a flyer posted by one teacher at North High School in ECASD, which states: "If your parents aren't accepting of your identity, I'm your mom now." Dkt. 1, ¶ 48.

OPINION

Defendants challenge the complaint under Rule 12(b)(1) for lack of standing, and under Rule 12(b)(6) for failure to state a claim. Because the court agrees that plaintiff lacks standing, this opinion will address only the first challenge under Rule 12(b)(1).

I. Legal Standard Regarding Standing

A complaint must plausibly allege standing to survive a Rule 12(b)(1) challenge. *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060, 1064 (7th Cir. 2020) ("At the pleading stage, the standing inquiry asks whether the complaint 'clearly ... allege[s] facts demonstrating each element in the doctrinal test.' ") (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), *as revised* (May 24, 2016)); *Silha v. ACT, Inc.*, 807 F.3d 169, 173-74 (7th Cir. 2015); *Scruggs v. Nielsen*, 2019 WL 1382159, at *1 (N.D. Ill. Mar. 27, 2019). An organization like plaintiff has associational standing to sue on behalf of its members if: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 639 (7th Cir. 2017); *United African Org. v. Biden*, —— F.Supp.3d ——, ——, 2022 WL 3212370, at *5 (N.D. Ill. Aug. 9, 2022). Defendants argue that plaintiff cannot establish the first element because the plaintiff's individual parent members do not have standing in their own right.

***5** To establish Article III standing, a litigant "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo,* 578 U.S. at 338, 136 S.Ct. 1540 (internal citations omitted); *see also Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 667 (7th Cir. 2021) (citing same). Disputed in the instant case is the injury-in-fact element, which requires " 'an invasion of a legally protected interest' that is 'concrete

and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 578 U.S. at 339, 136 S.Ct. 1540 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); *see also Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions."). To be concrete, the injury "must be de facto; that is, it must actually exist." *Spokeo,* 578 U.S. at 340, 136 S.Ct. 1540 (internal quotation omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " *Id.* at 339, 136 S.Ct. 1540 (quoting *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130).

With respect to standing to seek injunctive relief, the Supreme Court has held that a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal citations omitted); *see also Beley v. City of Chicago*, 2013 WL 3270668, at *3 (N.D. Ill. June 27, 2013) (Citing same for proposition that "[t]o establish standing for injunctive relief or a declaratory judgment, a party must show a real and immediate threat of injury.").

II. Injury In Fact

Plaintiff alleges that ECASD is providing "psychosocial medical/psychological care through transgender social transition" for which it is intentionally not obtaining parental consent. Dkt. 1 at ¶¶ 64-65. Plaintiff also alleges that the non-public nature of the policy and "secrecy with which schools are to operate" means there is no way for its parent members to determine if their child has been "targeted by the school." Dkt. 1, ¶ 75. In support of its allegations, plaintiff points out that the Guidance and Plan documents do not contain any minimum age limit or a requirement to notify the student's parents that the child is or will be using a new name or gender identity, opposite-sex intimate facilities, or opposite-sex overnight lodging during school activities.

According to plaintiff, defendants' Guidance "mandates" that schools and teachers hide critical information regarding a child's health from the child's parents and take action specifically designed to alter the child's mental and physical well-being, including: (1) allowing and requiring district staff to change a child's name, pronouns, and intimate facility use without the parents' knowledge or consent; (2) requiring a school and its staff to hold secret meetings with children to develop a gender support plan; and (3) requiring school officials, teachers, and administrators to continue using the child's given name and pronouns when interacting with the child's parents as to not alert parents to the changes the school has made. Complaint, dkt. 1, at 2, ¶2. However, contrary to plaintiff's interpretation, a fair reading of the Guidance and Plan documents shows that they do not *mandate* the exclusion of parents and guardians. *See John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, —— F. Supp. 3d ——, —— – ——, 2022 WL 3544256, at *6-7 (D. Md. Aug. 18, 2022) (finding same in Rule 12(b)(6) review of similar guidelines related to student gender identity); *id.* at ——, 2022 WL 3544256, at 7 ("My review of the Guidelines reveals that the Plaintiff Parents' argument is based on a selective reading that distorts the Guidelines into a calculated prohibition against the disclosure of a child's gender identity that aims to sow distrust among MCPS students and their families.").

***6** Actually, defendants encourage family involvement in developing a gender support plan: "The purpose of this document is to create shared understanding about the ways in which the student's authentic gender will be accounted for and supported at school. School staff, family, and the student should work together to complete this document." Dkt. 1-4 at 1. True, the Guidance anticipates that some students may chose not to tell their parents about their gender nonconformity or transgender status, and it instructs school personnel to "[s]peak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian," dkt. 1-3. That being so, the Guidance does not instruct staff to keep the information secret and it makes clear that the student's name will not be changed in the district's system without parent/guardian permission. Further, the Plan document clearly notes that the Plan will not be kept confidential from the student's parents if they ask for it. *Id.*

More critical to the standing analysis, however, is that plaintiff does not allege (1) that any of its members' children are transgender or gender nonconforming, (2) that the district has applied the gender identity support Guidance or Plan with respect to its members's children or any other children, or (3) that any parent or guardian has been denied information related to their child's identity. Defendants argue that plaintiff's general distress about the gender identity policy does not demonstrate an actual injury because plaintiff's fear that the policy might be applied to one of its members' children in the future is too speculative to confer standing.

See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)) ("[W]e have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient.").

In an initial cursory argument, plaintiff contends that *Clapper* does not apply because defendants' Guidance is currently harming its members by providing "an experimental and controversial form of psychological/psychosocial medical treatment" without parental notice or consent. Dkt. 15 at 7. However, the complaint does not include allegations supporting an inference that any actual harm is occurring now. Thus, the crux of the parties' dispute is whether the *possible* application of the policy to plaintiff's members and their children is sufficiently imminent and harmful to confer standing. *See Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, —— F. Supp. 3d ——, ——, 2022 WL 4356109, at *9 (N.D. Iowa Sept. 20, 2022) ("In the absence of enforcement on a facial challenge, courts evaluate whether injury was caused through a chilling effect or through a credible threat of enforcement.").

As plaintiff points out, "*Clapper* does not ... foreclose any use whatsoever of future injuries to support Article III standing." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015). The Court has explained that

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.
>
> *Clapper*, 568 U.S. at 414 n.5, 133 S.Ct. 1138 (internal citations omitted).

See also Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."); *TransUnion LLC v. Ramirez*, —— U.S. ——, 141 S. Ct. 2190, 2210, 210 L.Ed.2d 568 (2021) ("[A] person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.").

Nonetheless, "[i]n *Clapper*, the Court decided that human rights organizations did not have standing to challenge the Foreign Intelligence Surveillance Act (FISA) because they could not show that their communications with suspected terrorists were intercepted by the government" but instead relied only on their suspicions that "such interceptions might have occurred." *Remijas*, 794 F.3d at 693. The Court went on to note that "to the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here ... Plaintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.' " *Clapper*, 568 U.S. at 414 n.5, 133 S.Ct. 1138.

***7** Plaintiff argues that the potential harm in this case is not as attenuated as that in *Clapper*. Instead, plaintiff contends that this case is more analogous to *Remijas*, 794 F.3d at 690 and 693, in which all plaintiffs had their identity stolen through a hack that targeted defendant but only some plaintiffs suffered fraudulent charges. The court in *Remijas* held that plaintiffs had shown a substantial risk of harm from the data breach because it was plausible to infer that the purpose of the hack was to make fraudulent charges or to assume stolen identities with respect to all of the affected plaintiffs. *Id.* at 693. The court of appeals explained that "[u]nlike in *Clapper*, where respondents' claim that they would suffer future harm rested on a chain of events that was both 'highly attenuated' and 'highly speculative,' the risk that Plaintiffs' personal data will be misused by the hackers who breached Adobe's network is immediate and very real." *Id.* (quoting *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014) (involving similar data breach case)).

I am not persuaded by plaintiff's argument.

Plaintiff's entire standing argument is premised on a speculative chain of possibilities, including future choices made by individuals who have not yet been identified, indeed who *cannot* yet be identified because they have *not* acted, and they might *never* act. This will not suffice. "[T]he failure to raise a right to relief above the speculative level is the very definition of insufficient pleading." *Phillips v. Board*, 2017 WL 3503273 (N.D. Ind. 2017) at *3 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Plaintiff's asserted injuries are based on its belief that the Guidance one day will interfere with one of its members' right to direct the upbringing of their child.

Therefore, to sustain an injury, a member's child must: (1) develop a belief that they have a gender identity that differs from their biological sex; (2) affirmatively approach a district employee and request gender identity support; (3) request a gender support plan; and (4) make the request without parental consent or knowledge. Also part of this chain of possibilities are: (5) the school must not discuss the gender support plan with the parent and/or (6) the parent must not request to see the student's educational records.

As the Northern District of Iowa recently held in denying a motion for a preliminary injunction seeking to prevent enforcement of a similar gender identity support policy and plan:

> Though the Court does not doubt their genuine fears, the facts currently alleged before the Court do not sufficiently show the parents or their children have been injured or that they face certainly impending injury through enforcement of the Policy. The theory that (1) their child will express a desire for or indicate by mistake a desire for a plan, (2) the child will be given a plan, (3) without parental consent or knowledge, (4) and the information will be hidden or denied when parents ask requires too many speculative assumptions without sufficient factual allegations to support a finding of injury.
>
> *Parents Defending Educ.*, —— F.Supp.3d at ——, 2022 WL 4356109, at *9.

Reliance on such speculative, discretionary acts of others precludes a finding of standing. *Id.*; *see also The Cornucopia Inst. v. United States Dep't of Agric.*, 260 F. Supp. 3d 1061, 1069 (W.D. Wis. 2017) ("Like *Clapper*, plaintiffs' chain of causation here is further weakened by its reliance on third parties' discretionary acts.").

Nonetheless, plaintiff insists that because of the Guidance: (1) its members will be denied critical information necessary for its members to exercise their constitutional rights; (2) its members must surrender their constitutional right to receive public education for their children; and (3) its members will be denied their right under the PPRA to obtain information and opt out of specified public school activities. Although plaintiff cites a number of additional cases and standing-related doctrines in an attempt to show a possible injury, I am not persuaded its arguments or cited authority for the reasons stated below.

A. Threatened Loss of and Interference With Constitutional Right

***8** Plaintiff argues that courts have recognized that a threatened violation of constitutional rights amounts to irreparable harm and should be actionable. *See Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (Regarding challenge to Small Business Administration's use of racial preferences in awarding funding, court held "when constitutional rights are threatened or impaired, irreparable injury is presumed."); *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 969 (W.D. Wis. 2020) (State-imposed voting restrictions are "threatened loss of constitutional rights [that] constitute[ ] irreparable harm."). However, unlike in this case, the policies and statutes at issue in *Vitolo* and *Bostelmann* applied directly to the plaintiffs themselves and barred the exercise of *their* constitutional rights. *See Vitolo*, 999 F.3d at 358-59 ("The injury here is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.") (internal citations omitted). Although plaintiff argues that defendants' Guidance denies its members the information they need to exercise their constitutional decision-making authority regarding their children, the actual application of the Guidance to *their* children remains fatally speculative for the reasons discussed above.

Plaintiff cites *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007), in which the Court held that parents of children enrolled in a school district had standing to challenge a policy using race to reassign the school students would attend, even though there was no guarantee that the policy would be applied to change the school of any particular child. Even though plaintiff's members' children had not yet been denied their preferred school because of their race, the Court found that harm was not speculative because *every* student enrolled in the school district would be "forced to compete in a race-based system that may prejudice" them. *Id.* at 719, 127 S.Ct. 2738. In other words, the school assignment policy created a systemic process that would affect all students as they matriculated from elementary school to middle school or middle school to high school. Here, in contrast, plaintiff's alleged lack-of-information injury is not systemic: the Guidance will not be applied to all children, or even most children. Only a small fraction of ECASD students ever will make use of the policy, and a fraction of that group *will* alert their parents. Whether any of plaintiff's members' children will seek assistance under the Guidance without their parents' knowledge or input is completely conjectural.

Plaintiff also cites *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), (which involved the constitutionality of a city ordinance banning the sale of hollow-point ammunition) for the proposition that a violation of a constitutional right occurs when government action makes the exercise of a constitutional right nearly impossible.[2] Plaintiff notes that the Ninth Circuit recognized that the "Second Amendment ... does not explicitly protect ammunition" but held that "[n]evertheless, without bullets, the right to bear arms would be meaningless" and "[t]hus the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them." *Id.* at 967. However, the court of appeals made this finding in the context of determining whether a constitutional claim had been stated, not whether the plaintiff had standing. In addressing standing, the *Jackson* court applied the injury-in-fact test outlined in *Lujan*: plaintiff must show injury in fact that is concrete and particularized and actual or imminent and not conjectural or hypothetical. *Id.* The court of appeals found that plaintiff Jackson satisfied that standard because she was a gun owner who would purchase hollow-point ammunition within San Francisco but-for the challenged ordinance. *Id.* Therefore, *Jackson* is not on point and does not support plaintiff's contention that it has standing in this case based on a denial of information.[3]

B. Pre-Enforcement Challenge

***9** Plaintiff also asserts that it has standing to bring a pre-enforcement challenge to the district's Guidance under Supreme Court precedent allowing "pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 159, 134 S.Ct. 2334; *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"). Under this precedent, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.' " *Susan B. Anthony List*, 573 U.S. at 159, 134 S.Ct. 2334 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)); *see also Brown v. Kemp*, 506 F. Supp. 3d 649, 656 (W.D. Wis. 2020) (citing same).

Although the "plaintiff's fear of prosecution and self-censorship constitute the injury for standing purposes" in such cases, "the mere existence of a statute [or in this case, a policy] adverse to plaintiff's interests is not sufficient to show justiciability." *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 905-06 (E.D. Wis. 2002). The Supreme Court has made clear that "persons having no concrete fears that a policy or statute will be applied against them, except for those fears that are imaginary or speculative, are not accepted as appropriate plaintiffs." *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301 (quoting *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969)). As discussed above, plaintiff has not shown that its members are under any real or credible threat of being subjected to the Guidance. *See Anders v. Fort Wayne Cmty. Sch.*, 124 F. Supp. 2d 618, 628-30 (N.D. Ind. 2000) (citing *Babbitt* and Seventh Circuit cases for same in case involving policy to search vehicles on school property). Although plaintiff argues that parents *may* choose to withdraw their children from school or abandon their rights to public education in order to avoid the policy, that scenario also is speculative and is not based on any realistic or impending action by district staff.

C. Unconstitutional Conditions Doctrine

As plaintiff notes, the unconstitutional conditions doctrine prevents the government from awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his or her exercise of a constitutional right. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."); *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 986 (7th Cir. 2012) ("Understood at its most basic level, the doctrine aims to prevent the government from achieving indirectly what the Constitution prevents it from achieving directly."); *see also Carson v. Makin*, —— U.S. ——, 142 S. Ct. 1987, 213 L.Ed.2d 286 (2022) (tuition assistance program penalized free exercise of religion by disqualifying private religious schools from generally available benefit for families whose school district did not provide public secondary school).

However, the doctrine does not "give rise to a constitutional claim in its own right; the condition must actually cause a violation of a substantive [constitutional] right." *EklecCo NewCo LLC v. Town of Clarkstown*, 2019 WL 2210798, at

*12 (S.D.N.Y. May 21, 2019) (quoting *U.S. v. Oliveras*, 905 F.2d 623, 628 n.8 (2d Cir. 1990), and citing *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (noting unconstitutional conditions doctrine "has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question")).

***10** Plaintiff invokes the unconditional conditions doctrine in making a cursory argument that defendants' Guidance conditions the right to attend public school on parents surrendering their constitutionally protected right to the care, custody, and control of their children. However, the argument does not provide plaintiff with a path to standing. Plaintiff's citations to *Perry* and *Carson* are not helpful because neither case discusses the unconditional conditions doctrine in terms of standing or addresses the speculative nature of plaintiffs' alleged injuries. In *Perry*, the Supreme Court merely reaffirmed that the government cannot deny someone a government benefit because that person exercised a constitutionally protected right, such as free speech. 408 U.S. at 597, 92 S.Ct. 2694. And in *Carson*, the Court emphasized the general rule that the state violates the free exercise clause when it excludes religious observers from otherwise available public benefits. 142 S. Ct. at 1996. In the instant case, none of plaintiff's members have been subject to retaliation or excluded from anything for their opposition to the Guidance. In addition, and as explained above, plaintiff's allegation that the Guidance hinders its members' rights to send their children to public school is too speculative to confer standing.

D. PPRA and Informational Standing

Plaintiff contends that defendants have violated its rights related to student surveys and evaluations under the PPRA, 20 U.S.C. § 1232h, and its implementing regulations, 34 C.F.R. § 98.4(a). Specifically, plaintiff cites §§ 1232h(b)(2), (3), and (5), which provide that "[n]o student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning ... mental or psychological problems of the student or the student's family, sex behavior or attitudes, or critical appraisals of other individuals with whom respondents have close family relationships" without "the prior written consent of the parent." In addition, plaintiff points to 34 C.F.R. §§ 98.4(a)-(b), which provide in relevant part that no student shall be required to submit without prior parental consent to a psychiatric or psychological examination, testing, or treatment in which the primary purpose is to reveal information concerning sex behaviors and attitudes and other sensitive issues. The regulations define a "psychiatric or psychological examination or test" as a method of obtaining information "that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings." § 98.4(c)(1). According to plaintiff, the above provisions "describe[ ] exactly what occurs when the District requires students to complete a gender support plan with school staff." Dkt. 15 at 21.

Although the parties debate whether there is a private right of action under PPRA that can be brought under § 1983, it is unnecessary to reach those arguments because plaintiff has failed to show that it has suffered, or is at a substantial risk of suffering, an injury in fact that would permit it to pursue any such claims. Plaintiff argues that it has informational standing because its members are injured by the district's "promise that it will deny them information about their children that the PPRA requires the District to disclose." Dkt. 15 at 21. However, as explained above, this argument is based on a mischaracterization of the Guidance and Plan documents. Neither document requires students to complete a gender support plan without their parents' consent, and neither document states that information will be withheld from parents. Moreover, plaintiff has not alleged that defendants have required any child to submit to any type of survey, analysis, or evaluation in conjunction with the gender identity support Guidance. Accordingly, plaintiff has failed to show standing on this ground as well.

CONCLUSION

Defendants frame this lawsuit as arising out of "plaintiff's members uncomfortableness with transgender individuals, and their speculative fears about what would happen if their child became gender non-conforming." Def. Reply, dkt. 18, at 2. Plaintiff rejects this characterization, framing its lawsuit as a defense of the parental, religious, and statutory rights of its members to raise their children as they see fit. Pl.'s Resp., dkt. 15, at 51. It's a fraught topic, and both sides are entitled to their views on the issues that underlie ECASD's Gender Identity Policy. At this juncture, however, the issue before this court is narrow and procedural: does plaintiff have standing to bring the instant lawsuit? For the reasons stated above, I have concluded that it does not.

ORDER

***11** IT IS ORDERED that defendants' motion to dismiss, dkt. 11, is GRANTED, and the motion for leave to file an amicus curiae brief, dkt. 10, is DENIED as unnecessary. The case is DISMISSED without prejudice for lack of subject matter jurisdiction.

All Citations

--- F.Supp.3d ----, 2023 WL 2139501

Footnotes

1 "Skyward" is a software program used by ECASD to manage student records and similar information.

2 As discussed at-length above, plaintiff mischaracterizes the Guidance as actively hiding a constitutional violation from parents.

3 After briefing was completed, plaintiff filed a notice of supplemental authority, dkt. 19, in which it cites *Deanda v. Becerra*, —— F.Supp.3d ——, 2022 WL 17572093 (N.D. Tex. Dec. 8, 2022), without discussion, as support for its standing argument. Defendants did not have the opportunity to address this case, but their input is not necessary because *Deanda* does not does change this court's conclusion. *Deanda* addresses a father's challenge to Title X of the Public Health Service Act, 42 U.S.C. §§ 300, which "mak[es] comprehensive voluntary family planning services readily available to all persons desiring such services." *Id.* at ——, 2022 WL 17572093 at 1. The federal statute expressly instructed grant recipients that they could not require parental consent for their child's access to contraception (although they should "encourage family participation") and it did not allow parents to opt out of family planning services for their children. *Id.* at —— – ——, 2022 WL 17572093 at 3-6. But Texas law confers upon parents the right to consent to their children's medical treatment, along with general standing to file suit for a violation of that right. *Id.* at ——, 2022 WL 17572093 at 6. The court in *Deanda* found that the father's loss of his state-law right to consent to the medical treatment of his minor children constituted an injury in fact, even though an actual medical situation had not yet arisen. *Id.* at —— and n.1, 2022 WL 17572093 at 3 and n.1.

In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2475

JOHN M. KLUGE,

Plaintiff-Appellant,

v.

BROWNSBURG COMMUNITY SCHOOL CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:19-CV-02462 — **Jane Magnus-Stinson**, *Judge*.

ARGUED JANUARY 20, 2022 — DECIDED APRIL 7, 2023

Before ROVNER, BRENNAN, and ST. EVE, *Circuit Judges*.

ROVNER, *Circuit Judge*. John M. Kluge brought a Title VII religious discrimination and retaliation suit against Brownsburg Community School Corporation ("Brownsburg") after he was terminated from his employment as a teacher for refusing to follow the school's guidelines for addressing students. Brownsburg requires its high school teachers to call all students by the names registered in the school's official

student database, and Kluge objected on religious grounds to using the first names of transgender students to the extent that he deemed those names not consistent with their sex recorded at birth. After Brownsburg initially accommodated Kluge's request to call all students by their last names only, the school withdrew the accommodation when it became apparent that the practice was harming students and negatively impacting the learning environment for transgender students, other students both in Kluge's classes and in the school generally, as well as the faculty. The district court granted summary judgment in favor of the school after concluding that the undisputed evidence showed that the school was unable to accommodate Kluge's religious beliefs and practices without imposing an undue hardship on the school's conduct of its business of educating all students that entered its doors. The district court also granted summary judgment in favor of Brownsburg on Kluge's retaliation claim. We agree that the undisputed evidence demonstrates that Kluge's accommodation harmed students and disrupted the learning environment. Because no reasonable jury could conclude that harm to students and disruption to the learning environment are *de minimis* harms to a school's conduct of its business, we affirm. Our dissenting colleague asserts that there are genuine issues of material fact regarding undue hardship but he mischaracterizes the harms claimed by the school and focuses on fact questions that are not legally relevant to the outcome of the discrimination claim, in particular suggesting that a jury should reweigh the harms using information not known to the school at the time of the occurrences in issue, and not relevant to the ultimate question.

I.

On summary judgment, we must construe the facts in favor of the nonmovant, and may not make credibility determinations or weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *McCottrell v. White*, 933 F.3d 651, 655 (7th Cir. 2019); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). We therefore construe the facts in favor of Kluge. Brownsburg is a public school corporation in Brownsburg, Indiana. The Indiana Constitution requires the State's General Assembly "to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." Ind. Const. art. VIII, § 1. School attendance is compulsory in the State by statute. Ind. Code § 20-33-2-4. Brownsburg is governed by an elected Board of Trustees. R. 120-1, at 2. At the relevant time, the corporation and school leadership included the Board President, Phil Utterback; the Superintendent, Dr. Jim Snapp; the Assistant Superintendent, Dr. Kathryn Jessup; the Human Resources Director, Jodi Gordon; and the principal, Dr. Bret Daghe. R. 120-1, at 2–3; R. 120-2, at 3; R. 113-3, at 5; R. 113-4, at 5. Brownsburg High School was the sole public high school in the district. R. 120-2, at 2.

Brownsburg hired Kluge in August 2014 to serve as the sole music and orchestra teacher at the high school. R. 113-2, at 2; R. 120-2, at 3. In that capacity, he taught beginning, intermediate, and advanced orchestra; beginning music theory; and advanced placement music theory. He also assisted the middle school orchestra teacher in teaching classes at the middle school. R. 120-3, at 19–20. Kluge remained employed in

that capacity until the end of the 2017–2018 academic year. R. 120-2, at 3.

Prior to the start of that school year, officials at Brownsburg became aware that several transgender students were enrolled as freshmen. R. 120-1, at 3. This awareness led to discussions among the Brownsburg leadership to address the needs of these students. Gordon and Drs. Snapp, Jessup, and Daghe reached a "firm consensus" that transgender students "face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying." R. 120-1, at 3. According to Dr. Jessup, the Brownsburg leaders concluded that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being." R. 120-1, at 3. The group began to discuss and consider practices and policies that could address these challenges.[1] R. 120-1, at 3–4.

The staff of the school first became aware of these discussions in January 2017, when administrators invited Craig Lee, a Brownsburg teacher and faculty advisor for the high school's Equality Alliance Club, to speak about transgenderism at a faculty meeting.[2] R. 15-3, at 2; R. 58-2, at 1–2. At

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[1] The policies and practices eventually adopted by Brownsburg to address concerns about transgender students were not formally ratified by the Board, but they did operate as directives that teachers were required to follow. We refer to them as policies for convenience.

[2] The Equality Alliance Club is a student club at the school that meets weekly to discuss social and emotional issues affecting all students, including LGBTQ students. R. 58-2, at 2; R. 112-5, at 9. Attendance varied from twelve to forty students at any given meeting, and often included

(continued)

another faculty meeting in February 2017, Lee and guidance counselor Laurie Mehrtens gave a presentation on what it means to be transgender and how teachers can encourage and support transgender students. R. 15-3, at 2.

After these faculty meetings, Kluge and three other teachers approached Dr. Daghe on May 15, 2017, to speak about issues related to transgender students. R. 15-3, at 2; R. 113-5, at 6; R. 120-3, at 11. The four teachers presented Dr. Daghe with a seven-page letter expressing religious objections to transgenderism, taking the position that the school should not treat gender dysphoria as a protected status, and urging the school not to require teachers to refer to transgender students by names or pronouns that the teachers deemed inconsistent with the students' sex recorded at birth. R. 113-1, at 26–32. Kluge identifies as Christian and is a member of Clearnote Church. R. 113-1, at 4. Kluge believes that gender dysphoria "is a type/manifestation of effeminacy, which is sinful." R. 113-1, at 5. Kluge describes "effeminacy" as "for a man to play the part of a woman or a woman to play the part of a man and so that would include acting like/dressing like the opposite sex." R. 120-3, at 6. In addition to believing that gender dysphoria itself is sinful, Kluge believes that it is sinful to "promote gender dysphoria." R. 120-3, at 7. Because the transgender students changed their first names in order to "present[] themselves as the opposite sex," Kluge believes

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transgender students. R. 120-14, at 6. Dr. Daghe described it more broadly as a club trying to make the culture and climate of the school the best it could be. R. 112-5, at 9.

that calling those students by their preferred names would be "encouraging them in sin." R. 120-3, at 10.

The American Psychiatric Association has a very different view of gender dysphoria for adolescents and adults, which it defines as a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months duration," and manifested by at least two of the six listed criteria. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, 2013 ("DSM-5"), at 452. "The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." DSM-5, at 453. *See also Campbell v. Kallas*, 936 F.3d 536, 538 (7th Cir. 2019) (describing gender dysphoria as "an acute form of mental distress stemming from strong feelings of incongruity between one's anatomy and one's gender identity"). Kluge does not agree with the DSM-5 definition of gender dysphoria. R. 120-3, at 5–6.

At the May 15, 2017 meeting, Dr. Daghe discussed what he considered to be an accommodation to these teachers, namely, a policy that all teachers would use the names and pronouns recorded in the school's official student database, "PowerSchool." R. 112-5, at 5–6. The PowerSchool database contained names, gender markers, preferred pronouns and other data for all students at the school. R. 113-3, at 6; R. 113-5, at 4. According to Kluge, Dr. Daghe indicated that he had resisted the pressure to change the students' names in PowerSchool but would make this change if it would resolve the teachers' concerns regarding how to address transgender students. R. 120-3, at 12.

The three teachers who had signed onto Kluge's letter accepted Dr. Daghe's suggested practice that they would use the PowerSchool names and pronouns, and indicated to Dr. Daghe that they would comply with it going forward. R. 120-3, at 12. Kluge was shocked that the three other teachers "did an about-face" but he said nothing at that time. R. 120-3, at 12. According to Kluge, after the meeting with all four teachers concluded, he went back into Dr. Daghe's office and told him to "keep up the good work" of resisting the pressure of changing the names in PowerSchool. R. 120-3, at 12. Dr. Daghe left these meetings believing that all four teachers had agreed to this practice. R. 112-5, at 5–6. Kluge, however, believed that he and Dr. Daghe were "on the same page," that he could continue to use the students' "legal names," and that "we would not be promoting transgenderism in our school." R. 120-3, at 12.

The Brownsburg leadership settled on the practice of requiring teachers to use the PowerSchool names and pronouns ("Name Policy") as part of the larger plan to address the needs of transgender students. R. 120-1, at 3–4; R. 112-5, at 5. In addition to the Name Policy, transgender students were permitted to use the restrooms of their choice and dress according to the gender with which they identified, wearing school-related uniforms consistent with that gender. R. 112-5, at 5. Transgender students wishing to change their names, gender markers or pronouns in PowerSchool were permitted to do so only if they first presented two letters, one from a parent and one from a healthcare professional regarding the need for the changes. R. 120-1, at 4. Dr. Jessup explained that the Name Policy furthered two primary goals:

> First, the practice provided the high school faculty a straightforward rule when addressing students; that is, the faculty need and should only call students by the name listed in PowerSchool. Second, it afforded dignity and showed empathy toward transgender students who were considering or in the process of gender transition. Stated differently, the administration considered it important for transgender students to receive, like any other student, respect and affirmation of their preferred identi[t]y, provided they go through the required and reasonable channels of receiving and providing proof of parental permission and a healthcare professional's approval.

R. 120-1, at 4.

A little more than a week before the start of the 2017–2018 school year, Mehrtens (the guidance counselor) sent emails to several teachers, including Kluge, informing them that they would have a transgender student in their classrooms in the upcoming year. R. 120-3, at 13; R. 15-3, at 3. According to one email that Kluge received, the student was transitioning from female to male, and had changed his name and pronouns in the PowerSchool database. Mehrtens said:

> Parents are supportive and aware—Feel free to use "he" and "[student's preferred name]" when communicating.

R. 120-11, at 2 (student's name redacted in the record). Kluge received two such emails, one for each of the transgender

students he would have in his classes that year. R. 120-3, at 13. At first he was shocked that the school was moving in this direction, but because the email contained the language "feel free to use," he read the emails as "permissive, not mandatory," and planned to use the students' "legal names."[3] R. 120-3, at 13–14; R. 15-3, at 3.

On July 27, 2017, the first day of classes at Brownsburg, Kluge met briefly with Dr. Daghe and informed him that he would not call the transgender students by their PowerSchool names and pronouns. He reiterated that he had a religious objection to this practice. Dr. Daghe directed him to stay in his office and consulted the Superintendent, Dr. Jim Snapp. R. 120-3, at 14; R. 15-3, at 3. Later that morning, Drs. Daghe and Snapp met with Kluge to discuss the issue. Dr. Snapp told Kluge that he was required to use the names recorded in the PowerSchool database. Kluge explained again that it was against his sincerely held religious beliefs to use anything other than the names recorded on the students' original birth certificates. Dr. Snapp then presented him with three options:

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[3] As was the case with the district court, we find Kluge's use of the terms "transgender names" and "legal names" imprecise. Many transgender people change their legal names and both of the transgender students in Kluge's classes did so, albeit after the school year in question. There is no evidence in the record regarding what name Kluge planned to use if transgender students changed their legal names, although much of his testimony suggests that his religious objections would remain. Although a person may be transgender, a name may not be, and so we will refer to the students' new names as their "preferred names" or "PowerSchool names." This is not to imply that this was a casual preference of the students alone; as we noted, the students' parents and healthcare providers signed off on any changes to the names in PowerSchool.

comply with the Name Policy; resign; or be suspended pending termination. When Kluge refused to comply or resign, Dr. Snapp suspended him pending termination and told him to go home. R. 120-3, at 14–16; R. 15-3, at 3.

In the course of that July 27 meeting, Kluge told Dr. Snapp the name of his pastor, Dave Abu-Sara. R. 120-3, at 15–16. Kluge did not know who initiated the contact, but soon after the July 27 meeting, Kluge believed that Dr. Snapp and Abu-Sara spoke on the phone. According to Kluge, Abu-Sara told Kluge that he had asked Dr. Snapp to give Kluge the weekend to think about his options, and Dr. Snapp had agreed. R. 120-3, at 15–16. On Monday, July 31, Kluge returned to the school and met with Dr. Snapp and Human Resources Director Jodi Gordon. Dr. Snapp and Gordon reiterated that Kluge had to choose between complying with the Name Policy or termination. R. 120-3, at 17. They presented him with a memo and draft agreement from Dr. Daghe stating:

> You are directed to recognize and treat students in a manner using the identity indicated in PowerSchool. This directive is based on the status of a current court decision applicable to Indiana.
>
> You are also directed to not attempt to counsel or advise students on his/her lifestyle choices.
>
> Please indicate below if you will comply with this directive. This document must be returned to me by noon on Monday, July 31, 2017.
>
> _____ Yes, I will comply with this directive.
>
> _____ No, I will not comply with this directive.

_____ _____

John Kluge, teacher Date

cc: Personnel file

R. 15-1.[4]

Kluge then presented Dr. Snapp and Gordon with two requested accommodations: first, that he be allowed to refer to all students by their last names only, "like a gym coach;" and second, that he not be responsible for handing out gender-specific orchestra uniforms to students. He would treat the class like an "orchestra team," he proposed. He agreed that, if

[4] Kluge has never objected to the directive that he "not attempt to counsel or advise students on his/her lifestyle choices." Neither party addressed this term of the agreement in the briefing, but Dr. Snapp testified that Kluge requested "the ability to talk directly to students about their eternal destination," which Dr. Snapp told him was not allowed. R. 112-6, at 6. This directive is consistent with that conversation. *See also* R. 120-5, at 8 (Dr. Daghe testifying that he included that statement because Kluge's "job was to teach the students, not to make sure he was letting them know his opinion one way or the other," and because he "did not want one of my teachers counseling or advising students on their choices."). The "current court decision applicable to Indiana" was likely our decision in *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020), which had been issued two months prior to this meeting. We held there that a transgender student had a reasonable likelihood of succeeding on the merits of a Title IX sex discrimination claim based on a theory of sex-stereotyping. 858 F.3d at 1048–50. Although the dissent asserts that nothing in the record indicates that *Whitaker* was the decision to which the school referred, Kluge never contested the point and instead simply argued that any suit brought by a student on these facts under *Whitaker* would be frivolous. Because we decline to address the Title IX issue, we need not address this matter further.

a student asked him why he was using last names only, he would not mention his religious objections to using transgender students' first names and would explain, "I'm using last names only because we're a team, we're an orchestra team, just like a sports coach says, hey, Smith, hey, Jones. We are one orchestra team working towards a common goal." R. 120-3, at 17. Dr. Snapp and Gordon agreed that this was an acceptable arrangement. They also agreed to assign the task of handing out orchestra uniforms to another person so that Kluge would not be required to hand students clothing that he believed was inconsistent with their sex recorded at birth. R. 120-3, at 17. To memorialize this new understanding, Gordon altered the document presented to Kluge: after the first paragraph, she wrote, "We agree that John may use last name only to address students." At the bottom of the page, she wrote, "In addition, Angie Boyer will be responsible for distributing uniforms to students." She initialed both changes. Kluge checked the "I will comply" line, and signed and dated the form. R. 15-1.

Kluge then began to teach his regularly assigned classes which included two transgender students, Aidyn Sucec and Sam Willis.[5] R. 120-3, at 20. Within a month, Dr. Daghe began to hear complaints about Kluge from Lee, the faculty advisor of the Equality Alliance Club. R. 120-2, at 4; R. 58-2, at 2–3; R. 120-14, at 7–8. Lee was also a member of the school's three-

[5] As we note below, Sam Willis did not change his name and gender marker in PowerSchool until the end of September 2017. R. 120-3, at 20.

teacher Faculty Advisory Committee. R. 120-2, at 4. In an August 29, 2017 email to Dr. Daghe, Lee reported:

> I wanted to follow up regarding the powerschool/students changed name discussion at the Faulty Advisory as some issue[s] have arisen in the last few days that need to be addressed. … There is a student who has had their name changed in powerschool. They are a freshman who this teacher knew from 8th grade. The teacher refuses to call the student by their new name. I see this is a serious issue and the student/parents are not exactly happy about it. … As the student said, "what more are we supposed to do?"

R. 120-15, at 2. *See also* R. 120-12 (September 1, 2017 letter to the school from parent of student noting child's transgender status and reporting problems with a teacher who uses incorrect gendered language against the wishes of the parents and medical providers of the child, leading to confusion for other students on how to address the child); R. 120-13 (August 30 through September 21, 2017 email chain between parent and school counselor regarding student's transgender status, updates to PowerSchool database, and repeated problems with Kluge using incorrect gendered language that the parent characterizes as "very disrespectful and hurtful," and which causes the child "a lot of distress."). Lee also described the situation of a student in the process of a PowerSchool name change, whose supportive parent asked the teacher to start using the new name, and the teacher refused, citing the Name

Policy. R. 120-15, at 2. Lee closed his email by turning the problem over to Dr. Daghe:

> I know that this is something that must be hard to deal with from your perspective. You are trying to do the right thing for your employees and students alike. I absolutely do not envy your position and thus far you have been incredibly supportive and it means a lot. However, there is confusion amongst some teachers and students that I think needs clarification and perhaps a teacher or two that needs to know that it is not ok to disobey the powerschool rule.
>
> I hope this makes sense mate. Maybe me, you and Kat need to sit down and talk about this. I am not totally sure and of course I am very biased. However, I have always admired your leadership and now look to you for the next step.

R. 120-15, at 2–3.

Lee also began to report to Dr. Daghe on comments he was hearing from students who attended the Equality Alliance meetings, where Kluge's behavior became a frequent topic of conversation. R. 58-2, at 2–4; R. 120-14, at 7–14; R. 120-2, at 4. According to Lee, both Aidyn and Sam discussed during those meetings how Kluge was referring to them by their last names only, a practice they found insulting and disrespectful. R. 58-2, at 2; R. 120-14, at 7. Lee confirmed that Aidyn and Sam attributed Kluge's last names practice to their presence in the classroom, and this made them feel isolated and targeted.

R. 58-2, at 2–3; R. 120-14, at 7–8. "It was clearly visible the emotional distress and the harm that was being caused towards them. It was very, very clear, and, so, that was clear for everyone to see but that is also what they described as well," Lee testified. R. 120-14, at 7–8. When asked if it was his interpretation that Sam and Aidyn "felt as if they were being discriminated against by Mr. Kluge," Lee replied, "I wouldn't describe it so much as an interpretation. It was just very, very clear at the meetings to see how much emotional harm was being caused towards Sam and Aidyn. It was clear for everyone at the meetings just to see how much of an impact it was having on them. … [I]t was so clearly visible that I don't feel like there was anything necessarily to interpret." R. 120-14, at 8. Lee passed these concerns onto Dr. Jessup as well. R. 120-14, at 8. Although Kluge asserted that he was perfectly compliant in the use of last names only, Lee also reported that students complained that Kluge would occasionally slip up and use first names or gendered honorifics rather than last names only.[6] R. 58-2, at 3; R. 120-14, at 8–9.

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[6] In his deposition, Kluge testified, "From Day 1 I was consistent in using last names only and using it for all students. I didn't target students." R. 120-3, at 36. Because we must construe the record in favor of Kluge on summary judgment, we credit his testimony that he was perfectly compliant with the Name Policy and never slipped up. However, in a letter to the Equal Employment Opportunity Commission, Kluge's lawyer stated, "Kluge made a good faith effort to address all students by last names and to never 'misgender' students. He admits that he may have made occasional mistakes in referring to students he formerly called by their first names." R. 120-19, at 7. In any case, we may also credit Lee's statement that he conveyed to administrators that students complained that Kluge did slip up, not for the truth of the matter but to show the state

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In addition to the complaints of the transgender students, Lee reported that he had been approached by a student who was not in the Equality Alliance but was in Kluge's orchestra class. R. 58-2, at 3; R. 120-14, at 9. That student, who did not identify as LGBTQ, told Lee that Kluge's use of last names made him feel incredibly uncomfortable. The student described Kluge's practice as very awkward because the student was fairly certain that all the students knew why Kluge had switched to using last names, and that it made the transgender students in the orchestra class stand out. The student felt bad for the transgender students, and shared with Lee that other students felt this way as well. R. 58-2, at 3; R. 120-14, at 9. Some students believed that Kluge avoided acknowledging transgender students who raised their hands in class. R. 58-2, at 3; R. 120-14, at 8–9. Kluge denied doing so, but the evidence is undisputed that these sorts of complaints were reported to school administrators.

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of mind of the school administrators receiving these reports. In addition to Lee's testimony, as we discuss below, two transgender students in Kluge's classes averred that Kluge sometimes used gendered honorifics or first names for non-transgender students. Because Kluge denies this, we assume Kluge's perfect compliance for the purpose of the summary judgment motion. Kluge does not, however, contest that the students conveyed such complaints to teachers and administrators, and this is relevant to the administrators' state of mind. *See Khunger v. Access Cmty. Health Network*, 985 F.3d 565, 575 (7th Cir. 2021) (out-of-court complaints about an employee are admissible when offered not for their truth but to show the employer's state of mind when making a termination recommendation). Moreover, Kluge submitted no evidence that the teachers and administrators did not honestly believe the reports that Kluge was not fully compliant.

The record also contains sworn statements from Sam Willis and Aidyn Sucec memorializing their experiences in Kluge's class. R. 58-1 (Willis Affidavit); R. 22-3 (Sucec Affidavit). Sam averred that he knew Kluge from his participation in music programs in middle school. After deciding to publicly transition at the start of his sophomore year (2017–2018), Sam emailed the school counselor that he would be using the name "Samuel" and masculine pronouns going forward. His mother emailed Kluge directly about the change because Kluge had known Sam by a different name in middle school. Kluge did not respond to the email and Sam reported that Kluge referred to him as "Miss Willis" on several occasions.[7] This led to other students questioning Sam's sex, which was upsetting to him. In early fall, Sam's mother requested that he be allowed to wear a tuxedo for a fall concert. At that point, the school informed Sam's mother about the new PowerSchool Name Policy. Sam's parents then submitted the required letters from themselves and Sam's healthcare provider, and his name and gender markers were amended in PowerSchool in time to get the tuxedo. According to Sam, Kluge then stopped calling him "Miss Willis," but sometimes used gendered honorifics such as "Miss" or "Mr." and gen-

[7] Although Sam did not change his name and gender markers in PowerSchool until late September 2017, Kluge's use of the term "Miss Willis" would have violated the Name Policy because of the use of the gendered honorific "Miss." Kluge understood that his accommodation required him to use last names only and refrain from using gendered honorifics in all of his classes, whether or not there were transgender students in the class. R. 120-3, at 18. Nevertheless, Kluge denies ever slipping up, and we credit that testimony as we discuss above.

dered pronouns when referring to students who were not transgender. Sam reported that Kluge's last names practice was awkward because most students knew why Kluge had made the switch, contributing to Sam's sense that he was being targeted because of his transgender identity. Sam explained that he felt hurt by Kluge's treatment, and that his family was hurt and angry that Kluge thought he knew better than they did. He averred that Kluge's actions exposed him to widespread public scrutiny in high school. R. 58-1.

Aidyn Sucec, who began high school the same year that the Name Policy went into effect, averred that, after years of struggling with depression and anxiety, he was diagnosed with gender dysphoria in the spring of 2017. While receiving treatment from medical providers for that condition, Aidyn began to take steps to socially transition, including changing his name and asking others to use male pronouns to refer to him. He explained, "Being addressed and recognized as Aidyn was critical to helping alleviate my gender dysphoria. My emotional and mental health significantly improved once my family and friends began to recognize me as who I am." R. 22-3, at 3. Prior to beginning high school, Aidyn's mother spoke to a guidance counselor to discuss steps the school could take to ensure his safety and well-being as a transgender student. Aidyn's mother and therapist subsequently submitted letters to the school requesting changes to Aidyn's name and gender marker in PowerSchool, and the change was in place at the beginning of the academic year. All of Aidyn's teachers except Kluge complied with the Name Policy. On the first day of class, Aidyn received a folder from the substitute teacher covering for Kluge with his former first

name on it. The substitute also referred to him by his former first name in front of other students, which he experienced as "intensely humiliating and traumatizing." Throughout the fall semester, Kluge refused to call him "Aidyn," instead referring to him as "Sucec" or avoiding using any name and simply nodding or waving in his direction. Aidyn averred that Kluge sometimes used gendered honorifics with other students in the class, and less frequently called those students by their first names. Kluge's behavior left Aidyn feeling "alienated, upset, and dehumanized." He dreaded going to class each day and was uncomfortable each time he had to speak with Kluge one-on-one. Kluge's behavior was noticeable to others in the class, and at one point Aidyn's stand partner asked him why Kluge would not just say his name; Aidyn felt forced to tell him that it was because he was transgender. Aidyn discussed Kluge's behavior with his therapist as part of his ongoing treatment for gender dysphoria. He noted that Kluge's practice was also discussed multiple times at Equality Alliance meetings. By the end of the first semester, Aidyn told his mother that he did not want to continue with orchestra in his sophomore year. He did not in fact continue with orchestra the next year, and due to harassment he faced after Kluge left the school, Aidyn left Brownsburg at the end of his sophomore year.[8] R. 22-3.

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[8] Kluge characterizes the affidavits of Sam and Aidyn as "after-created evidence," which contained information about events that occurred after Kluge's termination. But both affidavits largely describe events that occurred before the school made the decision to terminate Kluge, and both affirm the information that Lee passed on to Dr. Daghe from Equality Alliance Meetings. The only exception is that the school was not aware that,

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Students were not the only source of concern about Kluge's practice. Lee reported that he had been approached by three teachers—Jason Gill, Melinda Lawrie, and Justin Bretz—during that academic year with concerns that Kluge's practice was causing harm to students. R. 120-14, at 16–17 ("they felt very strongly that this was harming students, not just Sam and Aidyn but just students in general who would potentially be in Mr. Kluge's class."). Dr. Daghe was approached by two additional teachers who were also department heads in Fine Arts (the department in which Kluge taught), Tracy Runyon and Melissa Stainbrook. They too conveyed complaints about Kluge's use of last names only. Dr. Daghe explained that teachers within the department who had a complaint about another teacher would convey concerns to the department heads and he was therefore most in contact with those two teachers in Kluge's department. R. 113-5, at 8–9.

After hearing about concerns from counselors that students were uncomfortable in some of their classes with regards to transgender issues, Dr. Jessup attended an Equality Alliance Club meeting to hear from students herself. R. 120-1,

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midway through the school year, Aidyn told his mother that he did not wish to continue with orchestra the next academic year, and in fact ended up leaving Brownsburg at the end of the following year due to harassment he received from other students. Although Brownsburg did not know that Aidyn would withdraw from orchestra or leave the school, at most the affidavit confirms that the school accurately predicted the fallout from Kluge's failure to follow the Name Policy that was designed to avoid this very harm to the school's mission. We do not rely on any information from the affidavits that post-dates Kluge's termination.

at 4; R. 120-6, at 7. Approximately forty students attended the meeting. Four or five students at the meeting complained about a teacher using last names only to address students.[9] The other students in attendance appeared to agree with the complaints. R. 120-1, at 4. Dr. Jessup also heard from students that they felt singled out by the use of their last names and that "not all students were called by their last name by Mr. Kluge." R. 120-6, at 7. *See also* R. 113-4, at 9 (Gordon testifying that she was "made aware that there had been complaints made to Dr. Daghe from students and staff that Mr. Kluge wasn't following those guidelines that he had agreed to at the start of the year.").

Dr. Daghe continued to hear complaints about Kluge's last-names-only practice throughout the fall semester, but hoped that the issue would resolve itself. R. 120-2, at 4. He therefore did not raise the matter with Kluge until he met with Kluge on December 13, 2017, after it became apparent that the accommodation was not working in practice because students were being harmed, and the learning environment was being disrupted. R. 120-2, at 4; R. 112-5, at 7. Dr. Daghe testified that the purpose of the meeting was to tell Kluge that the last-names-only policy was not working in practice:

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[9] The Equality Alliance Club had a policy of not using teachers' names at meetings. R. 120-14, at 11. Nevertheless, because of references to orchestra class and because Kluge was the only teacher at the school who had been permitted the last-names-only accommodation, both Lee and Dr. Jessup understood the students to be referring to Kluge. R. 120-14, at 7; R. 120-1, at 4.

> And the purpose of that meeting was to tell him that that's not going well. I'm getting reports from students, I'm getting reports from parents, I'm getting reports from our teams which are done by grade level, I'm getting reports by teachers in his own department that students are uncomfortable in his class and that they are bringing the conversations that occur in his class to other classrooms and having discussions about the uncomfortableness, whether it was dealing with a transgender student and last names only or whether it was times when last names weren't used or it was times when, you know, kids just want it all to go away and act like everything is normal. So I called John down and told him that's what's been given to me. And so, to me, as the high school principal trying to accommodate people and also trying to make sure that education can move forward, I just told him that.

R. 112-5, at 7.

According to Kluge's own description of the meeting:

> Daghe scheduled a meeting with me to ask me how the year was going and to tell me that my last-name-only Accommodation was creating tension in the students and faculty. He said the transgender students reported feeling "dehumanized" by my calling all students last-name-only. He said that the transgender students'

> friends feel bad for the transgender students when I call transgender students, along with everyone else, by their last-name-only. He said that I am a topic of much discussion in the Equality Alliance Club meetings. He said that a number of faculty avoid me and don't hang out with me as much because of my stance on the issue.
>
> Daghe said that parents complain about me. He stated that a transgender student's mother complained to the principals about my orchestra [hair color] policy, that it was an unfair and unwarranted policy and should be removed. The building principal asked if the other teachers had this same policy. I told him "yes" and sent him their policies and mine. He responded to the parent and the parent backed down. This was a policy by my entire performing arts department that students must have natural-colored hair for performances so they don't distract from the music being played.
>
> Daghe referred to this parent complaint in this meeting as being evidence of me being singled out while other teachers with the same policies did not receive any complaints.
>
> I explained to Daghe that this persecution and unfair treatment I was undergoing was a sign that my faith as witnessed by my using last-names-only to remain neutral was not coming

> back void, but was being effective. He didn't seem to understand why I was encouraged. He told me he didn't like things being tense and didn't think things were working out. He said he thought it might be good for me to resign at the end of the year. I told Daghe I was now encouraged all the more to stay.

R. 15-3, at 4–5. *See also* R. 120-3, at 21–25. Kluge had not "witness[ed]" tension, and also had not "witness[ed]" that anyone was avoiding him. R. 120-3, at 23; R. 112-5, at 7. Although Kluge believed that he was singled out for complaints about the department-wide hair color policy because of his religion, Dr. Daghe concluded that "it was because of the way he was handling this accommodation." R. 112-5, at 7. Because Dr. Daghe would not name the students or faculty who complained, Kluge suspected that Dr. Daghe was lying. R. 120-3, at 23. Kluge left this meeting believing that his use of last names only was working and that there was no evidence of "undue hardship" arising from his practice. R. 120-3, at 23–25.

On January 17, 2018, Dr. Daghe held another meeting with Kluge. According to Kluge's own account of the meeting:

> Daghe scheduled a meeting with me because he said he didn't think he was direct enough in our December 13 meeting. He told me in this meeting plainly that he really wanted to see me resign at the end of the school year. I told him that it was simply because he didn't like the tension and conflict. But I used examples in scripture to point to why this is a sign that I should stay. I

> referenced Acts 19:11-41 with Paul's conflict in Ephesus and 1 Corinthians 16:8-9 when Paul was encouraged by the opportunity, saying, "a wide door for effective service has opened to me, and there are many adversaries."

R. 15-3 at 5. Kluge also reported that Dr. Daghe asked him if he was going to resign and offered to write him letters of recommendation. Kluge deferred the decision, saying he wanted to wait until a January 22, 2018 faculty meeting when new transgender policies would be announced. R. 15-3, at 5.

On January 22, 2018, Dr. Jessup presented the faculty with a document titled "Transgender Questions." R. 15-4. The document provided policies and guidance for faculty in a question/answer format regarding issues relevant to transgender students. Among the questions posed and answers given were the following:

> **Are we allowed to use the student's last name only?** We have agreed to this for the 2017–2018 school year, but moving forward it is our expectation the student will be called by the first name listed in PowerSchool.
>
> **How do teachers break from their personal biases and beliefs so that we can best serve our students?** We know this is a difficult topic for some staff members, however, when you work in a public school, you sign up to follow the law and the policies/practices of that organization and that might mean following practices that are different than your beliefs.

> **What feedback and information has been received from transgender students?** They appreciate teachers who are accepting and supporting of them. They feel dehumanized by teachers they perceive as not being accepting or who continue to use the wrong pronouns or names. Non-transgender students in classrooms with transgender students have stated they feel uncomfortable in classrooms where teachers are not accepting. For example, teachers that call students by their last name, don't use correct pronouns, don't speak to the student or acknowledge them, etc.

R. 15-4, at 9–10.

After this faculty meeting, on February 4, 2018, Kluge sent an email to Drs. Snapp and Daghe quoting the language in the Transgender Questions document regarding the prohibition on the use of last names only. R. 120-16; R. 15-3, at 5. He noted that his agreement with the school was not limited to the 2017–2018 academic year, and asked if he would be allowed to use last names only going forward. R. 120-16. In response, Gordon and Dr. Daghe scheduled a meeting with Kluge for February 6, 2018. R. 15-3, at 6. Kluge secretly recorded the meeting, and the transcript appears in the record. R. 112-4, at 20–55; R. 120-3, at 25. Gordon and Dr. Daghe informed Kluge that, after the 2017–2018 school year, all teachers would be required to address students by the first name recorded in PowerSchool. R. 15-3, at 6; R. 112-4, at 24. Kluge again explained that his objection to using the PowerSchool names for transgender students was religious and that he felt this was a

reasonable accommodation. R. 112-4, at 25–32. Gordon and Dr. Daghe disagreed with him, explaining that he worked in a public school and that the last-names-only practice was not reasonable because it was "detrimental to kids." R. 112-4, at 25–28. Kluge said he felt that using the names in PowerSchool forced him to "encourage" students "in a path that's going to lead to destruction, to hell, I can't as a Christian be encouraging students to hell." R. 112-4, at 28. He cited a study from a doctor at Johns Hopkins that likened transgenderism to anorexia. R. 112-4, at 30. Dr. Daghe and Gordon explained to him that there were doctors on the other side of the issue and that the administrators had conducted their own extensive research in how to address the issue. R. 112-4, at 30. They held firm on the school's Name Policy, and the conversation turned to Kluge's resignation/termination. R. 112-4, at 32. Gordon explained that some teachers were sensitive about letting colleagues and students know that they were leaving, and she therefore honored requests to not communicate or process retirements or resignations until the school year concluded. R. 112-4, at 35–37. She discussed the timing of his departure from the school, explaining that because his position was difficult to fill, the school would need to begin the search as soon as possible. R. 112-4, at 35–37. Kluge interpreted this offer as allowing him to submit a conditional resignation that he could withdraw before some agreed date. R. 15-3, at 6; R. 120-3, at 26. Gordon believed she was offering only to delay notifying anyone of the resignation, not that the resignation could be withdrawn. R. 120-17, at 2; R. 112-4, at 11–12. In fact, Indiana law and the school's bylaws do not permit the withdrawal of a resignation once it has been properly submitted

to the Superintendent, and Gordon was the Superintendent's agent for this purpose. R. 112-4, at 11–12; R. 120-8; R. 120-9.

Gordon met with Kluge again in March 2018 to set a date for his decision. She reiterated that Kluge had three options: comply with the Name Policy; resign; or be terminated. She explained that if he would not comply and did not resign by May 1, 2018, the termination process would begin on that date. R. 15-3, at 6; R. 113-2, at 6.

On April 30, 2018, Kluge submitted his resignation by email. R. 120-17, at 2. In the email, he said he would resign as of early August 2018 when his contract for the academic year finished. He explained that he was resigning because the school required teachers to call transgender students by a name that "encourages the destructive lifestyle and psychological disorder known as gender dysphoria." R. 120-17, at 2. He noted that the school was withdrawing the last-names-only accommodation that allowed him to remain "neutral" on the issue. He was resigning because his Christian conscience "does not allow [him] to call transgender students by their 'preferred' name and pronoun," and the school had directed him to either resign by May 1, or he would be terminated. He concluded:

> Please do not process this letter nor notify anyone, including any administration, about its contents before May 29, 2018. Please email me to acknowledge that you have received this message and that you will grant this request.

R. 120-17, at 2. Gordon replied the same day, telling Kluge, "I will honor your request and not process this letter or share

with BHC administration until May 29." R. 15-2; R. 120-17, at 2.

In May 2018, as part of the curriculum, Kluge participated in an orchestra awards ceremony. R. 120-3, at 32–33. At the ceremony, he addressed the students, including the transgender students, by their first and last names as they appeared in PowerSchool. R. 120-3, at 33; R. 58-1, at 4. Kluge explained that he did this because "it would have been unreasonable and conspicuous to address students in such an informal manner at such a formal event as opposed to the classroom setting where teachers refer to students by last names as a normal form of address." R. 120-3, at 33. In his deposition, Kluge also affirmed the account that his lawyer gave to the EEOC in explaining the exception he made at this event, asserting that he did not wish to "bring into doubt my stated rationale for usage of last names only." R. 120-3, at 32–33; R. 120-19, at 7. Kluge confirmed that his lawyer's statement was an accurate account of what transpired at the orchestra award ceremony, and he adopted some of his lawyer's language as his own statement. R. 120-3, at 32–33. His attorney's statement to the EEOC explained:

> During classes, Kluge addressed students by last names, as a reasonable accommodation for his sincerely held Christian beliefs. But during the orchestra awards ceremony, because of its formal nature, he used the full names for students listed in PowerSchool to address all students as they were receiving their awards—including transgender students—because he was trying to work with the school in only

> requesting what was reasonable. Kluge thought it unreasonable and conspicuous to address students in such an informal manner at such a formal event, as opposed to the classroom setting where teachers refer to students by last names as a normal form of address. Kluge's Christian faith required that he do no harm to his students, and this acquiescence to the administration's position was done solely out of sincerely-held beliefs, and not in agreement with the policy.

R. 120-19, at 7 (Letter of Michael J. Cork, Esq. to David A. Tite, EEOC Investigator). Thus Kluge acknowledged that using last names only in some settings would be unreasonable, conspicuous, and potentially cause harm to his students contrary to the requirements of his Christian faith.[10] He therefore decided to use first and last names, and in keeping with the accommodation, he used the first names from PowerSchool rather than the students' former first names.[11] Kluge conceded that a school has an interest in being concerned with the mental health of its students. R. 120-3, at 35.

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[10] The dissent contends that we are "construe[ing] this statement as a legal concession" that Kluge's practice would potentially harm his students. No construing is necessary; the statement speaks for itself.

[11] Brownsburg contends that Kluge's use of the PowerSchool names at this ceremony calls into question the sincerity of his asserted religious beliefs. Because we resolve the case in favor of Brownsburg, we need not address the sincerity of Kluge's beliefs, and we assume his sincerity for summary judgment purposes.

Kluge scheduled a meeting with Dr. Daghe and Gordon on May 25, 2018, at the Brownsburg Central Office. R. 15-3, at 1. When Kluge arrived for the meeting, Gordon was not present, and Dr. Daghe told Kluge, "We have everything we need. We don't need to meet. Go back to the high school." Dr. Daghe also told Kluge not to meet with Gordon that day. R. 15-3, at 1. Kluge instead delivered a letter to Gordon's office, explaining that he had wanted to meet in order to present a written "Withdrawal of Intention to Resign and Request for Continuation of Accom[m]odation." R. 15-3. A few hours later, Brownsburg locked Kluge out of school buildings and online services, and posted his job as vacant. R. 113-2, at 7; R. 120-3, at 29.

At the June 11, 2018 school board meeting where resignations were considered, Kluge was denied a request to speak during the regular part of the meeting, but gave a brief statement during the public-comment section of the meeting. R. 120-3, at 29; R. 120-18, at 10. He explained what had happened, and asked the board to allow him to withdraw his resignation and to reinstate him. R. 120-3, at 29–30; R. 120-18, at 10. The board instead accepted his resignation without comment. R. 113-2, at 7; R. 120-3, at 30; R. 120-18, at 2.

Kluge sued the school, bringing claims under Title VII for religious discrimination/failure to accommodate; retaliation; and hostile work environment. He also brought claims under the First and Fourteenth Amendments and Indiana law. The district court dismissed the claims under the First and Fourteenth Amendments as well as the state law claims, and the Title VII claim for hostile work environment. Kluge does not appeal those dismissals. Kluge's claim for religious

discrimination/failure to accommodate (for the sake of simplicity, we will call this the discrimination claim) and his retaliation claim proceeded to discovery. Ultimately, Kluge filed a motion for partial summary judgment on his discrimination claim, and the school countered with a cross-motion for summary judgment on both of the remaining claims.

The district court denied Kluge's motion, and granted Brownsburg's cross-motion. On the discrimination claim, the court framed the ultimate issue as "whether, assuming perfect compliance with the last names only accommodation, that accommodation resulted in undue hardship to" Brownsburg. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 839 (S.D. Ind. 2021). For summary judgment purposes, the court treated Kluge's forced resignation as an adverse employment action. The court also accepted that his religious beliefs and objections to using the PowerSchool names and pronouns of transgender students were sincerely held. After finding that there was an objective conflict between Kluge's sincerely held religious beliefs and Brownsburg's policies for transgender students, the court concluded that Kluge's refusal to follow those policies created an undue hardship on Brownsburg's mission of educating all of its students. In particular, the court found that the last-names-only accommodation burdened Brownsburg's ability to provide an education for all students and conflicted with the school's philosophy of creating a safe and supportive environment for all students. In finding that the accommodation created an undue burden, the court relied on the reports of Aidyn and Sam as well as those of other students and teachers. Aidyn and Sam reported feeling targeted and uncomfortable, and Aidyn grew to dread going to

Kluge's orchestra class, ultimately quitting orchestra entirely. Other students and teachers complained that Kluge's practice was offensive or insulting and made his classroom environment unwelcome and uncomfortable. The court found that Brownsburg was not required to allow an accommodation that unduly burdened its business of educating all students in a supportive manner. The court found an additional undue burden in that the accommodation opened the school up to the threat of Title IX discrimination lawsuits that could be brought by transgender students who felt targeted and dehumanized by Kluge's practice. The court concluded that Brownsburg had demonstrated as a matter of law that it could not accommodate Kluge's "religious belief against referring to transgender students using their preferred names and pronouns without incurring undue hardship." *Kluge*, 548 F. Supp. 3d at 846.

As for Kluge's retaliation claim, the court found that Kluge's briefing on the matter had been meager, and that he had simply recited his version of the facts without discussing how those facts meet the requirements of a retaliation claim. The court also noted that Kluge failed to address Brownsburg's argument that there is no evidence in the record from which a reasonable fact finder could infer that its non-discriminatory explanation for its action was a pretext for religious discrimination. Without any explanation of his theory of retaliation and without any evidence demonstrating pretext, the court found that Kluge had waived his claim for retaliation. As an alternate basis for granting judgment in favor of the defendant, the court also noted that Kluge failed to present any evidence from which a reasonable fact finder could

conclude that a causal connection exists between Kluge's protected activity and his resignation, any evidence of pretext, or any evidence that Brownsburg's action was motivated by discriminatory animus. The court therefore granted summary judgment in favor of the school on the retaliation claim as well. Kluge appeals.

II.

On appeal, Kluge asks the court to reverse the grant of summary judgment in favor of Brownsburg on both of his claims. For the discrimination claim, he asks that we remand to the district court in order to enter summary judgment in his favor because Brownsburg withdrew a reasonable accommodation and forced him to resign without demonstrating that the accommodation caused undue hardship.[12] Kluge also

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[12] Kluge appeals both the grant of summary judgment in favor of Brownsburg and the denial of summary judgment in his favor. Specifically, he asks that we reverse and remand for judgment to be entered in his favor as a matter of law. When the district court considers cross-motions for summary judgment, granting one and denying the other, the denial of summary judgment "has merged into the final judgment and is therefore appealable" as part of the appeal from the final judgment granting the opposing party's motion. *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). In order to consider Kluge's request that we reverse the denial of summary judgment in his favor, we would be required to review the facts in the light most favorable to the defendant, Brownsburg, and draw all reasonable inferences in favor of the school. *See Hess v. Reg-Ellen Machine Tool Corp.*, 423 F.3d 653, 658 (7th Cir. 2005) ("With cross-motions, our review of the record requires that we construe all inferences in favor of the party against whom the motion under consideration is made."). As is apparent from our recitation of the undisputed facts, such a review would demonstrate that Kluge is not entitled to judgment as a

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urges this court to find that he preserved his retaliation claim and presented sufficient evidence in support of that claim to merit summary judgment in his favor; in the alternative, he seeks a trial on the retaliation claim. Brownsburg asks the court to affirm the district court's judgment in all respects. We review the district court's grant of summary judgment *de novo,* and we examine the record in the light most favorable to the party opposing judgment, in this case Kluge, construing all reasonable inferences from the evidence in his favor. *Anderson*, 477 U.S. at 255; *Horne v. Electric Eel Mfg. Co.*, 987 F.3d 704, 713 (7th Cir. 2021). Summary judgment is appropriate when there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson*, 477 U.S. at 247–48; *Horne*, 987 F.3d at 713. "[S]ince the review of summary judgment is plenary, errors of analysis by the district court are immaterial; we ask whether we would have granted summary judgment on this record." *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 386 (7th Cir. 2000). *See also Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993) ("The question whether a movant is entitled to summary judgment is one of law—one therefore that we review *de novo*, which is to say without deference for the

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matter of law: the school asserts with copious evidence from students, faculty and administrators that Kluge sometimes failed to follow the accommodation (a failure which he conceded through his lawyer during proceedings before the EEOC), treated transgender students differently than non-transgender students, and created what can be described at best as a difficult learning environment for the students in his class. He also alienated his colleagues in the Arts Department and offended parents. Construing the record in favor of Brownsburg, Kluge is not entitled to judgment. In considering Kluge's appeal of the grant of summary judgment in favor of Brownsburg, we must construe the record in Kluge's favor.

view of the district judge and hence almost as if the motion had been made to us directly.").

A.

Title VII provides, in relevant part, that "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). After that provision was enacted, the EEOC issued a guideline that required "that an employer, short of 'undue hardship,' make 'reasonable accommodations' to the religious needs of its employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977); 29 C.F.R. § 1605.1(b) (1968). Congress later codified that "reasonable accommodation" regulation in its definition of the term "religion":

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). The Supreme Court said that "[t]he intent and effect of this definition was to make it an unlawful employment practice under [sec. 2000e-2(a)(1)] for an employer not to make reasonable accommodations, short of undue

hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74.

The statute did not, however, provide guidance for determining the degree of accommodation required of an employer, and legislative history was not illuminating. *Hardison*, 432 U.S. at 74–75. In *Hardison*, the Supreme Court set out to determine the reach of the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, which had not previously been spelled out by Congress or by EEOC guidelines. 432 U.S. at 75. The plaintiff, Hardison, worked at Trans World Airlines ("TWA") in an airplane maintenance department that operated twenty-four hours a day, every day of the year. All employees of the department were subject to the terms of a collective bargaining agreement that had a system of bidding for shift assignments based on seniority. Early in his employment at TWA, Hardison began following a religion that required its members to refrain from work from sunset on Friday until sunset on Saturday. But Hardison lacked the seniority to bid for a schedule that accommodated his religious beliefs and the union was unwilling to allow him to bypass the seniority system. TWA considered other possible solutions, but each had a cost to the employer such as breaching the seniority system, paying premium wages to hire someone to cover the Saturday shift, or leaving the shift uncovered. The company met several times with Hardison in attempts to find a solution, authorized the union steward to search for someone who would voluntarily swap shifts, and attempted without success to find Hardison another job within the company. TWA

eventually discharged Hardison on grounds of insubordination for refusing to work his assigned shift.

In a bench trial, the district court entered judgment in favor of TWA after concluding that the proposed accommodations presented an undue hardship for the company. The court of appeals reversed and found in favor of Hardison, concluding that TWA could have: (1) given Hardison a four-day work-week and used a supervisor or other worker to cover the fifth day; (2) filled Hardison's shift with another employee; or (3) arranged a swap between Hardison and another employee for shifts in the sundown Friday to sundown Saturday period. The Supreme Court rejected all of these options because each would have created "undue hardship" under the statute. In particular, the first option would have caused other shop functions to suffer; the second would have required the company to offer premium overtime pay to the substitute employee; and the third would have violated the seniority system. *Hardison*, 432 U.S. at 77–84.

In considering the "undue hardship" language of the statute, the Court decided that the duty to accommodate did not require a company to take steps inconsistent with a valid collective bargaining agreement or seniority system, noting:

> Title VII does not contemplate such unequal treatment. The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities. … Indeed, the foundation of

> Hardison's claim is that TWA and IAM engaged in religious discrimination in violation of [sec. 2000e-2(a)(1)] when they failed to arrange for him to have Saturdays off. It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.

Hardison, 432 U.S. at 81. The Court relied in part on the statutory preference given to *bona fide* seniority systems, noting that, under section 2000e-2(h), "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." 432 U.S. at 82.

The Court then considered the other options open to TWA to accommodate Hardison's religious practice, such as replacing Hardison on those shifts with supervisory personnel or personnel from other departments, or replacing him with other available workers by paying premium overtime wages. Both alternatives, the Court noted, involved costs to the company, "either in the form of lost efficiency in other jobs or higher wages." 432 U.S. at 84. The Court found that the employer was not required by the statute to incur either cost, instead holding that, "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84.

> Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.
>
> As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.

Hardison, 432 U.S. at 84–85.

The Supreme Court subsequently spoke on reasonable accommodations for religious practice in the employment

context only two other times. In *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986), the Court clarified that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." The Court thus rejected the claim that the accommodation obligation includes a duty to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business. 479 U.S. at 68. Instead, in situations where multiple accommodations are possible, the Court held that an employer has met its statutory obligation "when it demonstrates that it has offered a reasonable accommodation to the employee." 479 U.S. at 69.

In the Court's last and most recent foray into the reasonable accommodation provision of Title VII, the Court considered a case where an employer declined to hire a woman for a sales position in a clothing store because she wore a head scarf, which would violate the store's "Look Policy" that governed employees' dress. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015). At the time the store made the decision, the assistant manager who interviewed the woman found her otherwise qualified to be hired but was concerned that the scarf violated the Look Policy's prohibition on caps. The assistant manager sought guidance from a district manager, informing him that she believed that the prospective employee wore the scarf for religious reasons. The district manager directed the assistant manager not to hire the woman because the scarf would violate the Look Policy as would all other headwear, whether religious or otherwise.

The prospective employee prevailed on a Title VII reasonable accommodation claim in the district court, but the court of appeals reversed, finding that an employer cannot be liable for failing to accommodate a religious practice until the applicant or employee provides the employer with actual knowledge of the need for an accommodation.

The Supreme Court noted that the statute prohibits employers from failing to hire an applicant "because of" her religious practice. The term "because of" imports at a minimum the "but-for" standard of causation. *Abercrombie*, 575 U.S. at 772. Title VII relaxes that standard by providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added); *Abercrombie*, 575 U.S. at 773. The statute also does not impose a knowledge requirement, but instead "prohibits certain *motives*, regardless of the state of the actor's knowledge." *Abercrombie* 575 U.S. at 773. Thus:

> An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his *motive*. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed. … An employer may not make an

> applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

Abercrombie, 575 U.S. at 773. Finally, the Court rejected the premise that a neutral employment policy cannot constitute intentional discrimination, finding:

> Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not "to fail or refuse to hire or discharge any individual ... because of such individual's" "religious observance and practice." An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an "aspec[t] of religious ... practice," it is no response that the subsequent "fail[ure] ... to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

Abercrombie, 575 U.S. at 775.

The Supreme Court did not address the undue hardship standard in *Philbrook* or *Abercrombie*, leaving in place the standard it set in *Hardison*, namely, that the employer need not "bear more than a *de minimis* cost" in making an accommodation. *See also E.E.O.C. v. Walmart Stores East, L.P.*, 992 F.3d 656, 658 (7th Cir. 2021) (describing *Hardison*'s *de minimis* cost as a "slight burden" to avoid the Latin). Our court

established a burden-shifting framework for proof of a Title VII claim for failure to accommodate religion in *E.E.O.C. v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997), which must be modified slightly to account for the Supreme Court's opinion in *Abercrombie*. To make out a *prima facie* case, an employee must demonstrate that: (1) an observance or practice that is religious in nature, and (2) that is based on a sincerely held religious belief, (3) conflicted with an employment requirement, and (4) the religious observance or practice was the basis or a motivating factor for the employee's discharge or other discriminatory treatment. *Abercrombie*, 575 U.S. at 772-73; *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013); *Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012); *Ilona of Hungary*, 108 F.3d at 1575. "If the employee shows these elements, the burden then shifts to the employer to show that it could not accommodate the employee's religious belief or practice without causing the employer undue hardship." *Adeyeye*, 721 F.3d at 449; *Baz v. Walters*, 782 F.2d 701, 706 (7th Cir. 1986).

The district court determined that Kluge established a *prima facie* case of failure to accommodate a religious practice. The court noted that there were issues of fact as to whether Kluge's religious beliefs were sincerely held, but taking the record in the light most favorable to Kluge for the purposes of summary judgment, there was enough evidence that his refusal to use the preferred names and pronouns of the transgender students was a religious practice based on a

sincerely held belief.[13] Kluge also presented adequate evidence that his practice conflicted with an employment requirement, in particular, the PowerSchool Name Policy. Brownsburg does not dispute that forcing Kluge to either comply with the Name Policy, resign, or be terminated was an adverse employment action, and the school generally concedes that, for the purposes of this appeal, Kluge has established a *prima facie* case of failure to accommodate.

B.

The burden then shifts to Brownsburg to demonstrate that it could not reasonably accommodate Kluge "without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). "Reasonableness is assessed in context, of course, and this evaluation will turn in part on whether or not the employer can in fact continue to function absent undue hardship if the employee is permitted" the requested accommodation. *Adeyeye*, 721 F.3d at 455. Accordingly, "[t]he issue of undue hardship will depend on close attention to the specific circumstances of the job[.]" *Id*. As a public school, Brownsburg's "business" is its constitutional and statutory charge to educate all students who enter its doors. We have noted that, "pupils are a captive audience. Education is

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[13] In his response opposing a motion for leave to file an *amicus* brief in the district court, Kluge described his sincerely held religious belief as "what is best for the eternal *spiritual* well-being of [the transgender students] is to avoid affirming them in a moral error." R. 145, at 7. As we mentioned earlier, Kluge also believed that it would be sinful for him to "promote gender dysphoria" by using the transgender student's PowerSchool names and pronouns. R. 120-3, at 6–10.

compulsory, and children must attend public schools unless their parents are willing to incur the cost of private education or the considerable time commitment of home schooling." *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). Because of the compulsory nature of education, we have noted in the First Amendment context:

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

474 F.3d at 479–80.[14]

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[14] The dissent asserts that under the Indiana Constitution, schools need only admit all children, and that the Constitution does not require or prescribe any specific standard of educational quality. The dissent also cites Indiana case law interpreting the State's education statutes as not requiring "that Indiana school corporations affirm transgender identity." (continued)

Brownsburg claims two undue hardships with Kluge's use of students' last names only: first, the school asserts that Kluge's last-names-only practice frustrated its efforts to educate all students because the accommodation negatively impacted students and the learning environment for transgender students and other students as well. Second, Kluge's practice exposed Brownsburg to the risk of Title IX litigation brought by transgender students who claim sex-based discrimination based upon a theory of sex-stereotyping. *See Whitaker*, 858 F.3d at 1047–48.

1.

We begin with Brownsburg's claim that the last-names-only practice frustrated the school's effort to educate all students by harming students and negatively affecting student learning. As we discuss below, the only relevant question at this point is whether the school could accommodate Kluge without working an undue hardship on the conduct of its business. We conclude that the undisputed evidence demonstrates that Brownsburg met its burden of establishing undue

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But Brownsburg never made any claims that the State's Constitution or statutes required it to affirm transgender identity. The school instead consistently relied on its own policy choices about how to run its high school, and how to address the specific challenges faced by a particular group of students. We have cited to the State's Constitution and educational statutes only to provide context and to explain the differences between running schools and managing other kinds of businesses. In addition to the compulsory nature of education, the school stands in for parents and deals with the needs not of adult customers or coworkers (the categories into which the dissent attempts to shoehorn the analysis) but of children.

hardship as a matter of law, and none of the additional evidence cited by the dissent calls that conclusion into question.

It is undisputed that, prior to the start of the 2017–2018 school year, Brownsburg recognized an increase in enrollment of transgender students, and concluded that these students faced "significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying." R. 120-1, at 3. It is also undisputed that Brownsburg administrators determined that "these challenges threaten transgender students' classroom experience, academic performance, and overall well-being." R. 120-1, at 3. They therefore began to develop policies and practices for addressing these challenges.

As Dr. Jessup averred, a "very practical but critical question that arose … is what names staff should use to address transgender students in class." R. 120-1, at 3. Obviously, "a high school classroom cannot function without teachers addressing students directly." R. 120-1, at 3. Brownsburg ultimately adopted the PowerSchool Name Policy as part of its larger plan to address the special needs of these students. The goal of the Name Policy was two-fold: to provide the faculty with a straightforward rule when addressing students; and to afford dignity and empathy towards transgender students because the administration considered it important "for transgender students to receive, like any other student, respect and affirmation of their preferred identity[.]" R. 120-1, at 4. The requirement that students could change their names and pronouns in PowerSchool only with the consent of a parent and the approval of a healthcare professional allayed the religious objections and concerns of three of the four teachers

who signed the seven-page letter and accompanied Kluge to the May 15, 2017 meeting with Dr. Daghe. Kluge alone continued to object. In response to Kluge's continued concerns, the school agreed to allow Kluge two accommodations: first, he would address all students by their last names only; and second, another adult would hand out gendered orchestra uniforms, relieving Kluge of that duty.

The school produced copious evidence that, once these accommodations were in place, Dr. Daghe, teacher Craig Lee, and Dr. Jessup soon began to receive reports and complaints about the harms caused by Kluge's last-names-only practice. In particular, Dr. Daghe received reports that transgender students in Kluge's class felt insulted and disrespected by Kluge's use of last names only. They also felt isolated and targeted. A non-transgender student in Kluge's class reported to Lee that the practice was "incredibly awkward." That student reported that the practice made the transgender students stand out, and that he and others in the school felt bad for the transgender students. Dr. Daghe also received reports that transgender students in Kluge's class felt dehumanized by the last-names-only practice, and Dr. Daghe concluded that the practice was "detrimental to kids."

Dr. Jessup personally attended an Equality Alliance meeting and heard complaints about Kluge's practice from four or five students at the meeting, complaints with which the other thirty-five students in attendance appeared to agree. Dr. Jessup heard from students and faculty that students felt singled out by the use of their last names, and that "not all students were called by their last name by Mr. Kluge." R. 120-6, at 7; R. 120-1, at 4.

Dr. Daghe also received reports that Kluge sometimes slipped up and used first names or gendered honorifics for non-transgender students. Although we credit Kluge's denial that he ever made such mistakes, Kluge has no evidence contradicting assertions by Drs. Daghe and Jessup that they received such reports and needed to address them. As Dr. Daghe testified, Kluge's practice also disrupted the learning environment more broadly because students who were uncomfortable in Kluge's classes brought their "discussions about the uncomfortableness, whether it was dealing with a transgender student and last names only or whether it was times when last names weren't used," to other classrooms.

Lee heard complaints about Kluge's practice from students regularly at Equality Alliance meetings, and personally witnessed the emotional pain suffered by the transgender students when they discussed the environment in Kluge's class. Other faculty in Kluge's own department reported tension among students and faculty created by Kluge's last-names-only practice.

All of this was reported to Kluge, mainly by Dr. Daghe, as Kluge himself acknowledged. *See* R. 15-3, at 3–6; R. 112-2, at 4; R. 112-5, at 7. *See also* R. 120-5, at 9 (where Dr. Daghe testified that he talked to Kluge about the transgender students but also about the entire class of students, "about the uncomfortableness of adults in my building around him with similar students in theater, in band, in choir, and orchestra that those teachers share and it was a concern that kids didn't know how to behave, didn't know how to address. And that was the temperament or the way I was addressing the meetings ahead of time and saying can you follow this second accommodation

because we're going to be changing that, as he heard in January, for the following year and I needed this to move forward as a high school principal in a way that he would follow the accommodations and that my conversation with him was not happening the way it was written."). In describing the January 17, 2018 meeting where Dr. Daghe told Kluge that he should resign at the end of the school year, Kluge told Dr. Daghe that "it was simply because he [Dr. Daghe] didn't like the tension and the conflict." R. 15-3, at 5. Kluge interpreted the tension and conflict that he had caused as a scriptural sign that he should stay at the school. R. 15-3, at 5.

Kluge has produced no evidence to the contrary. That is, he has produced no evidence tending to show that the transgender students were not emotionally harmed by his practice or that the learning environment was not disrupted. A practice that indisputably caused emotional harm to students and disruptions to the learning environment is an undue hardship to a school as a matter of law. As Kluge himself conceded, schools have a legitimate interest in the mental health of their students. R. 120-3, at 35. And as Dr. Daghe explained, his job as principal was to "make sure that education can move forward." R. 112-5, at 7. Education is, indeed, the business of every school. Thus, emotional harm to students and disruptions to the learning environment are objectively more than *de minimis* or slight burdens to schools.

Nor did Kluge produce any evidence that Dr. Daghe, Dr. Jessup, and Lee[15] all lied about receiving these reports and

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[15] The dissent points out that Lee described himself as "very biased" on the subject of how the school should handle issues related to (continued)

lied about feeling a need to act on them in order to address the needs of transgender students and the tense educational environment. At most Kluge claims that he did not believe Dr. Daghe on occasion because Dr. Daghe did not give him the names of the students who reported that they were harmed by Kluge's use of last names only. But Kluge's metaphysical doubt about Dr. Daghe's credibility does not create a genuine issue of material fact. "[N]othing requires the district court to disbelieve defendants' proffered evidence simply because [the plaintiff]—without proof—asserts it is false." *Carroll v. Lynch*, 698 F.3d 561, 565 (7th Cir. 2012). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."); *Barnes v. City of Centralia, IL*, 943 F.3d 826, 832 (7th Cir. 2019) (same). Instead, "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita*, 475 U.S. at 587; Fed. R. Civ. P. 56(e). *See also Carroll*, 698 F.3d at 565 (plaintiff cannot rest on "metaphysical doubt" that defendant lied but must produce evidence so showing).

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transgender students. To his credit, Lee candidly admitted that bias when he made his reports of harm and disruption to school administrators. Dr. Daghe and other administrators were thus aware of that bias when they were assessing the scope and severity of the problem. Although the dissent would have a jury reweigh whether the employer *should have* credited Lee's reports, that is not the relevant question, as we discuss below. *Infra*, at 53-55 (discussing undisputed evidence known to the school at the time of the decision).

Similarly, Kluge testified that he felt no tension from other teachers, was unaware of any problems in his classroom, and felt that his students were not adversely affected by his practice. Kluge believed that his students were performing well and not experiencing any problems. But summary judgment is not defeated by Kluge's perception that all was well. A failure to notice that anything problematic was happening is not evidence that it did not happen; nor is it evidence that Brownsburg did not receive reports from students, teachers, and others that it was happening. Moreover, in employment discrimination cases, the employee's "own opinion about his work performance is irrelevant." *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 897 (7th Cir. 2015). *See also Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 740 (7th Cir. 2006) (a plaintiff's conclusory statements do not create an issue of fact, and an employee's self-serving statements about his ability are insufficient to contradict an employer's negative assessment of that ability). Indeed, Kluge himself acknowledged that using last names only in some settings would be unreasonable, conspicuous, and potentially cause harm to his students, which is why he used the PowerSchool Names at the orchestra award ceremony. Kluge also acknowledged creating tension and conflict at the school. To the extent that Kluge draws a theological distinction between regular use of the first names in a classroom setting versus using them on a one-time basis at a more formal award ceremony, Brownsburg was within its rights to consider the daily harm of the last names practice in the classroom paramount.

Moreover, the evidence that the dissent cites from three students and a contract teacher is not relevant to the question

presented here. First, that these three children and a contract teacher did not experience or notice harm or disruption does not rebut the truth of the reports of harm and disruption experienced by others. It was not necessary for the school to find that Kluge's practice harmed all of the students before the school was justified in addressing the situation.

Second, none of the information from these four affiants is relevant to the question of whether the decision-makers received reports of emotional harm and disruption to the learning environment from other students, teachers and parents. We cannot emphasize strongly enough that Kluge has produced no evidence suggesting that the reported emotional harms to students and disruptions to the learning environment did not occur or that the reports were not made.

Third, to the extent that the dissent relies on this evidence to demonstrate that Kluge complied perfectly with the accommodation, we have already credited his claim of perfect compliance. The reports of emotional harm and disruption came in nevertheless.

Fourth, none of the information from these three students and the contract teacher was known to school administrators at the time they were making the decision to withdraw the accommodation. The dissent contends that evidence from these students and the contract teacher is relevant "whether or not this information was known by the School District at the time of the adverse employment decision." It is axiomatic that an employer can make decisions based only on the information known to it at the time of the decision. The dissent nevertheless poses the puzzling question, "If, by contextual

evidence obtained after discharge, an employee plaintiff is not able to undermine the alleged presence of undue hardship, when, if ever, can the employee prevail?" The answer is simple: by uncovering evidence that was before the employer at the time of the decision, evidence that would contradict the employer's claims that students were emotionally harmed and the learning environment was disrupted. If no one was harmed and there was no disruption, then the burden of allowing the accommodation would be *de minimis*. But in the absence of any evidence known to the employer contradicting the existence of the harms, there is nothing for a jury to decide. The evidence, of course, may be obtained after the discharge, but it must be evidence that the employer knew at the time of the decision to withdraw the accommodation. To suggest that the employer may be held liable for a decision to withdraw an accommodation based on information that did not exist at the time of the decision holds employers to an impossible "crystal ball" standard. The dissent asserts that applying a test that depends on the employer's knowledge would create a perverse incentive for employers to avoid investigating whether hardship would arise from an accommodation. But there is no claim of a faulty investigation here, and the employer actually granted the accommodation and then saw in real time the harms that resulted. If an employer conducted an inadequate investigation, that could be evidence that the withdrawal of the accommodation was based on some discriminatory reason rather than on the undue hardship, but that is simply not the case here.

The dissent would have a jury second guess whether the reported harms occurred and whether the employer received

those reports even in the absence of evidence to the contrary. In particular, the dissent would have a jury decide the credibility of the students who were emotionally harmed and the teachers who saw and reported disruptions to the learning environment when there is no evidence contradicting the reports of harm and educational disruption. Those assessments were for the school to make based on the information available to it at the time. The dissent would also have a jury second guess whether emotional harm to students (in this case, particularly vulnerable students) and disruptions to the learning environment were sufficient to overcome the *de minimis* undue hardship standard when Kluge himself conceded that the school had a legitimate interest in the mental health of its students, and even though learning is the primary purpose for the existence of the school. These harms were far more than a slight burden as a matter of law.

The dissent also contends that the transgender students were offended not because of any discomfort with the last-names practice itself but because of the students' "assumptions and intuitions about why Kluge was using only last names." The dissent maintains that "[t]he alleged offense arose from students' presumptions and guesses as to Kluge's motives for using last names only." There are two problems with this analysis. First, there is no dispute that the school received reports describing emotional harm to students and disruption to the learning environment, not mere offense. These were the very harms that the school sought to avoid when it developed the Name Policy.

Second, Kluge's motives for his practice are irrelevant to the Title VII analysis. The uncontested evidence demonstrates

that Kluge's *practice* caused the harms whether the students correctly understood his subjective *motives* or not. As we have discussed, the school was aware of the issues faced by this group of students and had identified the use of their PowerSchool names and pronouns as an important means of providing dignity, empathy, respect and affirmation for this group of children who faced significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying. Although some of the students appear to have inferred that Kluge's practice was due to the presence of transgender students at the school, the students had no information regarding why Kluge would not use the students' PowerSchool names and pronouns. Whether his motive was religious, ideological, grammatical or otherwise was irrelevant because it was the *practice*, not the unknown *motive* that caused the reported harms. The school stretched to accommodate Kluge with a facially neutral accommodation of using last names only; nonetheless, the undisputed evidence showed that the practice resulted in genuine harm to students and real disruption to the learning environment.

Moreover, Kluge's practice was contrary to the preference of not only the school and the students, but also the students' parents and healthcare providers, who had decided that it was in the best interest of these children to be addressed in a particular manner, with their PowerSchool names and pronouns. Brownsburg's "business" for the purpose of analyzing undue hardship was to provide public education. Unlike a for-profit corporation, Brownsburg's mission of education for all students was mandated by the State's constitution and

legislature. In Indiana, public schools play a custodial and protective role in the compulsory education system, and public schools stand in the relation of parents and guardians to the students regarding all matters of discipline and conduct of students. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 979 (Ind. 2002). After conducting its own research, the school reasonably deferred to the judgment of parents and healthcare providers regarding how to meet the specific needs of transgender students.

Although with corporate defendants, our cases analyze undue hardship by considering financial costs and business interests, the school's "business" here is more analogous to that of the Veterans Administration ("V.A.") in *Baz*. In that case, the V.A. hired a chaplain in a hospital where approximately two thirds of the patients were psychiatric patients. The V.A. saw the position of chaplain as a secular one where proselytizing was prohibited and chaplains were expected to serve as a "quiescent, passive listener and cautious counselor," as part of the hospital's philosophy of total patient care. Baz instead "saw himself as an active, evangelistic, charismatic preacher," and acted accordingly. 782 F.2d at 703–04. When he refused to change his approach, the hospital terminated his employment. After a bench trial, the district court ruled in favor of the hospital.

On appeal, Baz argued that the hospital had failed to prove that the health and welfare of the patients were harmed by his evangelism. We noted that he was confusing "the business necessity defense to a disparate impact cause of action with the 'undue hardship' standard used to measure an employer's duty to accommodate to an employee's religious

observances in a disparate treatment claim of religious discrimination." 782 F.2d at 706. The latter type of case, the same one that Kluge brings here, requires the defendant to provide "evidence to show that accommodation would create a hardship on his business. This hardship has been construed as anything more than a *de minimis* cost to the employer." *Id*. (citing *Hardison*, 432 U.S. at 84).

> The defendants are not required to show that their philosophy of total patient care is objectively better than that espoused by Reverend Baz; they need only show that it would be a hardship to accommodate his theology in view of their established theory and practice.
>
> The defendants here have met this burden. They have produced evidence tending to show that Reverend Baz's philosophy of the care of psychiatric patients is antithetical to that of the V.A. To accommodate Reverend Baz's religious practices, they would have to either adopt his philosophy of patient care, expend resources on continually checking up on what Reverend Baz was doing or stand by while he practices his (in their view, damaging) ministry in their facility. None of these is an accommodation required by Title VII.

Baz, 782 F.2d at 706–07.

Kluge makes a similar mistake of law here. Brownsburg need not show that its philosophy of treating transgender students "like any other student, [with] respect and affirmation

of their preferred identity" was better than that espoused by Kluge. They needed only to show "that it would be a hardship to accommodate his theology in view of their established theory and practice." *Baz*, 782 F.2d at 706. Brownsburg met this burden by producing evidence tending to show that Kluge's last-names-only practice was "antithetical to that of the" school. 782 F.2d at 706–07. It is no answer that Kluge called all students by their last names and was trying to be neutral on the issue of transgenderism. The last-names-only practice conflicted with the school's philosophy of affirming and respecting all students because the undisputed evidence showed that the accommodation resulted in students feeling disrespected, targeted, and dehumanized, and in disruptions to the learning environment. Title VII does not require the school to adopt an accommodation that, although facially neutral, does not work that way in practice. Brownsburg allowed Kluge to employ the practice for an entire school year, counseling him along the way about the problems he was creating and encouraging him to either follow the practice that every other teacher in the school followed or leave his job because he was harming students and the educational environment by failing to follow the school's philosophy of respect and affirmation for all students. Title VII does not require an employer to retain an employee who harms the employer's mission. *Baz*, 782 F.2d at 706–07.

Nor was any other reasonable accommodation available. Kluge was the school's only music teacher, and so students could not, for example, be transferred to another classroom (if we assume that transfer to another classroom would not be equally stigmatizing). There was no other teacher to take

Kluge's place in the orchestra class. Kluge himself has never suggested any other viable accommodation. *See Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 461 (7th Cir. 1991) (employers are not required to negotiate with employees about a religious accommodation but only to act on any accommodation that does not work an undue hardship; an employee who neglects multiple opportunities during a lengthy disciplinary process to propose a concrete accommodation makes his own choice). Because no reasonable jury could conclude that a practice that emotionally harms students and disrupts the learning environment is only a slight burden to a school, and because no other accommodations were available, under *Baz*, Brownsburg has proved undue hardship as a matter of law.[16] *See also Walmart Stores East, L.P.*, 992 F.3d at 658–60 (affirming summary judgment where the accommodation of the plaintiff's religious practice created more than a slight burden on the employer because it would have increased the burden on other workers, or resulted in a staffing shortage, or forced the employer to change its preferred rotation system designed to train all assistant managers in all departments); *Adams v.*

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[16] Kluge asserts that *Baz* is inapplicable because his religious beliefs did not preclude him from doing his job, as he claims was the case in *Baz*. But the issue in *Baz* was analogous: Baz was performing his job in a manner that conflicted with the hospital's requirement that the chaplain serve as a "quiescent, passive listener and cautious counselor," as part of the hospital's philosophy of total patient care. Kluge was performing his job in a manner that conflicted with the school's mission of educating all students, and its philosophy of treating all students with respect and affirmation for their identity in the service of that goal. Kluge's attempt to characterize the school's goal as somehow "illegitimate" lacks support in Title VII case law.

Retail Ventures, Inc., 325 Fed. App'x 440, 443 (7th Cir. 2009) (affirming summary judgment in favor of employer on religious accommodation claim where accommodation would have increased cost, decreased efficiency, or created a scheduling strain); *Noesen v. Medical Staffing Network, Inc.*, 232 Fed. App'x 581, 584–85 (7th Cir. 2007) (affirming summary judgment in favor of employer when Catholic pharmacist's requested religious accommodation of relief from telephone and counter duties in order to avoid customers requesting birth control would have required other employees to assume a disproportionate share of work, or would have left data input work undone).

Kluge's attempt to characterize the emotional harm expressed by the transgender students as "third party grumblings" or a "heckler's veto" has no basis in the record and no support in Title VII law.[17] The dissent echoes this

[17] The dissent also suggests that the question of whether the accommodation constituted an undue hardship "by way of the School District's clients—the students—should be an open question for the factfinder" because an adverse employment action based on the discriminatory preferences of others, including coworkers and customers, is unlawful. But there is no fact question for a jury here because Kluge presented no evidence that the students, teachers or parents harbored a discriminatory bias against Kluge or that Brownsburg terminated Kluge based on the discriminatory preferences of others. In fact, one of the parents reporting harm to her child from Kluge's practice told the school, "I really don't care what he thinks about transgender issues on a personal level. My child deserves to be treated with respect. His refusal to use [the child's] preferred name and pronouns is very disrespectful and hurtful." R. 120-13, at 2. Acting on such a report cannot reasonably be construed as giving effect to a discriminatory preference.

mischaracterization, reducing the harms claimed to "taking offense," "disgruntlement," "grumblings," and "mere offense," rather than the harms that the school actually claimed to students, the learning environment, and to the school's mission to treat all students respectfully. Kluge's complaint of a "heckler's veto" sounds in the First Amendment. But the district court dismissed Kluge's First Amendment claims, and he has not appealed that dismissal. R. 70. The district court correctly held that when Kluge was addressing students in the classroom, his speech was not protected by the First Amendment. R. 70, at 13 (noting that Kluge conceded that his address of students in his classroom was part of his official duties as a teacher); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Mayer*, 474 F.3d at 479 (citing our well-settled precedent that "public-school teachers must hew to the approach prescribed by principals (and others higher up in the chain of authority)"). Title VII provides more protection for an employee's religious speech than the First Amendment but its protection is limited to accommodations that do not work an undue hardship on the employer. *Ryan*, 950 F.2d at 461. *Cf. Mayer*, 474 F.3d at 480 (noting that "the first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system"). As we have just held, Kluge's practice resulted in an undue hardship on his employer as a matter of law.

As for "third party grumblings," the case law does not support Kluge in what is essentially a repackaged First Amendment claim of a heckler's veto. For example, in *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001), we considered a claim by Elizabeth Anderson, an employee of a shipping company, U.S.F. Logistics, who wished to use the phrase, "Have a Blessed Day," in correspondence with her co-workers and the company's customers. Although her co-workers did not object, an employee of Microsoft, U.S.F. Logistics' largest customer, received this religious greeting and complained that it was unacceptable and must stop. Her employer directed her to stop using the phrase with customers, and in particular with Microsoft. After her employer declined to identify the particular Microsoft contact who had complained, she continued to use the phrase with Microsoft employees and moved for a preliminary and permanent injunction allowing her to use the phrase in her work. 274 F.3d at 473–74.

The district court denied her motion for a preliminary injunction, finding that she did not have a likelihood of success on the merits because her employer reasonably accommodated her by allowing her to use the phrase with persons who were not offended by it. We affirmed, noting first that Title VII requires only reasonable accommodation, not the satisfaction of an employee's every desire. *Anderson*, 274 F.3d at 475. U.S.F. Logistics was legitimately concerned about its relationship with its customers. The company required only that she cease using the phrase with the objecting customer, and we concluded that her employer reasonably accommodated her. 274 F.3d at 476. Because a Microsoft representative had

complained that the use of the phrase was inappropriate, permitting Anderson to continue to use the phrase would impose her religious views on that customer. We concluded that the evidence therefore suggested that Anderson's religious practice could damage her employer's relationship with Microsoft. 274 F.3d at 477. But even if her practice had not imposed her religious beliefs upon others, the employer was still entitled to restrict it if it impaired the employer's legitimate interests, so long as her belief was reasonably accommodated. 274 F.3d at 477.

The same applies here, albeit in the non-profit business setting of a public school engaged in providing compulsory education to high school students. Brownsburg was entitled to require Kluge to use a form of address that did not offend or injure its students or harm the classroom environment. The school had a legitimate interest in its relationship with its students, who together with their parents, are effectively the school's customers. *See Smiley v. Columbia College Chicago*, 714 F.3d 998, 1002 (7th Cir. 2013) ("It is not unreasonable for [a college] to expect that its instructors will teach classes in a professional manner that does not distress students."). Because Kluge's practice harmed that relationship, and because there was no other way to accommodate Kluge's beliefs without harming the school's mission and philosophy for educating all students, his "third party grumblings" claim fails.[18]

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[18] In making his "third-party grumblings" argument, Kluge relied on cases that have either been reversed or are factually distinguishable. *See Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), vacated by *Parker Seal Co. v. Cummins*, 433 U.S. 903 (1977). The district court's judgment (continued)

in favor of the employer was eventually summarily affirmed by the Sixth Circuit on remand from the Supreme Court. *Cummins v. Parker Seal Co.*, 561 F.2d 658 (6th Cir. 1977). Kluge's lawyers failed to acknowledge that they were relying on a case that had been overturned, and even failed to acknowledge the error in his reply brief after opposing counsel pointed it out in the response brief. Appellee's Response Brief, at 36 n.4. "Lawyers are not entitled to ignore controlling, adverse precedent. We expect (and are entitled to) better performance by members of the bar." *Jackson v. City of Peoria, Illinois*, 825 F.3d 328, 331 (7th Cir. 2016). *See also* Practitioner's Handbook for Appeals, at 159 (available at www.ca7.uscourts.gov). Nor are the Ninth Circuit cases that Kluge cited applicable here. *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), merely found that the defendant's asserted basis for undue hardship had no factual basis in the record. The court also noted that, "Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." But this is not a case of grumbling by co-workers; Brownsburg's undue burden is to its mission of educating all students and its philosophy of treating all students with respect and affirmation. The Ninth Circuit repeated this formulation the same day in another case, *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), stating that, "undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief. … An employer or union would have to show, as in *Hardison*, actual imposition on co-workers or disruption of the work routine." In the context of a school, where the requested accommodation primarily affects students, disruption to the learning environment meets the *Hardison* standard. The teachers here were not "grumbling" but, as Dr. Daghe testified, were reporting disruptions to the learning environment because "students are uncomfortable in [Kluge's] class and that they are bringing the conversations that occur in his class to other classrooms and having discussions about the uncomfortableness, whether it was dealing with a transgender student and last names only or whether it was times when last names weren't used or it was times when, you know, kids just want it all to go away and act like everything is normal." R. 112-5, at 7. The teachers similarly reported that children did not know how to address each

(continued)

In sum, the school produced uncontradicted evidence that Kluge's last-names-only practice stigmatized the transgender students and caused them demonstrable emotional harm as reported to the administration by Lee, who personally witnessed it. Kluge was told that students reported feeling disrespected, targeted, isolated, and dehumanized. As Kluge conceded, the school has a legitimate interest in the mental health of its students, and an accommodation is not reasonable, as Dr. Daghe told Kluge, "when it's detrimental to kids." R. 113-4, at 28. Kluge's practice also adversely affected the classroom environment which both transgender and non-transgender students considered tense, awkward and uncomfortable. Dr. Daghe told Kluge, based on reports from students and faculty, that his practice resulted in students being uncertain about how to behave and how to address their transgender classmates. Kluge's practice also disrupted other classrooms when students brought their concerns and discussions about the practice to other teachers in other classrooms. It conflicted with the school's carefully constructed Name Policy that sought to address the special challenges that transgender students face in school, and balanced those concerns with the preferences of the students' parents and healthcare providers. Allowing Kluge to continue in the practice thus placed an undue hardship on Brownsburg's mission to educate all of its students, and its desire to treat all students

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other or how to behave around transgender students and similar students because of Kluge's practice. R. 120-5, at 9. The teachers reports of harm to students as well as classroom and school disruption are a far cry from "third-party grumblings."

with respect and affirmation for their identity in the service of that mission.

2.

Brownsburg claimed a second undue hardship, namely, that Kluge's practice unreasonably exposed the school to liability under Title IX. Close in time to Brownsburg's adoption of the Name Policy, our court issued its decision in *Whitaker*. In *Whitaker*, we recognized that transgender students may bring a sex discrimination claim under Title IX based on a theory of sex-stereotyping. 858 F.3d at 1047–50. We have already concluded that the district court correctly ordered summary judgment in favor of Brownsburg because the uncontested evidence demonstrated that Kluge's last-names-only practice harmed students and disrupted the educational environment, which constituted an undue hardship on Brownsburg's conduct of its business. Thus, we decline to reach the issue of whether Kluge's accommodation created an additional undue hardship by exposing the school to liability under Title IX. Our decision to decline to address liability under Title IX should not be interpreted as agreement with the dissent's analysis of this issue. It is simply unnecessary to reach this issue in this case.

C.

Kluge also brought a claim for retaliation against Brownsburg, alleging that Brownsburg "retaliated against Mr. Kluge for engaging in protected conduct, when it agreed in writing to the accommodation Mr. Kluge requested for his religious beliefs, then removed the accommodation—without any showing of undue hardship—and told Mr. Kluge he could

use transgender names and pronouns, resign, or be terminated." R. 15, at 17–18. Kluge sought to prove his retaliation claim using the burden-shifting method outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In order make out a *prima face* case for retaliation under the burden-shifting method, Kluge must demonstrate that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse action; and (3) there is a but-for causal connection between the two events. *Robertson v. Dep't of Health Servs.*, 949 F.3d 371, 378 (7th Cir. 2020); *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir. 2001). The causation standard in retaliation claims is more stringent than the standard in discrimination claims. *Carlson v. CSX Transp., Inc.*, 758 F.3d 819, 828 n.1 (7th Cir. 2014). Following *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013), "the protected activity of an employee making a retaliation claim must have been 'a but-for cause of the alleged adverse action by the employer.'" In contrast, a "lessened causation standard" applies in Title VII discrimination cases. *Nassar*, 570 U.S. at 348. "The requirement of but-for causation in retaliation claims does not mean that the protected activity must have been the only cause of the adverse action. Rather, it means that the adverse action would not have happened without the activity." *Nassar*, 570 U.S. at 346–47. *See also Robertson*, 949 F.3d at 378 (describing the causation requirement as producing adequate evidence to establish that "there existed a but-for causal connection" between the protected activity and the adverse action). Once the *prima facie* case of retaliation is established:

> an employer may produce evidence which, if taken as true, would permit the conclusion that

> it had a legitimate non-discriminatory reason for taking the adverse employment action. … If the employer meets this burden, the plaintiff, to avoid summary judgment, then must produce evidence that would permit a trier of fact to establish, by a preponderance of the evidence, that the legitimate reasons offered by the employer were not its true reasons but were a pretext for discrimination.

Robertson 949 F.3d at 378. *See also Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 564 (7th Cir. 2016) (where the employer demonstrates that the employee would have been fired absent his protected activity, then the alleged retaliatory motive, even if unchallenged, was not a but-for cause of the employee's harm).

In the district court, Brownsburg sought summary judgment on this claim, contending that: (1) Kluge could not make out a *prima facie* case of retaliation because no reasonable jury could conclude on this record that there was a causal connection between the protected activity of seeking a religious accommodation at the start of the school year, and the adverse employment action which occurred at the end of the school year after it became apparent that the accommodation was not working; and (2) even if Kluge was able to establish a *prima facie* case, Brownsburg had articulated legitimate, non-discriminatory reasons for its actions, and Kluge presented no evidence from which a reasonable jury could infer pretext.

Kluge responded to Brownsburg's motion by asserting that he had engaged in statutorily protected activity by

identifying a sincerely held religious belief that he should identify students by their "birth names, instead of their 'new' transgender names," by asking for an accommodation in July 2017, and by asking in February 2018 for the school to confirm that his accommodation was still valid. R. 153, at 27. For an adverse employment action, he asserted that the school withdrew the accommodation, demanded his compliance with the Name Policy or his resignation, and then coerced him into submitting a conditional resignation.[19] In his district court briefing, Kluge then flatly stated, "there is a causal connection between the protected conduct and the adverse employment action." R. 153, at 27. The remainder of his argument on retaliation was simply a recitation of the same facts that he alleged in support of his discrimination claim. Namely, he asserted that the accommodation was implemented in July 2017, the school indicated its intent to withdraw it in the January 2018 "Transgender Questions" document, he then asked in February for the school to confirm that his accommodation agreement had no end date, and the school indicated that it did intend to require compliance with the Name Policy from all faculty beginning in the next academic year as explained in the "Transgender Questions" document. Kluge then asserted that Gordon told him that he could submit a conditional resignation, that he did so in reliance of her promise that it would be conditional, that he attempted to rescind the resignation on May 28, 2018, but the school would not allow him to rescind

[19] In the district court, Brownsburg did not contest for summary judgment purposes that Kluge could produce evidence in support of protected activity and an adverse action, focusing instead on the causation element of the *prima facie* case, and the lack of any evidence of pretext.

and instead terminated his employment.[20] Kluge did not address Brownsburg's stated nondiscriminatory reason for his termination, that his refusal to comply with the Name Policy was detrimental to students and to the learning environment. He made no attempt to show that this reason was a pretext to cover religious discrimination.

As we noted above, the district court found that Kluge waived his retaliation argument at summary judgment with meager briefing, simply reciting his version of the facts without discussing how those facts meet the legal requirements of a retaliation claim. The court also noted that Kluge failed to address Brownsburg's argument that there is no evidence in the record from which a reasonable fact finder could infer that its nondiscriminatory explanation for its action was a pretext. The court thus found that Kluge had waived his retaliation

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[20] The district court found that the record contained no factual basis for Kluge's claim that Gordon led him to believe that he could submit a conditional resignation that could later be withdrawn. Nor was there any factual basis supporting his contention that he did in fact submit a conditional resignation, according to the district court. On appeal, Kluge cites no evidence contradicting those findings. As the district court pointed out, Gordon told Kluge only that she would respect an employee's wish not to disclose his resignation to colleagues until the end of the school year. She never told him that he could withdraw a properly submitted resignation, and in fact it was not possible to withdraw a resignation made to the Superintendent or his agent (Gordon, in this instance). R. 112-4, at 11–12; R. 120-8; R. 120-9. Kluge himself recorded the meeting where he asserts that Gordon made the offer of a conditional resignation, and the transcript of that meeting does not support his claim. R. 112-4, at 20–55. Nor is there any language in his actual resignation suggesting that it was conditional. The issue of the purported breach of a promise to allow a conditional resignation has no merit and we will not give it further consideration.

claim. As an alternate basis for granting judgment in favor of the defendant, the court also addressed the merits, noting that Kluge failed to present any evidence from which a reasonable fact finder could conclude that a causal connection exists between Kluge's protected activity and his resignation, any evidence of pretext, or any evidence that Brownsburg's action was motivated by discriminatory animus. The court therefore granted summary judgment in favor of the school on the retaliation claim as well.

Although Kluge's briefing on retaliation in the district court was thin, we find that the argument was not waived and proceed to the merits. Kluge's claim fails on the causation element. That is, he failed to produce evidence that established a but-for causal link between protected activity and the adverse action, and so failed to make out a *prima facie* case of retaliation.[21] Indeed, on appeal, Kluge relies on outdated precedent to assert that, to establish a causal link, he must show

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[21] In his reply brief on appeal, Kluge suggests for the first time that he meets the causation element with evidence that, in the July 27, 2017 meeting, Dr. Snapp became "very angry" with him the first time that Kluge mentioned his religious objection to using the transgender students' PowerSchool first names. Appellant's Reply Brief, at 20; R. 120-3, at 19. He also asserts that Dr. Snapp engaged in a theological debate with him, and told him that his beliefs were wrong. *Id*. Kluge waived this argument by not raising it in the district court, and by not raising it on appeal until his reply brief. *Accident Fund Ins. Co. of America v. Custom Mech. Constr., Inc.*, 49 F.4th 1100, 1108 (7th Cir. 2022) (arguments raised for the first time in a reply brief are waived); *White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021) (same); *DM Trans, LLC v. Scott*, 38 F.4th 608, 619 (7th Cir. 2022) (issues and arguments raised for the first time on appeal are forfeited, as are arguments that are not sufficiently developed).

only "that the protected activity and the adverse action were not wholly unrelated." *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1014 (7th Cir. 1997). But as we explained above, after the Supreme Court's decision in *Nassar*, he must demonstrate that the protected activity of an employee making a retaliation claim was a but-for cause of the alleged adverse action by the employer. Kluge's evidence falls short of meeting this standard. He says only that he engaged in protected activity and that when he refused to either comply with the policy or resign, "his supervisors subjected him to a [sic] 'a pattern of criticism and animosity' and finally constructively discharged him." Appellant's Opening Brief, at 42 (quoting *Hunt-Golliday*, 104 F.3d at 1014). He cited no record evidence in the district court in support of this conclusory claim that anyone subjected him to a "pattern of criticism and animosity," failed to cite any such evidence on appeal until his reply brief, and makes no attempt to connect his protected activity to his resignation. Although he cites evidence of protected activity and an adverse action (both of which Brownsburg conceded for the purposes of summary judgment), he cites nothing supporting but-for causation.

Instead, the undisputed evidence demonstrates that Brownsburg worked with Kluge to create a workable accommodation during the 2017-2018 school year. Only after the last-names-only practice proved harmful to students and the learning environment did the school withdraw it, and even then Brownsburg allowed Kluge to continue the practice through the end of the school year. Further, Brownsburg did not disturb the additional accommodation relieving Kluge of

the task of handing out gender-specific uniforms. The length of time between the protected activity (of Kluge requesting a religious accommodation) and the adverse employment action, together with the school's attempt to find a workable solution defeat any inference that Brownsburg asked Kluge to resign in retaliation for his protected activity.

Even if we assume that Kluge cleared the hurdle of the *prima facie* case, he makes no effort to demonstrate any material issue of fact on the question of pretext:

> "Pretext involves more than just faulty reasoning or mistaken judgment on the part of the employer; it is [a] 'lie, specifically a phony reason for some action.'" *Argyropoulos*, 539 F.3d at 736 (quoting *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 737 (7th Cir. 2006)). We have repeatedly emphasized that when "assessing a plaintiff's claim that an employer's explanation is pretextual, we do not ... second-guess[ ] an employer's facially legitimate business decisions." *Id*. (internal quotation marks omitted). An employer's reasons for firing an employee can be "foolish or trivial or even baseless,'' as long as they are "honestly believed." *Culver*, 416 F.3d at 547 (quoting *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997)).

Lord, 839 F.3d at 564. Instead of producing evidence of pretext, Kluge simply ties the legitimacy of his retaliation claim to the validity of his discrimination claim. That is, he asserts that he need not present evidence of pretext because Brownsburg

never presented a legitimate, nondiscriminatory basis for terminating his employment, and that his "whole argument was that the district had *no legitimate basis* for revoking his accommodation and forcing him to resign." Appellant's Opening Brief, at 40. In so arguing, Kluge is essentially conceding that he has never provided evidence of pretext, apparently resting entirely on his claim that Brownsburg never produced a legitimate, nondiscriminatory reason for his termination. That was a risky strategy.

As we have just concluded, Brownsburg did in fact demonstrate legitimate reasons for withdrawing the accommodation. Brownsburg was within its rights as an employer facing an undue hardship to withdraw the requested accommodation when it became apparent that it was not working in practice and was causing harm to students and to the educational environment. That was a legitimate, nondiscriminatory reason for the termination. In the absence of any evidence that it was a pretext for religious discrimination—i.e., that it was a lie or a phony reason—we will not second-guess Brownsburg's business decision. *Lord*, 839 F.3d at 564. *See also Boss v. Castro*, 816 F.3d 910, 917 (7th Cir. 2016) ("[W]hen an employer articulates a plausible, legal reason for its action, it is not our province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for its action;" the "federal courts are not a super-personnel department that second-guesses facially legitimate employer policies."). "We have said time and again (in more than one hundred reported opinions, by our count) that we are not a super-personnel department that will substitute our criteria for an employer's for hiring, promoting, or disciplining employees."

Joll v. Valparaiso Cmty. Sch., 953 F.3d 923, 933 (7th Cir. 2020). *See also Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677 (7th Cir. 1997) ("To successfully challenge the honesty of the company's reasons [the plaintiff] must specifically rebut those reasons. But an opportunity for rebuttal is not an invitation to criticize the employer's evaluation process or simply to question its conclusion about the quality of an employee's performance. Rather, rebuttal must include facts tending to show that the employer's reasons for some negative job action are false, thereby implying (if not actually showing) that the real reason is illegal discrimination. In other words, arguing about the accuracy of the employer's assessment is a distraction … because the question is not whether the employer's reasons for a decision are '*right* but whether the employer's description of its reasons is *honest*.'"). Here, the employer conclusively demonstrated that it withdrew the accommodation solely because it worked an undue hardship on the school's business of educating all students. There is no hint in this record that this explanation was false and that the real reason for the termination was discrimination.

Interestingly, the dissent acknowledges that Kluge's failure to demonstrate that Brownsburg's legitimate, nondiscriminatory reason for his termination was a pretext dooms his retaliation claim. Yet even though Kluge himself tied the success of his two claims together, the dissent does not acknowledge that Kluge's failure to rebut the school's uncontested, nondiscriminatory explanation for withdrawing the accommodation is also fatal to his discrimination claim.

Brownsburg began developing the Name Policy before it ever knew that Kluge would have a religious objection to the

directive. In the face of his objection, the school made several efforts to accommodate his beliefs, meeting with him multiple times, agreeing to allow his use of last names only, and offering to have another person hand out gender-specific orchestra uniforms (an accommodation that Brownsburg never withdrew). The school's decision to allow students to change their names and gender markers in the PowerSchool database only with the approval of a parent and a healthcare provider assuaged the religious concerns of three of the four teachers lodging a religious objection. That the school decided to withdraw the last-names-only accommodation only when it was apparent that it was harming students and disrupting the learning environment was to the school's credit. *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1490 (10th Cir. 1989) ("The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted."); *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (same). For all of these reasons, we affirm the grant of summary judgment in favor of Brownsburg on the retaliation claim.

III.

In sum, we affirm summary judgment against Kluge on his discrimination claim. Brownsburg has demonstrated as a matter of law that the requested accommodation worked an undue burden on the school's educational mission by harming transgender students and negatively impacting the learning environment for transgender students, for other students in Kluge's classes and in the school generally, and for faculty. Title VII does not require that employers accommodate religious practices that work an undue hardship on the conduct

of the employer's business; that sometimes means that a religious employee's practice cannot be accommodated. Moreover, Kluge's retaliation claim fails as a matter of law because he failed to produce any evidence supporting the causation element of the *prima facie* case, or any evidence that the school's explanation for its actions was a pretext for religious discrimination.

AFFIRMED.

BRENNAN, *Circuit Judge*, concurring in part and dissenting in part.

Brownsburg Community School Corporation required music teacher John Kluge to use the chosen first names and pronouns of transgender students. Kluge objected on religious grounds, and a gender-neutral accommodation was arrived at: He would address his students by their last names only. The School District received some complaints about this practice, so it revoked the accommodation and told Kluge he could comply, resign, or be terminated. He tendered his resignation.

Kluge sued the School District under Title VII for failure to reasonably accommodate his religious beliefs and for retaliation against his accommodation request. The majority opinion affirms summary judgment for the School District on both claims. On Kluge's retaliation claim, I disagree with my colleagues' conclusion as to causation but concur in the judgment for the School District. I respectfully dissent on the religious accommodation claim.

This case tests the limits of the Supreme Court's atextual but controlling interpretation of "undue hardship" in Title VII's religious accommodation provision as "more than a *de minimis* cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); 42 U.S.C. § 2000e(j). Do complaints of offense constitute more than a *de minimis* cost? Specifically, is being offended by an employee's religious practice enough to discharge the employer's duty to reasonably accommodate the employee's religious practice? The majority opinion answers in the affirmative. Under its reasoning, Title VII provides no protections for religious conscientious objectors who in good faith try to accommodate their employers' dictates. This court

has not ruled on whether taking offense can constitute more than a *de minimis* cost, so we should tread carefully.

I would reverse the district court in part and grant partial summary judgment for Kluge that his religious beliefs are sincerely held and that he has established a prima facie case for religious discrimination. Then Kluge's religious accommodation claim comes down to a fact-intensive inquiry: Did the School District demonstrate that Kluge's gender-neutral accommodation of calling all students by only their last names causes undue hardship—that is, more than a *de minimis* cost? The majority opinion says "yes," but it sidesteps Kluge's countervailing evidence, fails to construe the record in his favor, and overlooks credibility issues on both sides, which are reserved for resolution by the factfinder.

Courts uniformly review context-specific evidence to evaluate whether a religious accommodation in fact imposes an undue hardship. But without supporting authority, my colleagues hold that the undue hardship inquiry looks only to evidence within the employer's knowledge at the time of the adverse employment decision. The majority opinion thus resolves this case based on the School District's receipt of some allegations that the accommodation did not work and caused tension and discomfort. It deems irrelevant the testimony of Kluge, three students, and another teacher. Considering the entire record, there is a genuine issue of material fact on undue hardship, which we should remand for trial.

I. Factual Background

The majority opinion downplays certain record evidence that in my view creates a genuine issue of material fact on undue hardship. This includes evidence about the School

District's Name Policy and Kluge's last-names-only accommodation; complaints about that accommodation; countervailing evidence about Kluge's accommodation as practiced in his classroom; the School District's revocation of the accommodation; and Kluge tendering his resignation.

A. Name Policy & Accommodation

John Kluge is a Christian and a leader in his church. From 2014 to 2018, he taught orchestra at Brownsburg High School, part of the Brownsburg Community School Corporation (School District), west of Indianapolis. But he was not just any orchestra teacher; many students and former students said he was a great one. R. 52-5, at 2; R. 52-4, at 2; R. 120-18, at 11, 13.

In May 2017, discussions surrounding the needs of transgender students led the School District to adopt the Name Policy. R. 120-1, at 3–4. Kluge believes that based upon his religion, he cannot affirm the transgender identity of his students by calling them by their chosen names. R. 113-1, at 6–9. On July 27, 2017, Kluge objected to the Name Policy based on his religious convictions, and Principal Daghe and Superintendent Snapp gave Kluge three choices: comply, resign, or be suspended pending termination. R. 15-3, at 3; R. 120-3, at 14. At this meeting, Kluge says Snapp got "very angry," explained why Kluge's beliefs were "wrong," and argued that his "beliefs aren't what's in the Bible." R. 120-3, at 19. Kluge responded with scripture that supported his beliefs. To the contrary, Snapp recalled that he had a "cordial conversation" on their respective religious beliefs. R. 113-6, at 6. In

the end, Kluge refused to comply, and Superintendent Snapp gave him the weekend to consider his options. R. 120-3, at 15.

On Monday July 31, 2017, Kluge met with Snapp and Human Resources Director Gordon. *Id.* at 17. Gordon presented Kluge with a form to indicate whether he would comply with the Name Policy. R. 15-1, at 1. Kluge proposed a compromise that he be allowed to refer to students by their last names only, "like a sports coach," and the school administrators agreed. R. 120-3, at 17.

B. Complaints

During the 2017–2018 school year—the relevant time frame for evaluating undue hardship—Principal Daghe "first learned of concerns with Mr. Kluge and how he was addressing students in class via an email from Craig Lee … on August 29, 2017." R. 120-2, at 4. Lee served as the faculty advisor and host for the Equality Alliance, a student club that met weekly "to discuss issues that impact the LGBTQ community." R. 120-14, at 6.

Staff. In his email, Lee referenced a teacher who refused to call a transgender student by their new name, but he did not mention Kluge. R. 120-15. Still, Principal Daghe attested he believed and confirmed that the email referred to Kluge. R. 120-2, at 4. Among other things, Lee stated, "[T]here is confusion amongst some teachers and students that I think needs clarification and perhaps a teacher or two that needs to know that it is not ok to disobey the powerschool [sic] rule." R. 120-15. Lee said he was "not totally sure" of the best next step and that he was "very biased" on the topic. *Id*. Lee testified separately that several students in Equality Alliance meetings

found Kluge's last-names-only practice insulting and disrespectful. R. 58-2, at 2.

Assistant Superintendent Jessup also recounted visiting an Equality Alliance meeting where she heard four or five students complain about a teacher using last names only. R. 120-1, at 4. In her view, the other 35 or so students in attendance appeared to agree with the complaints.[1] *Id.* Again, while the students did not identify Kluge by name, "it was certainly implied that he was the teacher in question." *Id.* She had no doubt the teacher was Kluge because he was the only staff member who had been permitted the last-names-only accommodation. *Id.* Deposition testimony also revealed that some teachers had complained about Kluge's accommodation. R. 120-14, at 16–17; R. 113-5, at 8–9; *see also* R. 113-4, at 9.

Students. Two transgender students in Kluge's orchestra class during the 2017–2018 school year, Aidyn Sucec and Sam Willis, submitted declarations. The majority opinion addresses them at length, so I highlight only a few points. Aidyn said "Kluge's behavior was noticeable to other students in the class." R. 22-3, at 4. Aidyn recalled, "At one point, my stand partner asked me why Mr. Kluge wouldn't just say my name.

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[1] The record does not reflect the total number of transgender students at Brownsburg High School in school year 2017–2018. The evidence shows three transgender students in Kluge's classes: Aidyn Sucec, Sam Willis, and an unnamed third student. R. 22-3; R. 58-1; R. 52-3 at 3. A student in Kluge's orchestra class, Lauren Bohrer, said the class averaged about 40 students. R. 52-3 at 2. According to the Indiana Department of Education Data Reports Archive, Attendance & Enrollment, in the 2017–2018 school year, Brownsburg High School had 2,646 students. IND. DEP'T OF EDUC., *School Enrollment by Grade Level*, https://www.in.gov/doe/it/data-center-and-reports/data-reports-archive/.

I felt forced to tell him that it was because I'm transgender." *Id.* Similarly, Sam opined that "Kluge's use of last names in class made the classroom environment very awkward." R. 58-1, at 3. Sam said "[m]ost of the students knew why Mr. Kluge had switched to using last names, which contributed to the awkwardness and [his] sense that [he] was being targeted because of [his] transgender identity." *Id.* at 3–4.

Parents. In fall 2017, the high school received two complaints about Kluge. The first was in a letter from the parents of a transgender student, and the second in an email exchange between a Brownsburg school counselor and a transgender student's parent. R. 120-12; R. 120-13. In the email exchange, the counselor advised that the administration "require[d] that students role play" at home "to practice situations in which" they are called by a name other than the one they prefer. R. 120-13, at 6. The counselor continued, "As a school, we will certainly do our best to get the name/pronouns right, but we are all human and there may [be] instances where we don't get it quite right. In those moments, we do not want [the student] to be offended, feel disrespected, or feel discouraged." *Id.* at 6–7.

C. Countervailing Evidence

These complaints are just one side of the story, however. Three of Kluge's students and a fellow teacher, all of whom observed his classes in the 2017–2018 school year, attested that the last-names-only practice did not adversely affect the classroom environment. This evidence, along with Kluge's

testimony, create a genuine issue of material fact on undue hardship.

Lauren Bohrer Declaration. Lauren Bohrer and Aidyn were students in Kluge's orchestra class. R. 52-3, at 2. Bohrer attested that she "did not hear Mr. Kluge ever call students by gendered prefixes." *Id.* She explained that orchestra is a larger class, so individual interactions were few. "It was rare that Mr. Kluge had occasion to call on any individual student directly unless they raised their hand to ask a question." *Id.* Bohrer remembered that after the first few weeks of class, Kluge stopped calling out last names to take attendance and instead took attendance by noting students that were absent.

According to Bohrer, "Mr. Kluge never once brought up the use of only last names or made known to our class his reason for using only last names. I did not find it odd and Mr. Kluge did not seem uncomfortable addressing us in this fashion. I never suspected that it was anything other than the easiest way for him to address us as our last names are listed first in PowerSchool." *Id.* at 3. Bohrer also said she had a transgender stand partner—not Aidyn—and that she "never saw Mr. Kluge treat [her] stand-mate any differently than cisgender students." *Id.* "[She] never saw or heard about any animosity between them." *Id.* "[Her] stand mate never told [her] that they disliked Mr. Kluge's behavior or that Mr. Kluge had been unfair to them." *Id.*

Bohrer did not know Aidyn personally, but she was hesitant to engage or interact with him "due to [his] reputation for confrontational and aggressive behavior toward people who did not strictly conform to [his] mindset." *Id.* In fall semester 2018—after Kluge's termination—Bohrer alleges that she was called to the principal's office based on Aidyn's false

accusations of her calling him a "f----t." *Id.* at 4. Per Bohrer, the principal conceded that it was unlikely that Aidyn's accusations were true. *Id.* at 5.

Kennedy Roberts Declaration. Kennedy Roberts, another orchestra student, said Kluge was a "favorite teacher[]." R. 52-4, at 1. Roberts recalled that "the energy [Kluge] put into conducting [their] orchestra and creating a fun classroom environment is incomparable to any teacher [he'd] had." *Id.* at 1. Roberts said, "During the school year, [Kluge] always called everyone by their last names, which I never knew the reason as to why, but I never really thought anything of it. It's just what he did." *Id.* at 2. Roberts corroborated Bohrer's testimony that Kluge called student last names for attendance "at first, maybe 5-8 times over the year." *Id.* From what Roberts could tell, Kluge "treated everyone this way, no one was singled out in front of the class or intentionally treated disrespectfully." *Id.*

Mary Jacobson Declaration. A third student, Mary Jacobson, was in both Kluge's Music Theory and Advanced Orchestra classes. R. 52-5, at 2. Jacobson attested that, between these two classes, "[she] never heard Mr. Kluge refer to students by their first name, or by any gendered prefix or pronouns." *Id.* at 2. She "never heard Mr. Kluge discuss his use of last names with any student or give any explanation for it. His use of last names was not unnatural sounding. I never heard any students question him about it, and I never brought up the topic to him myself." *Id.* at 2. And she "did not see or hear Mr. Kluge in conflict with any students nor did [she] witness any students receiving different treatment than the rest of the class received." *Id.* She also added that Kluge was a

"wonderful teacher" whose "kindness and fairness" made for an "open and honest classroom demeanor." *Id.* at 2–3.

Natalie Gain Declaration. In addition to these student declarations, Natalie Gain, a teacher who led private music lessons at the school during the day, submitted a declaration stating that she "never heard [Kluge] use gendered language in the classroom." R. 52-2, at 3. "[She] only heard him use last names with the students" and "never heard any of the students discussing the [sic] Mr. Kluge's use of last names, or any references to his agreement with the administration." *Id.* "[A]s far as [she] could tell, Mr. Kluge's accommodation was not common knowledge … ." *Id.* She also said Kluge "had mostly used last names … the previous school year anyway, with 'Mr./Ms.' for students to encourage a respectful teaching environment, like college classes." *Id.* at 2.

Kluge's Testimony. Kluge also attested there were no issues with the last-names-only accommodation. He said that in the 2017 fall semester leading up to a meeting with Principal Daghe on December 13, 2017, "there were no student protests, there were no written complaints about [his] use of last names for all students, there were no classroom disturbances, and there were no cancelled classes." R. 113-2, at 4. Kluge said he did not witness tension in the students and faculty. R. 120-3, at 23. He did not see animosity from the students toward him. *Id.* Instead, Kluge averred that "the accommodation worked as intended and [his] students excelled," some winning awards for their performances during the 2017–2018 school year. R. 113-2, at 4. He recounted, "We performed better than ever in our orchestra competitions. Students' grades on their AP [Music Theory] exam were great. There was a lot of participation in the extracurricular programs, a lot of students

performing in the voluntary extra stuff that you can do in orchestra." R. 120-3, at 23–24.

D. Revocation of Kluge's Accommodation

On January 22, 2018, Assistant Superintendent Jessup presented faculty with a document entitled "Transgender Questions" accompanied by a presentation titled "Transgender Considerations." Both stated that the last-names-only accommodation would not be permitted the following school year. R. 15-4; R. 120-20. The majority opinion refers to excerpts from only the Transgender Questions document. Other portions of that document include:

> **Where is the line drawn on "pleasing" students and their beliefs?** It is our job to make all students feel welcome and accepted in the public school environment.
>
> …
>
> **How do we deal with a student exploding in anger with being called the wrong name or gender?** If it's the fifth time this week the staff member has messed up the pronoun, then the staff member needs to get on board. However, if the student explodes on one small mistake, we

> would address the student behavior as we normally would.

R. 15-4, at 9–10.

The Transgender Considerations presentation stated in relevant part:

> ***Considerations***
>
> …
>
> - Replace gender specific language with inclusive alternatives—instead of "ladies and gentleman" [sic] or "boys and girls" try using "everyone," "people" or "folks"
> - If you are creating a form for students, consider whether you really need to have a question about sex or gender; if so, provide gender options
> - Try not to make assumptions about the genders of students … .
>
> …
>
> - Avoid using boy/girl methods to divide students—seating charts, lining up, groups, etc.
> - If possible, provide gender neutral uniforms
>
> …
>
> ***Other Guidance***
>
> - Creating a safe and supportive environment for all students is important
>   - Be respectful and nonjudgmental; do not show skepticism and/or disapproval

R. 120-20, at 5–7.

On February 6, 2018, Kluge, Principal Daghe, and Human Resources Director Gordon met, and the school administrators confirmed that Kluge would not be allowed his

accommodation in the next school year. R. 113-2, at 6. In this meeting, the three discussed how Kluge might announce his departure if he resigned. Gordon said other staff had left and not told anybody—without "any fanfare." R. 113-4, at 39. She suggested that Kluge did not have to talk about his retirement with staff or students. But Gordon qualified, "that's kind of up to you." *Id.*

E. Kluge Tenders Resignation

Kluge submitted his resignation letter on April 30, 2018, and continued to teach for the rest of the school year. In May, he presided over the school's orchestra awards ceremony, where he referred to all students by their PowerSchool first and last name. R. 120-3, at 32. On May 25, 2018, the School District locked Kluge out of its buildings, effectuating his resignation. R. 15-3, at 1; R. 113-2, at 7. Two weeks later at a School District Board meeting, Kluge asked the Board of Trustees not to accept his resignation and requested that he be reinstated. R. 113-2, at 7; R. 120-3, at 29–30; R. 120-18, at 10. The Board heard comments from Kluge and the community—some in support of termination and others against—and ultimately accepted Kluge's resignation, ending his employment. R. 113-2, at 7; R. 120-18, at 9–13. Both Aidyn and Sam offered comments at the Board meeting. R. 120-18, at 11.

After the meeting, Jeff Gracey, a parent of a School District student, recalled that Kluge addressed the Board with passion and wept when he found out that he would not retain his position. R. 52-6, at 3. Gracey opined that Aidyn's comments were "confrontational," and that he "seemed well coached" and "enthused about the prospect of Mr. Kluge losing his job." *Id.* Gracey said that Aidyn's comments before the Board

"seemed like a personal vendetta or a means to force others to use their voices to reinforce their ideology." *Id.* at 4.

II. Legal Framework

Kluge's religious accommodation and retaliation claims and the record evidence are considered under the familiar law of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. Still, close review of the law on failure-to-accommodate claims is critical in this case because some of it is in flux and the law that is unclear bears directly upon the claims we decide.

A. Title VII

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … religion." 42 U.S.C. § 2000e-2(a)(1). The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

To make a prima facie case based on an employer's failure to provide a religious accommodation, a plaintiff must show: (1) an observance or practice that is religious in nature; (2) that conflicts with an employment requirement; and (3) that the need for a religious accommodation was a motivating factor in the adverse employment decision or other discriminatory treatment. *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997) (citations omitted); *EEOC v.*

Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 772–73 (2015) (modifying the former third factor—the employer's actual notice of the employee's need for a religious accommodation). In addition, the employee must show his religious belief is sincerely held. *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013) (citing *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978)).

Whether an accommodation is reasonable is necessarily linked to the question of undue hardship: "Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any reasonable accommodation would result in undue hardship." *Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012) (citing *Ilona*, 108 F.3d at 1575–76). "Reasonableness is assessed in context, of course, and this evaluation will turn in part on whether or not the employer can *in fact* continue to function absent undue hardship" with the accommodation in place. *Adeyeye*, 721 F.3d at 455 (emphasis added). Undue hardship is an objective inquiry that "will depend on close attention to the specific circumstances of the job" and the nature of the accommodation. *Id.*

B. *Hardison*'s *De Minimis* Cost Test

The Supreme Court interpreted "undue hardship" to mean "more than a *de minimis* cost" in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). *Hardison* involved a Sabbatarian employee who refused to work on Saturdays on religious grounds. *Id.* at 66. In holding that accommodating Hardison's schedule would impose more than a *de minimis* cost, the Court observed that replacing him with other employees "would involve costs to TWA, either in the form of

lost efficiency in other jobs or higher wages," and require TWA to "carve out a special exception to its seniority system" of giving senior employees priority in choosing their schedule. *Id.* at 83–84. Accordingly, this court has observed that *Hardison* is most instructive when there is an existing system that attempts to accommodate the religious and non-religious preferences of employes—such as by a seniority system or collective bargaining agreement. *Adeyeye*, 721 F.3d at 456; *see also EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 315 (4th Cir. 2008) (discussing pre-existing company policies to accommodate employees' work scheduling preferences). *Hardison*'s core is that "Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021).

Since *Hardison*, the Supreme Court has reaffirmed the *de minimis* cost test in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986). In that case, the Court also clarified that the employer's duty to accommodate under § 2000e(j) ends "where the employer has already reasonably accommodated the employee's religious needs." *Id.* at 68. The Court, in its only other Title VII religious accommodation case post-*Hardison*, did not mention the *de minimis* cost test because the Court remanded for further proceedings under its holding that the need for a religious accommodation need only be a motivating factor for the employer's adverse employment decision. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772–73, 775 (2015). The case apparently settled on remand.

So the *de minimis* cost test remains controlling law absent a contrary indication from the Supreme Court. *See Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016). But remember, *Hardison*'s test is

"*more* than a *de minimis* cost," and the Court has not defined how much more. 432 U.S. at 84 (emphasis added). The Court reaffirmed in *Abercrombie* that "Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices." 575 U.S at 775. "Rather, it gives them favored treatment, affirmatively obligating employers not 'to fail or refuse to hire or discharge any individual ... because of such individual's' 'religious observance and practice.'" *Id.* (citing §§ 2000e-2(a)(1), 2000e(j)). "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Id.* So the Court apparently reads the *de minimis* cost test to have some substance.

Since *Hardison*, the *de minimis* cost test has come under criticism.[2] Most importantly, the Supreme Court has recently

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[2] *E.g.*, *Patterson v. Walgreen Co.*, 140 S. Ct. 685 (2020) (Alito, Thomas, and Gorsuch, Js., concurring) ("*Hardison*'s reading does not represent the most likely interpretation of the statutory term 'undue hardship.'"); *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1229 (2021) (Gorsuch and Alito, JJ., dissenting) (referring to *Hardison* as a "mistake … of the Court's own making" and observing "it is past time for the Court to correct it"); *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 826–29 (6th Cir. 2020) (Thapar, J., concurring) (discussing how the *Hardison* test is contrary to ordinary, contemporary meaning and incongruent with the treatment of "undue hardship" in other federal statutory contexts); Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 Tex. Rev. L. & Pol. 107, 122 (2015) ("In relying on the de minimis standard, the Court essentially held that little more than virtual identical treatment of religious employees was required."); Matthew P. Mooney, *Between a Stone and a Hard Place: How the Hajj Can Restore the Spirit of Reasonable Accommodation to Title VII*, Note, 62 Duke L.J. 1029, 1040 (2013) ("Thus, the Court was left to fill in the gaps, which it did by severely limiting employers' duty to accommodate their employees.").

granted certiorari in *Groff v. DeJoy*, 143 S. Ct. 646 (2023) (mem.). That case presents a classic Sabbatarian scenario, as in *Hardison*. The Third Circuit held that the employee's requested accommodation to be exempted from work on Sunday caused more than a *de minimis* cost to the employer. *See Groff v. DeJoy*, 35 F.4th 162, 175 (3d Cir. 2022), *cert. granted*, 143 S. Ct. 646 (2023). The questions presented in *Groff* on which the Court has granted certiorari are squarely relevant here: "1. Whether this Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)[;] 2. Whether an employer may demonstrate 'undue hardship on the conduct of the employer's business' under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself." Petition for Writ of Certiorari, *Groff*, No. 22-174, at i; Questions Presented Report, *Groff*, No. 22-174.

C. "Undue Hardship" & Offense

1. Statutory Text

The statutory text of 42 U.S.C. § 2000e(j) provides little help in answering whether offense constitutes undue hardship. At enactment, "hardship" generally meant "'adversity,' 'suffering' or 'a thing hard to bear.'" *Small*, 952 F.3d at 826–827 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 601 (1969); BLACK'S LAW DICTIONARY 646 (5th ed. 1979); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 826 (2d ed. 1975)). The ordinary meaning of "hardship" does not exclude non-economic

difficulties such as hurt feelings, albeit connoting a degree of severity given the adjective "undue."

Hardison's controlling test uses the word "cost," 432 U.S. at 84, which implies an economic or at least quantifiable loss to the employer. As mentioned above, *Hardison* was focused on "costs to [the employer]" by scheduling around the Sabbatarian employee's schedule—"either in the form of lost efficiency in other jobs or higher wages." *Id.* at 84. So, from the outset, the Supreme Court appears to have set an operational or economic gloss on "hardship."

2. EEOC Regulation

While neither the statute's text nor *Hardison* provide answers to whether offense is enough, the Equal Employment Opportunity Commission has issued informative regulations and guidance. For Title VII, the EEOC may issue procedural but not substantive regulations to carry out the statutory provisions. 42 U.S.C. § 2000e-12(a); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002) (citations omitted). Nonetheless, the regulations are persuasive (albeit nonbinding) guidance, meriting lesser deference under *Skidmore* in light of the "specialized experience and broader investigations and information" available to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360–61 (2013); *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (explaining that the EEOC's interpretive statements are entitled to a "measure of respect" (quoting *Alaska Dept. of Env't Conservation v. EPA*, 540 U.S. 461, 487–88 (2004))).

In 29 C.F.R. § 1605.2(e), the EEOC states that it will determine "undue hardship" as "more than a *de minimis* cost" in

accordance with *Hardison*. In making the "undue hardship" determination, the EEOC gives "due regard [] to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation." *Id.* "In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship." *Id.* But administrative costs for providing a religious accommodation, such as "costs involved in rearranging schedules and recording substitutions for payroll purposes" "will not constitute more than a *de minimis* cost." *Id.* Coworker or customer feelings, preferences, and complaints are not mentioned in § 1605.2.

3. EEOC Guidance

An EEOC Guidance addresses coworker complaints and customer preferences. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, Section 12: Religious Discrimination (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_255006745363916107498 6%207844 (*EEOC Guidance*).

As to coworker complaints, the Guidance states, "Although infringing on coworkers' abilities to perform their duties or subjecting coworkers to a hostile work environment will generally constitute undue hardship, the general disgruntlement, resentment, or jealousy of coworkers will not." *Id.* (footnotes omitted). "Undue hardship requires more than proof that some coworkers complained or are offended by an unpopular religious belief or by alleged 'special treatment' afforded to the employee requesting religious accommodation; a showing of undue hardship based on coworker interests

generally requires evidence that the accommodation would actually infringe on the rights of coworkers or cause disruption of work." *Id.* (footnote omitted). "Applying this standard, it would be an undue hardship for an employer to accommodate religious expression that is unwelcome potential harassment based on race, color, sex, national origin, religion, age, disability, or genetic information, or based on its own internal anti-harassment policy." *Id.* So in general, the EEOC requires more than coworker complaints or offense by an employee's religious observance or practice to constitute an undue hardship. The religious accommodation must cause some operational disruption, or rise to such a level that it can be considered harassment or to cause a hostile work environment. *Id.*

As to customer preference, the Guidance states, "An employer's action based on the discriminatory preferences of others, including coworkers or customers, is unlawful." *Id.* It provides an illustrative example:

> **Employment Decision Based on Customer Preference**
>
> Harinder, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Harinder begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When he inquires, the crew complains that Harinder, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the September 11th attacks. The manager tells Harinder that he has to let him go because the

> customers' discomfort is understandable. The manager has subjected Harinder to unlawful religious discrimination by taking an adverse action based on customers' preference not to have a cashier of Harinder's perceived religion. Harinder's termination based on customer preference would violate Title VII regardless of whether he was – or was misperceived to be -- Muslim, Sikh, or any other religion.

Id.

This example shows that the EEOC does not tolerate religious discrimination based on the preferences, opinions, and feelings of customers about an employee's religious observance or practice.

It can be debated whether a public-school student is more like a coworker or a customer. A customer gives voluntary patronage to a business, while a public school requires student attendance (unless alternative schooling is available). So a public-school student may be more akin to a coworker than a customer. If a student is seen as a coworker, the Guidance suggests that the student's disgruntlement at employee conduct is not enough for undue hardship. But if the employee conduct constitutes harassment of the student or causes a hostile educational environment, then it would be enough. If a public-school student is closer to a customer of a school, the Guidance suggests that the student's disgruntlement is not enough for undue hardship. The majority opinion situates the student offense as closer to customer preference, which

categorically would not provide a basis for undue hardship under the EEOC Guidance.

4. Caselaw

The post-*Hardison* caselaw is sparse on whether coworker or customer offense is enough for more than a *de minimis* cost to the employer. This court has not addressed the question, but other circuits have and generally find that the grumblings or offense of others are not enough to constitute undue hardship.

Customer Sentiments. The majority opinion cites *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001), for the proposition that customer complaints—and thus student complaints—may suffice to constitute an undue hardship upon the employer. *Anderson* involved a Christian employee who sought to use the phrase "Have a Blessed Day" in signing off on written correspondence or ending telephone conversations. *Id.* at 473. The employer became concerned when one of its clients complained that the employee's use of the phrase was "unacceptable" and "must stop." *Id.* The employee filed suit for a preliminary injunction that allowed her to use the phrase in communications with the employer's customers, which the district court denied. *Id.* at 474.

In affirming the district court, this court observed that "Anderson's religious practice did not require her to use the 'Blessed Day' phrase with everyone" and that the employer was "concerned about its relationship with its customers." *Id.* at 476. We also recognized that the employer had a "legitimate interest[]" in protecting its relationship with clients. *Id.* at 477. Ultimately, we concluded that the employer had reasonably accommodated its employee by allowing Anderson to use the

phrase with co-workers but not clients. *Id.* at 474–76. Recall that the employer's Title VII duty to accommodate "is at an end" when "where the employer has already reasonably accommodated the employee's religious needs." *Ansonia*, 479 U.S. at 68. Therefore, in *Anderson* this court did not consider whether customer objections to an employee's religious belief or practice were enough to constitute more than a *de minimis* cost to the employer.

More importantly, *Anderson* is distinguishable from the facts in this case. Anderson sought to use a religious phrase, which the district court had found to impose her religious beliefs on the employer's clients or vendors. *Anderson*, 274 F.3d at 477–78. As the majority opinion recognizes, *Anderson* held that the employer could restrict the employee's religious speech with clients in providing the reasonable accommodation. *Id.* But here, an employer seeks to force an employee to engage in transgender-affirming speech contrary to his religious beliefs. Whether Kluge's gender-neutral accommodation constitutes an undue hardship by way of the School District's clients—the students—should be an open question for the factfinder. Recall that the EEOC opines that employers' adverse employment "action based on the discriminatory preferences of others, including coworkers or customers, is unlawful." *EEOC Guidance*.

Coworker Sentiments. Other courts have addressed whether coworker offense is enough to constitute undue hardship. In *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), the Ninth Circuit held that coworkers' "general sentiment against" a "free rider[]" employee who refused to join an employer-mandated union on religious grounds was not an undue hardship. *Id.* at 402. The court stated,

"Undue hardship means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts. Even proof that employees would grumble about a particular accommodation is not enough to establish undue hardship." *Id.* And in a factually similar case, the Ninth Circuit reiterated that "undue hardship requires more than proof of some fellow-worker's grumbling or unhappiness with a particular accommodation to a religious belief." *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (citing *General Dynamics*, 589 F.2d at 402). Though *General Dynamics* did not discuss *Hardison*'s *de minimis* cost test, the Ninth Circuit cited the case and operated under its regime. *Id.* at 400–01 (citing *Hardison*, 432 U.S. 63). *Burns* affirmed *General Dynamics*'s core principle that grumblings are not sufficient in an explicit analysis under *Hardison*. *Burns*, 589 F.2d at 406–07. Whether students are closer to coworkers or customers, *General Dynamics*, *Burns*, and the EEOC Guidance provide that grumblings are not enough for undue hardship.

In *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607–08 (9th Cir. 2004), the Ninth Circuit explained that an employer "need not accept the burdens that would result from allowing actions that demean or degrade, or are designed to demean or degrade, members of its workforce." The relevant employee had publicly posted in the workplace Bible scriptures condemning sodomy in response to his employer's poster promoting inclusion of gay workers. *Id.* at 601–02. So the Ninth Circuit's law generally accords with the EEOC Guidance's

suggestion that, while coworker grumblings are not sufficient to establish undue hardship, coworker harassment is.[3]

How much more than de minimis*?* In *Burns* and *General Dynamics*, the courts entered a judgment in favor of the employee, reversing bench trial decisions and concluding that the employer had failed to demonstrate that no reasonable accommodation could be provided without undue hardship. *Burns*, 589 F.2d at 407–08; *General Dynamics*, 589 F.2d at 402–03. That these cases and numerous other court decisions on the *de minimis* cost issue have been resolved by trial—some in favor of the employer, others for the employee—shows that the test, even if more than a *de minimis* cost, has some teeth.[4]

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[3] Kluge also cited a decision that was later vacated, *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975), *aff'd*, *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976), *vacated on reh'g*, 433 U.S. 903 (1977). Another Sixth Circuit decision, *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520–21 (6th Cir. 1975), stands for the principle for which Kluge cited it: that coworker grumblings are not enough for undue hardship. Whether *Draper*'s holding on coworker grumblings remains good law in the Sixth Circuit after *Hardison* is an open question.

[4] *See, e.g.*, *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995) (judgment for employer); *Mann v. Frank*, 7 F.3d 1365 (8th Cir. 1993) (same); *Cook v. Chrysler Corp.*, 981 F.2d 336 (8th Cir. 1992); *Ryan v. U.S. Dep't of Just.*, 950 F.2d 458 (7th Cir. 1991) (same); *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990) (same); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (same); *Turpen v. Missouri-Kansas-Texas R. Co.*, 736 F.2d 1022 (5th Cir. 1984) (same); *Wren v. T.I.M.E.-D.C., Inc.*, 595 F.2d 441 (8th Cir. 1979). *But see, e.g.*, *Opuku-Boateng v. California.*, 95 F.3d 1461, 1469 (9th Cir. 1996) (Sabbatarian case in which the Ninth Circuit concluded that the district court clearly erred in finding undue hardship and granted judgment for employee); *Brown v. Polk County*, 61 F.3d 650, 656–57 (8th Cir. 1995) (partial reversal and remand for judgment and relief for employee because employer had not demonstrated that "occasional spontaneous prayers and

At least one circuit court has remanded for a new jury trial on the *de minimis* cost issue. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439–41 (9th Cir. 1993). So, it follows that this fact-laden issue is often decided by trial.

Even when the *de minimis* cost issue is decided at summary judgment, our fellow circuits vary greatly in construing the test.[5] But religious accommodation caselaw confirms that the

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isolated references to Christian belief" caused undue hardship); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 134–35 (3d Cir. 1986) (upholding on clear error review the district court's finding of no undue hardship based on the lower court's familiarity with the evidence and witness credibility findings); *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 452 (7th Cir. 1981) (affirming judgment for plaintiff because the employer failed to present evidence of undue hardship).

[5] *See, e.g.*, *Groff v. DeJoy*, 35 F.4th 162, 175 (3d Cir. 2022) (judgment for employer), *cert. granted*, 143 S. Ct. 646 (2023); *EEOC v. Walmart Stores E., L.P.*, 992 F.3d 656 (7th Cir. 2021) (judgment for employer); *EEOC v. GEO Grp., Inc.*, 616 F.3d 265 (3d Cir. 2010) (same); *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009) (same); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (judgment for employer where there was harassment of coworkers); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508 (6th Cir. 2002) (judgment for employer); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001) (same); *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001) (same); *Seaworth v. Pearson*, 203 F.3d 1056 (8th Cir. 2000) (same); *Weber v. Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000) (same); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019 (10th Cir. 1994) (same); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994) (same); *Eversley v. MBank Dallas*, 843 F.2d 172 (5th Cir. 1988) (same). *But see, e.g.*, *Tabura v. Kellogg USA*, 880 F.3d 544, 557–58 (10th Cir. 2018) (remanded for trial because defendant did not move for summary judgment on undue hardship issue); *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014) (genuine issue of material fact on undue hardship issue); *Antoine v. First Student, Inc.*, 713 F.3d 824 (5th Cir. 2013) (same); *Adeyeye v. Heartland Sweeteners*, LLC, 721 F.3d 444, 455–56 (7th Cir. 2013) (same); *Balint v. Carson City*, 180 F.3d 1047 (9th Cir.

de minimis cost test has some weight. Application of that test to an accommodation is necessarily fact-intensive, and many cases are resolved by the factfinder. The majority opinion's reading of the *de minimis* cost test effectively eliminates the duty of the employer to provide reasonable religious accommodations where there are complaints of offense.

III. Religious Accommodation Claim

At the heart of this appeal is the district court's grant of summary judgment to the School District on Kluge's religious accommodation claim. We review that decision de novo. *Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1016 (7th Cir. 2020). When reviewing cross-motions for summary judgment, as here, we view the facts "in favor of the party against whom the motion under consideration is made," drawing all reasonable inferences in its favor. *Id.* (citation omitted); *Hess v. Bd. of Trs. of S. Ill. Univ.*, 839 F.3d 668, 673 (7th Cir. 2016) (citation omitted).

I conclude first that Kluge has demonstrated his religious beliefs are sincerely held and he has established a prima facie case for religious discrimination. In reaching this partial summary judgment for Kluge, I construe all facts in favor of the School District. Then the burden shifts to the School District to show that any reasonable accommodation would in fact result in undue hardship. *Porter*, 700 F.3d at 951; *Adeyeye*, 721 F.3d at 455. We do not have to postulate a reasonable accommodation as one is provided: Kluge's last-names-only accommodation as used in the 2017–2018 school year. The question then is whether, construing the evidence and reasonable inferences in favor of Kluge, the School District has carried its

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1999) (same); *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1577, 1583 (7th Cir. 1997) (affirming summary judgment for employee).

burden to prove that the accommodation caused more than a *de minimis* cost to it. In performing this analysis, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are reserved for the factfinder. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *McCottrell v. White*, 933 F.3d 651, 655 (7th Cir. 2019). To me, the School District has not satisfied its burden and a genuine issue of material fact remains for trial.

A. Sincerity

The School District concedes for purposes of appeal that Kluge made his prima facie case, but it challenges the sincerity of Kluge's religious beliefs in the alternative.

To show sincerity, Kluge "must present evidence that would allow a reasonable jury to find that (1) 'the belief for which protection is sought [is] religious in [the] person's own scheme of things' and (2) that it is 'sincerely held.'" *Adeyeye*, 721 F.3d at 451 (quoting *Redmond*, 574 F.2d at 901 n.12). When reviewing a plaintiff's sincerity, courts do not review an individual's "motives or reasons for holding the belief." *Id.* at 452. Nor do courts "dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 452–53 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981)). "In such an intensely personal area, … the claim of the [practitioner] that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger*, 380 U.S. 163, 184 (1965). Title VII does not "require perfect consistency in observance, practice and interpretation when determining if a belief system qualifies as a religion or whether a person's belief is sincere." *Adeyeye*, 721 F.3d at 453.

"[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance." *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("[F]or where would religion be without its backsliders, penitents, and prodigal sons?") (citing *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988)). It is not within the court's "province to evaluate whether particular religious practices or observances are necessarily orthodox or even mandated by an organized religious hierarchy." *Adeyeye*, 721 F.3d at 452.

Kluge has proved the sincerity of his beliefs. He is an active leader at his local church and believes in the absolute truth of the Bible, a fact he repeatedly told the School District when voicing concerns over its new policies. R. 120-3, at 4–5, 7, 19; R. 113-1, at 6–9; R. 113-2, at 2. He believes that, per his religion, he cannot affirm transgender identity by calling his transgender students by their modified PowerSchool names. R. 120-3, at 14; R. 120-19, at 6. All of this is uncontested, and "[t]he validity of what he believes cannot be questioned." *Seeger*, 380 U.S. at 184; *see also Adeyeye*, 721 F.3d at 452.

Kluge and Superintendent Snapp recount discussing their contrasting Christian beliefs on July 27, 2017, and I credit Snapp's testimony that it was a "cordial" chat. R. 113-6, at 6–7; R. 120-3, at 19. During that conversation, Kluge said he explained his beliefs with scripture. R. 120-3, at 19. Nothing in Snapp's recollection of the discussion suggests this is untrue. R. 113-6, at 6–7. In that meeting, Kluge ultimately refused to comply with the School District's Name Policy because his religious beliefs would not permit it. R. 120-3, at 14; R. 120-19,

at 6. So when opposed, Kluge defended his religious beliefs and practices.

The School District's sole rejoinder to these undisputed facts is Kluge's deviation from the last-names-only accommodation during the May 2018 orchestra awards ceremony. Kluge testified he complied with the Name Policy on that occasion because he believed "it would have been unreasonable and conspicuous" to refer to his students by only their last names at the ceremony.[6] R. 120-3, at 33. Kluge said he was "making a good effort to work within the bounds of [his] accommodation," and believed an exception for this "special" and "formal" event complied with his religious beliefs because it was not "ordinary" or regular behavior. *Id.* at 33–34. On this point, his attorney's EEOC submission states, "Kluge's Christian faith required that he do no harm to his students, and this acquiescence to the administration's position was done solely out of sincerely-held beliefs." R. 120-19, at 7.

No evidence is presented to the contrary. The School District notes that Kluge testified there are instances where it is appropriate and consistent with his religious beliefs to address a transgender student by the student's first name, even if the first name differs from the student's biological sex. R. 120-3, at 8–9. This is consistent with Kluge balancing his Christian beliefs of not affirming transgender identity with doing no harm. The School District also cites evidence that Kluge's religious denomination does not take a hardline

[6] The majority opinion construes this statement as a legal concession that using last names only would potentially cause harm to his students, but Kluge did not concede this point in his briefs or at oral argument.

stance in requiring a transgender child to use the bathroom of her birth sex. R. 120-4, at 12. But even construing the record in the light most favorable to the School District, I do not see how this evidence impugns Kluge's otherwise regular religious belief and practice of not using the PowerSchool names.

The evidence shows Kluge balancing his Christian values of not "regularly calling students by transgender names" with his duty to "do no harm." R. 120-3, at 33; R. 120-19, at 7. In evaluating sincerity, we are not to criticize Kluge's balancing or take issue with a one-time exception. *Adeyeye*, 721 F.3d at 453–54 (rejecting employer's contention that the court should probe and disapprove of employee's religious beliefs); *Grayson*, 666 F.3d at 454 (overlooking that Nazirite believer followed certain biblical proscriptions but not others). At the ceremony, Kluge chose a path in accord with his balancing of his Christian values. This does not detract from his sincerity or create a genuine issue of material fact on the issue. Construing all facts in the School District's favor, I conclude that Kluge has established the sincerity of his religious beliefs and practices.

B. Prima Facie Case

The majority opinion proceeds under the School District's concession on appeal that Kluge established a prima facie case for the religious accommodation claim. I conclude that Kluge is entitled to partial summary judgment on the prima facie case for his religious accommodation claim.

Recall that to make a prima facie case based on an employer's failure to provide a religious accommodation, a plaintiff must show: (1) an observance or practice that is religious in nature; (2) that conflicts with an employment

requirement; and (3) that the need for a religious accommodation was a motivating factor in the adverse employment decision or other discriminatory treatment. *Ilona*, 108 F.3d at 1575; *Abercrombie*, 575 U.S. at 772–73. There is no question that Kluge's refusal to adhere to the Name Policy is a religiously motivated practice. This refusal conflicts with the School District's Name Policy. Further, the School District does not dispute that requiring Kluge to choose between Name Policy compliance, resignation, or termination was an adverse employment action. So, the prima facie case turns on whether Kluge's need for a religious accommodation was a motivating factor for his forced resignation.

There is no doubt that it was, viewing the record in the School District's favor. Its asserted reason for forcing Kluge to resign was the "[c]omplaints from the high school community" regarding the very last-names-only accommodation that Kluge had requested in July 2017. R. 121, at 45. The School District said it had "received complaints that the accommodation was not conducive to a well-run classroom and negatively impacted students." *Id.* Thus, the reason for the adverse employment action is the accommodation that Kluge requested and received for the 2017–2018 school year. Kluge had three choices at the end of that school year: comply with the Name Policy, resign, or be terminated. R. 113-2, at 6; R. 15-3, at 6.

If Kluge did not need a religious accommodation for the Name Policy and complied with its terms, he could stay. So, there is no genuine issue of material fact that Kluge's need for a religious accommodation was a motivating factor behind the School District's adverse employment decision. The Supreme Court clarified in *Abercrombie* that Title VII supplies a

"motivating factor" standard even lower than "the traditional standard of but-for causation." 575 U.S. at 773 (citing 42 U.S.C. § 2000e-2(m)). Under this lenient standard Kluge proved the motivating factor element and thus a prima facie case for his religious accommodation claim.

Having established the prima facie case, the burden shifts to the School District to show that any reasonable accommodation would result in undue hardship—that is, more than a *de minimis* cost. *Porter*, 700 F.3d at 951; *Hardison*, 432 U.S. at 84. Viewing the evidence and reasonable inferences in Kluge's favor, there is a genuine issue of material fact on the question of undue hardship. The School District points to two sources of hardship: fear of Title IX liability and interference with its ability to educate students. I consider these two grounds in the next two sections.

C. Fear of Title IX Liability

The evidence is lacking that the School District considered and was concerned about Title IX liability. Under current caselaw, the alleged fear amounted to speculation.

Only a single piece of evidence might indicate that the School District contemplated Title IX liability: one sentence in the form presented to Kluge on July 31, 2017, which stated, "This directive is based on the status of a current court decision applicable to Indiana." R. 15-1, at 1. Nothing suggests what the School District meant by this sentence. Yet the majority opinion states, without record support, that "[t]he 'current court decision applicable to Indiana' was likely our decision in *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d

760 (7th Cir. 2020), which had been issued two months prior to" the July 31 compromise meeting. Presumably the majority opinion juxtaposes the timing of the School District's form and *Whitaker* to conclude that the District was likely referring to that case. But without record evidence, that inference stretches too far. In addition, this speculation runs counter to the requirement at this stage that facts and inferences be construed in favor of Kluge. Properly viewed, the sentence on the School District's form is an unclear statement of concern about the implications of an unidentified court decision.

Even if we were to accept that the School District considered *Whitaker*, at best that case creates only a speculative risk of Title IX liability based on Kluge's actions. First, *Whitaker* concerned a district court's grant of preliminary injunction based on a Title IX theory of transgender sex-stereotyping by a school district. 858 F.3d at 1038–39. In that case this court concluded only that the transgender students in question were sufficiently likely to succeed on the merits of their Title IX sex discrimination claim against the school district to warrant a preliminary injunction. *Id.* at 1046–50. That said, the Supreme Court has held that, under Title VII, an employer who discriminates against an employee for being transgender discriminates on the basis of sex. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020). But the Court has not held that the same construction of sex discrimination applies to Title IX.

Second, *Whitaker* concerned a transgender student who requested preliminary injunctive relief to allow him to use the boys' bathroom in violation of the school district's bathroom policy. *Whitaker*, 858 F.3d at 1038–39. So, assuming that "on the basis of sex" is interpreted in accordance with *Bostock*, the school district's policy of excluding transgender students

from non-birth-sex restrooms only arguably violated Title IX's provision that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); *see also* 34 C.F.R. § 106.31(a). Such legal assumptions, without the benefit of Supreme Court or Seventh Circuit authorities establishing Title IX liability for transgender discrimination, present merely speculative risk of Title IX liability for the School District.

Even more, it is unlikely that Kluge conforming with the Name Policy constitutes a benefit of a federally funded educational program. Further, Kluge's last-names-only practice is gender-neutral and generally applicable, so it is doubtful that the practice constitutes discrimination on the basis of sex. Even if we assume that the School District considered the implications of *Whitaker* and Title IX liability, any risk it faced was speculative. Construing the record in Kluge's favor, I conclude that the School District may not rely on fear of Title IX liability in the undue hardship equation.

D. Interference with Educational Mission

This leaves the School District with its other alleged basis for undue hardship—interference with its educational mission. The majority opinion agrees with the district court's conclusion that "Kluge's use of the last names only accommodation burdened [the School District's] ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." I evaluate this ground by examining: (1) the School District's educational mission; (2) the complaints of offense taken to Kluge's last-names-only accommodation and whether they

constitute more than a *de minimis* cost; and (3) other considerations, including caselaw and the practical impact of the majority opinion.

1. The School District's Educational Mission

Before assessing the evidence, it is important to understand what the School District's educational mission is for its students and its grounds for claiming this mission.

Indiana Constitution. The School District relies first on the Education Clause (Article 8, Section 1) of the Indiana Constitution to define its educational mission. That provision states in relevant part that it "shall be the duty of the General Assembly … to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." IND. CONST. art. VIII, § 1. The district court suggests that this charge to provide public education "equally open to all" meant the School District has a constitutional mission to affirm transgender identities in public schools.

But the text and history of the Education Clause confirm that the phrase "equally open to all" refers only to the equal admission of students. The text of the Indiana Constitution expresses "a duty to *provide* for a general and uniform system of open common schools without tuition." *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009). The Education Clause "does not require the attainment of any standard of resulting educational quality." *Id.* at 521. "The phrases 'general and uniform,' 'tuition … without charge,' and 'equally open to all' do not require or prescribe any standard of educational achievement that must be attained by the system of common schools." *Id.* Contemporary dictionaries confirm this

reading. For example, "open" was defined as "[a]dmitting all persons without restraint; free to all comers." *Open*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 571 (1841). On its face, the text of the Education Clause "says nothing whatsoever about educational quality." *Bonner*, 907 N.E.2d at 521.

The historical context of the Education Clause supports this plain meaning interpretation. In the years preceding the Education Clause's ratification, the Indiana General Assembly had engaged in a series of constitutional and legislative efforts to provide for a "common school" education. *Nagy ex rel. Nagy v. Evansville-Vanderburgh Sch. Corp.*, 844 N.E.2d 481, 484–89 (Ind. 2006); 2 DONALD F. CARMONY, THE HISTORY OF INDIANA 381 (1998); DONALD F. CARMONY, THE INDIANA CONSTITUTIONAL CONVENTION OF 1850–1851 103–04 (1931). The phrase "common school" referenced schools that were "open to the children of all the inhabitants of a town or district." *Nagy ex rel. Nagy*, 844 N.E.2d at 489 (quoting AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 988 (1856))

By the 1850–1851 Indiana Constitutional Convention—in which the Education Clause was drafted—the common school movement had garnered "considerable attention" and support for the idea that the state should be responsible for providing every child the opportunity for elementary education. *Embry v. O'Bannon*, 798 N.E.2d 157, 162–63 (Ind. 2003). The convention debates centered on the need to provide for the "education of every child in the State." 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1858–61 (1851). The Convention also adopted a resolution to describe the relevant changes in the Indiana Constitution it had drafted, which stated: "It is also provided, that the Legislature

shall establish a uniform system of common schools, wherein tuition shall be free." INDIANA HISTORICAL COMMISSION, CONSTITUTION MAKING IN INDIANA 410 (1916) (quoting *An Address to the Electors of the State* (Feb. 8, 1851)). The Education Clause was thereafter ratified as part of the Constitution of 1851. IND. CONST. art. VIII, § 1; WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION 16 (2011). Following ratification, in December 1851, Governor Joseph A. Wright addressed the General Assembly, stating that it was their "duty to husband this fund … to provide for the education of the youth of every county, township, and district." *Horner v. Curry*, 125 N.E.3d 584, 599 (Ind. 2019) (quoting *Indiana House Journal* at 20 (Dec. 2, 1852)).

This historical tour confirms that the text of the Indiana Constitution's Education Clause only charges the School District with admitting all children into its schools. It does not require or prescribe any specific standard of educational quality.

Statutory Directive. In identifying the School District's educational mission, the district court also relied on the fact that "[t]he Indiana Supreme Court has recognized that public schools play a 'custodial and protective role,' which has been codified by the legislature in passing compulsory education laws that mandate the availability of public education. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 979 (Ind. 2002)." The majority opinion also relies on *Linke*. But the Indiana Supreme Court in *Linke* merely confirmed that the Indiana legislature had codified compulsory school attendance and Indiana school corporations' supervision over all pupils in accordance with the Education Clause. *Linke*, 763 N.E.2d at 979, 983 (citing IND. CONST. art. VIII, § 1 and the then-effective IND. CODE

§ 20–8.1–5.1–3). That court did not read into the Education Clause a requirement that Indiana school corporations affirm transgender identity.

The School District's Policy. Without a purported constitutional or statutory obligation to affirm transgender identity, the School District is left with its own recent policy to inform its educational mission. The principles and mission underlying the Name Policy were outlined in the January 22, 2018 Transgender Questions document and accompanying Transgender Considerations presentation in the middle of the 2017–2018 school year. R. 15-4; R. 120-20. While styled as "Questions" and "Considerations" and couched in precatory language on gender-neutral practices, as applied to Kluge and in practice, they were more than suggestions.

For example, the Questions document said that staff should "make all students feel welcome and accepted in the public school environment." R. 15-4, at 9. And the Considerations presentation said, "Creating a safe and supportive environment for all students is important." R. 120-20, at 7. The Considerations presentation also had several gender-neutral best practices such as providing "gender neutral uniforms"; avoiding using "boy/girl methods to divide students"; and using gender-neutral indefinite pronouns/nouns such as "everyone" or "people" instead of "ladies and gentlemen." *Id*. at 5. It suffices to say that the School District adopted an educational mission to create a safe and supportive learning environment for all students and, more specifically, transgender students.

2. Complaints of Offense

The question then becomes whether the complaints of offense taken by school staff and students to Kluge's use of last names are enough to constitute more than a *de minimis* cost to the School District's mission of creating a transgender-supportive learning environment. Considering Kluge's gender-neutral accommodation, teacher and student complaints about that accommodation, evidence in Kluge's favor, and various credibility questions, I conclude that there is a genuine issue of material fact on this evidentiary record.

i. Gender-neutral Accommodation

The last-names-only accommodation was, obviously, gender-neutral. Kluge called students by their last names in the 2017–2018 school year. The evidence conflicts as to whether he was perfectly consistent in this practice. *See* R. 58-2, at 3; R. 120-19, at 7; R. 120-3, at 36; R. 52-3, at 2; R. 52-4, at 2; R. 52-5, at 2. But Kluge, another teacher, and three of his students during the 2017–2018 school year attested that he was consistent. R. 120-3, at 36; R. 52-2, at 3; R. 52-3, at 2; R. 52-4, at 2; R. 52-5, at 2. Construing the record in Kluge's favor and crediting his testimony leads to the conclusion that he adhered to the accommodation.

Even if Kluge's testimony is not credited, the school administration acknowledged that mistakes could happen. A Brownsburg High School counselor acknowledged that there may be instances where school staff "don't get" a transgender student's name or pronoun "quite right." R. 120-13, at 5. And the Considerations presentation stated, "*Try* not to make assumptions about the genders of students." R. 120-20, at 5 (emphasis added). The Questions document even addressed how

to handle a "student exploding in anger with being called the wrong name or gender." R. 15-4, at 10. For the most part, Kluge consistently referred to all students in a gender-neutral manner by their last names only, so undue hardship either did not arise or the record presents a factual dispute.

ii. Teacher Complaints

Craig Lee and several teachers, including two fine arts department heads, complained about how Kluge was addressing students to the school administration. R. 120-2; R. 120-14, at 16–17; R. 113-5, at 8–9. Lee averred the complaints of three teachers arose out of concerns that Kluge's practice "was harming students." R. 120-14, at 17. Lee did not mention any harm or harassment of the teachers themselves. But he added that none of the three teachers told him that they had visited Kluge's class or witnessed the harm firsthand. *Id.* And Principal Daghe attested the complaints from the department heads mostly arose from "continued issues" relayed from students "that were in [Kluge's] classes." R. 113-5, at 8. Unlike in *Peterson*, where the employee posted scriptures demeaning or degrading gay coworkers, 358 F.3d at 601–02, 607, nothing in the record shows Kluge harassing his coworkers by adhering to the last-names-only accommodation.

Undue hardship requires more than coworker offense by a religious belief or practice. It requires actual infringement on the rights of coworkers—such as by harassment—or the disruption of work. *See EEOC Guidance*; *General Dynamics*, 589 F.2d at 402; *Burns*, 589 F.2d at 407. Viewing the record in favor of Kluge, the evidence does not show that his coworkers' complaints were more than mere complaints of offense. In fact, the teacher complaints relay student complaints, which

form the real core of the School District's case for undue hardship.

iii. Student Complaints

Two transgender students and an unidentified number of other students complained that Kluge's use of last names only offended them. Teacher Craig Lee relayed that at Equality Alliance meetings, Aidyn and Sam said they found the practice "insulting and disrespectful." R. 120-14, at 7. He could not "recall any other students … who are transgendered [sic]" talking about the subject. *Id.* at 6–7. Lee's declaration said students in Kluge's class felt likewise. R. 58-2, at 2. Assistant Superintendent Jessup's recollection of an Equality Alliance meeting accords with this report. R. 120-1, at 4.

Aidyn and Sam also spoke on their own behalf. Aidyn said Kluge's practice "made [Aidyn] feel alienated, upset, and dehumanized." R. 22-3, at 4. Sam attested "Mr. Kluge's use of last names in class made the classroom environment very awkward" and that, even now, Kluge's actions hurt him and cause him anxiety. R. 58-1, at 3–4. Their complaints were consistent with one letter and one email chain from parents of transgender students, which were transmitted to the school administration in fall 2017. R. 120-12; R. 120-13. The parents of one transgender student, in reference to a teacher that "routinely refers to [our child] by his last name only," said the practice was "ok, but we do wonder if the teacher does this with other students or if it is only [our child]." R. 120-12. So at least one transgender student's parents thought Kluge's practice was fine if consistently applied.

The majority opinion repeatedly states that Kluge's last-names-only practice caused classroom "disruption," citing

portions of Principal Daghe's affidavit and deposition. R. 120-2, at 4; R. 112-5, at 7. Daghe does not mention disruption. Instead, he notes "tension," "uncomfortableness," and that the accommodation was "not going well." R. 120-2, at 4; R. 112-5, at 7–8. He asserts such "tension … was affecting the overall functioning of the performing arts department." R. 120-2, at 4. But neither Daghe nor the record reveals how Kluge's last-names-only practice hampered the department's operations, and there is much countervailing evidence. Besides, we are to draw all reasonable inferences in Kluge's favor.

My colleagues also infer that Kluge acknowledged creating tension and conflict at the school when he said Principal Daghe wanted him to resign "simply because [Daghe] didn't like the tension and conflict." R. 15-3, at 5. But the context of this quote demonstrates that Kluge was referring to *Daghe's* perception of tension and conflict—not his own. In the paragraph directly before this quote, Kluge recounted that Daghe said "he didn't like things being tense and didn't think things were working out." The majority opinion again fails to view the record in Kluge's favor.

There is a crucial distinction here: No evidence shows that Kluge revealed to students his motivations for calling them by their last names in the 2017–2018 school year. Lee's retelling of a student's complaint said that the student "was fairly certain that all the students knew why Mr. Kluge had switched to using last names." R. 58-2, at 3. Aidyn alleged that "Kluge's behavior was noticeable to other students in the class." R. 22-3, at 4. But Aidyn also recalled, "At one point, my stand partner asked me why Mr. Kluge wouldn't just say my name. I felt forced to tell him that it was because I'm transgender." *Id.* The record says nothing about Aidyn telling

the stand-mate about his intuitions of Kluge's motive. And importantly, Aidyn's recollection of his stand partner asking him about Kluge's last-names-only practice corroborates other testimony that students did not know Kluge's motives. Similarly, Sam said "[m]ost of the students knew why Mr. Kluge had switched to using last names." R. 58-1, at 3–4. But Sam did not explain how the students knew Kluge's motives for using last names only.

In contrast, the record is replete with evidence that Kluge never revealed his religious motives and that students did not know the reason why Kluge used last names only. Three students—Lauren Bohrer, Kennedy Roberts, and Mary Jacobson—attested that Kluge consistently called his students by their last names and did not explain his motives for doing so. R. 52-3, at 3; R. 52-4, at 2; R. 52-5, at 2. Roberts "never really thought anything of it. It's just what he did." R. 52-4, at 2. And fellow music teacher Natalie Gain averred that she "never heard [Kluge] use gendered language in the classroom"; "only heard him use last names with the students"; and "never heard any of the students discussing the [sic] Mr. Kluge's use of last names, or any references to his agreement with the administration." R. 52-2, at 3. "[A]s far as [she] could tell, Mr. Kluge's accommodation was not common knowledge … ." *Id.*

The evidence shows that student complaints of offense at Kluge's last-names-only practice came not from any discomfort with the practice itself but from students' assumptions and intuitions about why Kluge was using only last names. Neither this nor any other court has held that mere offense at an employee's religious observance or practice is enough for undue hardship. And the facts here are a step removed: The

alleged offense arose from students' presumptions and guesses as to Kluge's motives for using last names only. The majority opinion breaks new ground here. This distinction, as well as the evidence in Kluge's favor, presents a genuine issue of material fact on undue hardship.

iv. Evidence for Kluge

The record also contains the testimony of Kluge, three students, and a teacher, who contradict the complaints about Kluge's last-names-only accommodation. The district court failed to give due weight to this evidence. But the majority opinion goes further, stating that Kluge's evidence is not relevant to undue hardship. To my colleagues, the undue hardship inquiry ended once the School District received some reports that the accommodation did not work and caused tension and discomfort.

Every court to consider undue hardship has framed the inquiry as an objective one, dependent on the factual context of the case. *See, e.g.*, *Groff*, 35 F.4th at 174 ("The undue hardship analysis is case-specific, requiring a court to look to 'both the fact as well as the magnitude of the alleged undue hardship' … ." (quoting *GEO Group*, 616 F.3d at 273)); *Tabura*, 880 F.3d at 558 (cleaned up and citations omitted) ("Whether an employer will incur an undue hardship is a fact question that turns on the particular factual context of each case."); *Adeyeye*, 721 F.3d at 455. In a similar vein, cases evaluating undue hardship—including *Hardison*—address factors such as the need to rearrange schedules or the additional work burden on coworkers. *See, e.g.*, *Hardison*, 432 U.S. at 83–84; *Adeyeye*, 721 F.3d at 455; *Ilona*, 108 F.3d at 1576–77. Because undue hardship depends on the factual context, the reports of three students and a teacher that contradict the alleged harms caused

by Kluge's last-names-only practice are relevant, whether or not this information was known by the School District at the time of the adverse employment decision.

The majority opinion holds that the undue hardship inquiry considers only evidence within the employer's knowledge when the adverse employment decision is made. But no authority is cited for this proposition. Under this reasoning, an employer's sole focus on allegations of difficulties arising from a religious accommodation would defeat any employee's failure-to-accommodate claim. Such an outcome creates a perverse incentive for employers to avoid investigating undue hardship. If, by contextual evidence obtained after discharge, an employee plaintiff is not able to undermine the alleged presence of undue hardship, when, if ever, can the employee prevail? Before his termination, the employee would have to bring to the employer's attention evidence contrary to the reports of undue hardship.

Consider the evidence for Kluge. Three students and a teacher submitted declarations that Kluge's practice did not diminish the classroom environment. Bohrer attested that because the orchestra class was large, Kluge rarely had occasion to call on any individual student directly. R. 52-3, at 2. Roberts corroborated that Kluge called last names for attendance "at first, maybe 5-8 times over the year." R. 52-4, at 2. This evidence tends to show that Kluge's last-names-only practice did not have more than a *de minimis* impact on classroom operations.

A number of students said Kluge's practice did not cause significant interruption with the classroom environment. Bohrer, Roberts, and Jacobson all testified similarly that Kluge's use of only last names was not unnatural, odd, or

uncomfortable. R. 52-3, at 3; R. 52-4, at 2; R. 52-5, at 2. Bohrer said she never saw Kluge treat her transgender stand partner differently and that the stand-mate "never told [her] that they disliked Mr. Kluge's behavior or that Mr. Kluge had been unfair to them." R. 52-3, at 3. Fellow teacher Natalie Gain added that Kluge "had mostly used last names … the previous school year anyway, with 'Mr./Ms.' for students to encourage a respectful teaching environment, like college classes." R. 52-2, at 2. As such, she "saw no reason as to why there would be issues with Mr. Kluge's compromise." *Id.*

Kluge also alleged that there were no issues with his use of last names—no protests, classroom disturbances, cancelled classes, student animosity, or tensions. R. 113-2, at 4; R. 120-3, at 23. Instead, Kluge says the accommodation worked without undue hardship. His students excelled, winning awards, scoring high on their AP Music Theory exams, and participating in extracurricular music activities. R. 113-2, at 4; R. 120-3, at 23–24. The School District contests none of these objective measures of pedagogical success.

v. Credibility Issues

The record also revealed potential biases and credibility issues with many of the witnesses. A few notable examples underscore the fact-intensive nature of the undue hardship decision. Weighing the evidence on undue hardship and making credibility determinations are reserved for the factfinder. *Liberty Lobby*, 477 U.S. at 255; *McCottrell*, 933 F.3d at 655. Only the factfinder "can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*,

470 U.S. 564, 575 (1985); *see also Kadia v. Gonzales*, 501 F.3d 817, 819–20 (7th Cir. 2007).

Kluge is biased to give testimony in his favor. His student Bohrer is a professed Christian, so her testimony may have been offered to favor Kluge. R. 52-3, at 3. Aidyn also has credibility issues. Bohrer alleged that Aidyn falsely accused her of calling him a "f----t." *Id.* at 4. A parent, Jeff Gracey, also opined that Aidyn seemed motivated to put Kluge out of a job. R. 52-6, at 3–4. And Craig Lee, the teacher who relayed student complaints about Kluge to the school administration, admitted he was "very biased." R. 120-15.

* * *

The evidence on undue hardship cuts for and against Kluge. Three students, a teacher, and Kluge all attest that the last-names-only accommodation worked without issue. But Aidyn and Sam, some students in secondhand accounts, and some teachers complained the accommodation did not work. Both sides have credibility issues. The witnesses conflict as to whether and to what degree Kluge's accommodation was offensive. Even more, the evidence shows that any alleged offense came from students' assumptions about Kluge's motives for the last-names-only practice—not from the practice itself. The record also shows that Kluge's practice was infrequent and not critical to how his music classes operated. Of course, at this posture, we must draw inferences from the facts in favor of Kluge, and reserve credibility issues and weighing of the evidence for the factfinder. This record demonstrates a genuine issue of material fact as to whether

the accommodation caused more than a *de minimis* cost to the School District's educational mission.

3. Caselaw and Practical Impact

In examining the School District's alleged basis for undue hardship—interference with its educational mission—there are also other considerations, including consistency with caselaw and the practical impact of the majority opinion's analysis.

Caselaw. Concluding that a fact issue exists on this record accords with this court's caselaw on the employer's duty to provide reasonable religious accommodations under Title VII. In *Walmart*, this court stated *Hardison*'s core is "that Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers." *Walmart*, 992 F.3d at 659 (citing *Hardison*, 432 U.S. at 78–79). As mentioned earlier, there was no evidence that Kluge's accommodation burdened other school staff.

The majority opinion cites *Smiley v. Columbia College Chicago*, 714 F.3d 998, 1002 (7th Cir. 2013), for the proposition that a school has a legitimate interest in ensuring that its "instructors will teach classes in a professional manner that does not distress students." While correct, *Smiley* involved a teacher who singled out and harassed a student for being Jewish. *Id.* at 1000. The teacher was terminated for unprofessional conduct that "distress[ed] students." *Id.* at 1002. Kluge's last-names-only practice is different in kind, not just degree.

The majority opinion also analogizes the facts here to those in *Baz*, in which a V.A. hospital chaplain actively proselytized and held "Christian evangelical service[s]" in contravention of the hospital's purpose for his role that he serve as

a "quiescent, passive listener and cautious counselor." 782 F.2d at 703–04, 709. The V.A. had "instituted … an ecumenical approach to its chaplaincy with special attention to the sensitive needs of its patient population." *Id.* at 709. Reverend Baz's self-ascribed "active, evangelistic, charismatic" preaching and proselytization went against the hospital's mission and purpose for his role. *Id.* at 709. This court held that the V.A. had met its burden of producing evidence "tending to show that Reverend Baz's philosophy of the care of psychiatric patients is antithetical to that of the V.A." *Id.* at 706–07. "To accommodate Reverend Baz's religious practices, they would have to either adopt his philosophy of patient care, expend resources on continually checking up on what Reverend Baz was doing or stand by while he practices his (in their view, damaging) ministry in their facility." *Id.*

Here, of course, Kluge did not proselytize. He did not reveal to his students why he used only last names, and he never shared his religious beliefs with them. He used last names only with all his students, and Bohrer and Roberts suggested that even this last name usage was relatively infrequent. R. 53-3, at 2; R. 52-4, at 2. The question is whether this infrequent use of last names only when referring to students caused more than a *de minimis* cost as to render the practice unreasonable.

This court stated in *Adeyeye* that "[r]easonableness is assessed in context … and this evaluation will turn in part on whether or not the employer can in fact continue to function absent undue hardship" under the accommodation. 721 F.3d at 455. *Adeyeye* involved an employee who sought several weeks of unpaid leave to lead his father's religious burial rites. *Id.* at 447. This court held that the employer was not

entitled to summary judgment "that any reasonable jury would have to find that permitting Adeyeye to take three weeks of unpaid leave in conjunction with his week of vacation would have created an undue hardship." *Id.* at 455. Similarly in *Ilona*, this court upheld the district court's factual finding that the employer had not demonstrated that allowing two employees to take off a day for Yom Kippur resulted in more than a *de minimis* cost to the employer. 108 F.3d at 1572, 1576–77. If taking time off from work does not establish more than a *de minimis* cost, perhaps neither does allowing a teacher to use last names only.

In the district court, the School District argued that using a student's chosen first name is a "purely administrative" task or duty. R. 145, at 9-10; R. 121, at 24, 28. So it should come as no surprise that Kluge's accommodation required no adjustment to the School District's operation, scheduling, or curriculum. Our and other circuits' caselaw shows that the *de minimis* cost test has substance.

Practical Impact. Under the reasoning of the majority opinion, once an employer receives complaints of offense about an employee's religious observance or practice, undue hardship has been established as long as avoiding offense is its policy. But reviewing those complaints and the credibility of those complainants—including assessing any biases and motivations—are context-specific questions for the factfinder, which our caselaw requires. *See Adeyeye*, 721 F.3d at 455; *Kadia*, 501 F.3d at 819–20.

Consider a variation of the facts here. What if a teacher does not take issue with a transgender student's chosen first names, but that teacher does take issue—on religious grounds—with the use of chosen pronouns (they / them /

their). So, the teacher insists on calling students by their chosen first name. Say a transgender student feels uncomfortable with the teacher's efforts to refer to all students by their first name where a pronoun would suffice. Would the students' discomfort and complaints be sufficient to force the teacher to use the chosen pronouns where appropriate or be terminated? Under the majority opinion's reasoning, the answer is "yes." The facts here are close to this hypothetical.

Recall the EEOC Guidance's example of the Sikh coffee shop employee, Harinder, who sought to wear his religiously mandated turban at work. Is Harinder out of luck if the café decides that religious neutrality or avoiding customer offense by religious apparel is its official policy? The EEOC is concerned that the already lenient *de minimis* cost test may be read out of existence by customer preferences or opinions. The majority opinion realizes these fears.

Properly interpreted and applied, Title VII should provide protection for conscientious religious objectors who in good faith try to accommodate their employers' dictates. The undue hardship provision should not become "an exemption from the accommodation requirement altogether," whenever an employer receives some complaints of emotional hurt arising from protected religious activity. *Ilona*, 108 F.3d at 1577. More broadly, the purpose of Title VII is to protect minorities against those who disagree with their beliefs. *See* 42 U.S.C § 2000e–2. Under the majority opinion, if some people—on this record, at most a few transgender students in Kluge's classes—say they are offended, the protected religious adherent has no right to a reasonable accommodation.

On Kluge's religious accommodation claim, I conclude that a genuine issue of material fact exists about whether the

last-names-only accommodation would result in more than a *de minimis* cost. So I would reverse the district court's grant of summary judgment to the School District on this claim and remand the undue hardship issue for trial.

IV. Retaliation Claim

Although at least a genuine issue of material fact exists as to whether Kluge's protected activity was a but-for cause of his forced resignation by the School District, I concur with my colleagues to affirm the judgment for the School District on his retaliation claim. The record does not contain sufficient evidence from which a reasonable jury could infer that the School District's nondiscriminatory explanation for its adverse employment action was pretext for religious discrimination.[7]

Kluge's claimed protected activity was his July 2017 request for the last-names-only religious accommodation. R. 15,

[7] Kluge's failure to show that the School District's nondiscriminatory explanation was pretext does not also doom his religious accommodation claim. A different version of the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework applies to failure-to-accommodate cases, as opposed to retaliation or disparate treatment cases. *See Tabura*, 880 F.3d at 549–50; *Porter*, 700 F.3d at 951; *Firestone Fibers & Textiles Co.*, 515 F.3d at 312. Neither discriminatory intent nor pretext are elements of a failure-to-accommodate claim. *See Walmart Stores East*, 992 F.3d 656; *Adeyeye*, 721 F.3d at 449; *Porter*, 700 F.3d at 951; *Anderson*, 274 F.3d at 475; *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998); *Ilona*, 108 F.3d at 1574–75; *Ryan*, 950 F.2d 458; *Redmond*, 574 F.2d at 901. After Kluge established a prima facie case, the burden was on the School District "to show that any reasonable accommodation would result in undue hardship." *Porter*, 700 F.3d at 951 (citing *Ilona*, 108 F.3d at 1575–76). Because a genuine issue of material fact exists on undue hardship, that issue should

at 17–18; R. 121, at 44–45. The School District does not contest that forcing Kluge to comply with the Name Policy, resign, or be terminated is an adverse employment action. The nondiscriminatory reason for forcing Kluge to comply or resign was the "[c]omplaints from the high school community" about the accommodation that Kluge had requested in July 2017. R. 121, at 45.

Recognizing the obvious tie between the School District's claimed reason for terminating Kluge and the religious accommodation requested, in my view Kluge has established but-for causation. (The prima facie causation standard for Title VII retaliation claims is but-for—not proximate—causation. *Robertson v. Dep't of Health Servs.*, 949 F.3d 371, 378 (7th Cir. 2020).) At a minimum, construing all the facts in his favor, there is a genuine issue of material fact on this question. This is not a case where the employer has a separate nondiscriminatory reason—such as poor work performance—unrelated to the protected accommodation activity. *See, e.g.*, *Logan v. City of Chicago*, 4 F.4th 529, 537 (7th Cir. 2021); *Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948, 954 (7th Cir. 2021). The employer's asserted nondiscriminatory reason is the alleged harm caused by the protected accommodation requested and granted. So this case presents enough facts to establish but-for cause. Ultimately though, I agree with my colleagues that

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proceed to trial. A retaliation claim, however, is governed by the standard *McDonnell Douglas* framework. *See Rozumalski v. W.F. Baird & Assocs., Ltd.*, 937 F.3d 919, 926 (7th Cir. 2019); *Miller v. Am. Fam. Mut. Ins. Co.*, 203 F.3d 997, 1007 (7th Cir. 2000). So once the School District supplied a nondiscriminatory reason for forcing Kluge to resign, he had to come up with enough evidence of pretext to raise a genuine issue of material fact, which he did not.

Kluge has failed as a matter of proof to show pretext, so I concur that the judgment for the School District on Kluge's retaliation claim should be affirmed.

V. Conclusion

Title VII's religious accommodation provisions do not apply only in a community accepting of the tenets of an employee's religion. "If relief under Title VII can be denied merely because the majority group … will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976) (quoting *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 663 (2d Cir. 1971)).

For the reasons explained above, I respectfully DISSENT on the religious accommodation claim, and I conclude that a genuine issue of material fact exists on undue hardship and would remand that issue for trial. I respectfully CONCUR in the judgment for the School District on Kluge's retaliation claim.

43 S.Ct. 625
Supreme Court of the United States.

MEYER

v.

STATE OF NEBRASKA.

No. 325.
|
Argued Feb. 23, 1923.
|
Decided June 4, 1923.

Synopsis

In Error to the Supreme Court of the State of Nebraska.

Robert T. Meyer was convicted of an offense, and his conviction was affirmed by the Supreme Court of Nebraska (107 Neb. 657, 187 N. W. 100), and he brings error. Reversed and remanded.

Attorneys and Law Firms

****625** ***391** Messrs. A. F. Mullen, of Omaha, Neb., C. E. Sandall, of York, Neb., and I. L. Albert, of Columbus, Neb., for plaintiff in error.

***393** Messrs. Mason Wheeler, of Lincoln, Neb., and O. S. Spillman, of Pierce, Neb., for the State of Nebraska.

Opinion

****626** ***396** Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained ***397** and successfully passed the eighth grade. The information is based upon 'An act relating to the teaching of foreign languages in the state of Nebraska,' approved April 9, 1919 (Laws 1919, c. 249), which follows:

'Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

'Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

'Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for any period not exceeding thirty days for each offense.

'Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.'

The Supreme Court of the state affirmed the judgment of conviction. 107 Neb. 657, 187 N. W. 100. It declared the offense charged and established was 'the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,' in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

'The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting for ***398** eigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state.

Pohl v. State, 102 Ohio St. 474, 132 N. E. 20; State v. Bartels, 191 Iowa, 1060, 181 N. W. 508.

'It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The Legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage. ***399** Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence.'

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:
'No state * * * shall deprive any person of life, liberty or property without due process of law.'

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; ****627** Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Allegeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; Twining v. New Jersey 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; Chicago, B. & Q. R. R. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; New York Life Ins. Co. v. Dodge, 246 U. S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772, Ann. Cas. 1918E, 593; Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254; Adkins v. Children's Hospital (April 9, 1923), 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785; Wyeth v. Cambridge Board of Health, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. The established doctrine is that this liberty may not be interfered ***400** with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares:
'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of ***401** the act.' Nebraska District of Evangelical Lutheran Synod, etc., v. McKelvie et al. (Neb.) 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:
'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, ***402** nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the ****628** males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. ***403** Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes and Mr. Justice Sutherland, dissent.

All Citations

262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446

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45 S.Ct. 571
Supreme Court of the United States.

PIERCE, Governor of Oregon, et al.
v.
SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.
SAME
v.
HILL MILITARY ACADEMY.

Nos. 583, 584.
|
Argued March 16 and 17, 1925.
|
Decided June 1, 1925.

Synopsis

Appeals from the District Court of the United States for the District of Oregon.

Two suits, one by the Society of the Sisters of the Holy Names of Jesus and Mary, the other by the Hill Military Academy, both against Walter M. Pierce as Governor of Oregon, and others, to enjoin enforcement of Compulsory Education Act 1922. From decrees for plaintiffs, denying motions to dismiss and granting a preliminary injunction (296 F. 928), defendants appeal. Affirmed.

Attorneys and Law Firms

Messrs. George E. Chamberlain, of Portland, Or., and Albert H. Putney, of Washington, D. C., for appellant Pierce.

Mr. Willis S. Moore, of Salem, Or., for other appellants.

Messrs. Wm. D. Guthrie, of New York City, and J. P. Kavanaugh, of Portland, Or., for appellee Society of the Sisters of the Holy Names of Jesus and Mary.

Mr. John C. Veatch, of Portland, Or., for appellee Hill Military Academy.

Opinion

***529** Mr. Justice McREYNOLDS delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary ****572** orders restraining ***530** appellants from threatening or attempting to enforce the Compulsory Education Act[1] adopted November 7, 1922 (Laws Or. 1923, p. 9), under the initiative provision of her Constitution by the voters of Oregon. Judicial Code, § 266 (Comp. St. § 1243). They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor. There are ***531** exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eight grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee the Society of Sisters is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal ***532** property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between 8 and 16. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both

temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income from primary schools exceeds $30,000—and the successful conduct of this requires long time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business ****573** or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of lthe measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged ***533** in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years. The average attendance is 100, and the annual fees received for each student amount to some $800. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the state board of education. Military instruction and training are also given, under the supervision of an army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs, long time contracts must be made for supplies, equipment, teachers, and pupils. Appellants, law officers of the state and county, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged act contravenes the corporation's rights guaranteed by the Fourteenth Amendment and that unless appellants are restrained from proclaiming its validity and threatening to enforce it irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges (Judicial Code, § 266 [Comp. St. § 1243]) on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the ***534** deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that appellees' schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy appellees' business and property. Finally, that the threats to enforce the act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and

education of children ***535** under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 255, 27 S. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; Western Turf Association v. Greenberg, 204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such ****574** action. Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 543, Ann. Cas. 1917B, 283; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255.

The courts of the state have not construed the act, and we must determine its meaning for ourselves. Evidently it was expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in Berea College v. Kentucky, 211 U. S. 45, 29 S. Ct. 33, 53 L. Ed. 81. No argument in favor of such view has been advanced.

Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be de prived ***536** of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360; Nebraska District, etc., v. McKelvie, 262 U. S. 404, 43 S. Ct. 628, 67 L. Ed. 1047; Truax v. Corrigan, supra, and cases there cited.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.

The decrees below are affirmed.

All Citations

268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468

Footnotes

1 *Be it enacted by the people of the state of Oregon:*

Section 1. That section 5259, Oregon Laws, be and the same is hereby amended so as to read as follows:

Sec. 5259. *Children Between the Ages of Eight and Sixteen Years*.—Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:

(a) *Children Physically Unable*.—Any child who is abnormal, subnormal or physically unable to attend school.

(b) *Children Who Have Completed the Eighth Grade*.—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from School*.—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction*.—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year.

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This act shall take effect and be and remain in force from and after the first day of September, 1926.

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400 F.3d 965
United States Court of Appeals,
Seventh Circuit.

Daniel CROWLEY, Plaintiff–Appellant,
v.
Donald McKINNEY and Berwyn South School District # 100, Defendants–Appellees.

No. 02–3741.
|
Argued Nov. 10, 2004.
|
Decided March 11, 2005.

Synopsis

Background: Noncustodial divorced parent brought § 1983 action against school district and against principal, seeking money damages for denial of his purported constitutional right to participate in his children's education, and asserting claims under Due Process, Equal Protection, and free speech clauses. The United States District Court for the Northern District of Indiana, 2002 WL 31101287, Charles P. Kocoras, C. J., dismissed action, and parent appealed.

Holdings: The Court of Appeals, Posner, Circuit Judge, held that:

protections of Due Process Clause did not extend to parent's desire to be present on school grounds or to obtain educational records;

principal enjoyed qualified immunity on due process claim;

district's alleged inaction could not serve as basis for § 1983 liability; but

parent stated "class of one" equal protection claim against principal; and

parent's previous criticisms of school and district constituted protected speech.

Affirmed in part and reversed and remanded in part.

Wood, Circuit Judge, filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

***966** Daniel Crowley, Naperville, IL, pro se.

J. Brett Busby (argued), Mayer, Brown, Rowe & Maw, Houston, TX, for Plaintiff–Appellant.

Thomas G. Dicianni, Allen Duarte (argued), Ancel, Glink, Diamond, Bush, Dicianni & Rolek, Chicago, IL, for Defendants–Appellees.

***967** Before POSNER, WOOD, and EVANS, Circuit Judges.

Opinion

POSNER, Circuit Judge.

The district court dismissed, for failure to state a claim, Daniel Crowley's civil rights suit (42 U.S.C. § 1983) against the principal of his children's school, and the school district itself. His appeal presents questions mainly about the right of a noncustodial divorced parent to participate in his children's education. Our only source of facts is the complaint itself plus the divorce decree, of which we take judicial notice. The summary that follows assumes the truth of the plaintiff's allegations, but of course without vouching for them.

The children, a boy and a girl, were 8 and 7 when the complaint was filed in 2002. The parents had been divorced four years earlier. A marital settlement agreement incorporated in the divorce decree provides that Mrs. Crowley "shall have the sole care, custody, control and education of the minor children." But this is qualified by a later provision that the parties "shall have joint and equal rights of access to records that are maintained by third parties, including ... their education ... records. Each of them shall direct the school ... to send them each duplicate notices of all records, events, and issues concerning the children, and neither of them shall be responsible to inform the other of any such records, events or issues if such direct notice has been or can be provided for. They shall cooperate to ensure that the children and other authorities do provide the requested notices and information to both parents regarding their progress and activities .... Each party shall direct the children's school authorities to promptly advise each of them of the children's grades and progress in school and of all school meetings, functions and activities that

are open to attendance by parents. They shall cooperate to ensure that such dual notice is in place."

The children attend the Hiawatha Elementary School, a public school in a Chicago suburb. Defendant McKinney is the school's principal and is directly responsible for all the acts of which the plaintiff complains. The superintendent of the school district (William Jordan, not named as a defendant), the policymaker for the district, knew about McKinney's acts but did nothing to stop them.

Crowley had long been critical of the "leadership and direction" of the school by McKinney and Jordan, and had expressed these criticisms at public meetings. He had also complained directly to them about his son's being bullied by other children and about the school's "failure to adequately provide Plaintiff with notices, records, correspondence and other documents" that custodial parents receive. As a result of that failure, Crowley "must rely on his children telling him about matters such as upcoming school events or injuries suffered at school, and only hears about incidents such as a gun being brought to Hiawatha School through third parties." In letters to McKinney, Crowley "asked for increased supervision and response to bullying of his children, and asked that he receive all of the documents received by custodial parents with children attending Hiawatha School." He even "provided the teachers and McKinney each with 100 self-addressed envelopes, to facilitate his receipt of all correspondence." All to no avail; "Plaintiff's requests have never been granted, and Plaintiff still does not receive all of the items to which he is entitled." After his son was again beaten up on the school playground, Crowley went to observe his son during recess and was told that he (that is, Crowley) was not allowed on the playground. He volunteered to be a playground monitor, but McKinney ***968** turned him down. Once, because his son had been feeling ill, Crowley called the school to ask whether his son was at school that day, and the person who answered the phone refused to tell him. The school also forbade him to attend a book fair held at the school on Hiawatha School Day.

These incidents and others narrated in the complaint caused Crowley emotional distress for which he seeks damages. No injunctive relief is sought, which is surprising and casts some doubt on the bona fides of the suit, since we were told at argument without contradiction that Crowley's relations with McKinney and Jordan have not improved. There is nothing in the complaint about the reaction, if any, of Mrs. Crowley to her husband's efforts to obtain school records of their children or otherwise participate in school activities.

Crowley contends that the defendants' conduct deprives him of a federal constitutional right to participate in his children's education, denies him equal protection of the laws by arbitrarily distinguishing between custodial and noncustodial parents, also denies him equal protection by treating him worse than similarly situated parents because of McKinney's personal hostility to him, infringes his freedom of speech, and violates Illinois' school-records act and the state's common law of tortious infliction of emotional distress. The two state law claims are "supplemental" because they have no independent basis of federal jurisdiction (i.e., diversity of citizenship), and, as is usual, the district court relinquished jurisdiction over them when it dismissed Crowley's federal claims before trial. 28 U.S.C. § 1367(c)(3).

The claim he presses hardest is that he has a constitutional right, which the defendants violated, to participate in his children's education. Such participation, he argues, is an aspect of his liberty, and so a state may not deprive him of it on arbitrary grounds, that is, without according him due process of law. He thus is claiming a denial of "substantive" due process. He also claims that he was denied procedural due process, which is to say notice and an opportunity for a hearing before his (substantive) right was taken away from him. We won't have to consider this claim separately. Both claims founder on the scope of the federal constitutional right over the education of one's children.

Crowley relies primarily on a trio of famous Supreme Court decisions that discuss the constitutional rights of parents with respect to the education of their children. *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), invalidated a Nebraska law that forbade the teaching of foreign languages in private (or public, but that was not in issue) schools. *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), invalidated an Oregon law requiring children to attend public school. And *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), invalidated a Wisconsin law that required children to attend high school (public or private) despite the religious objections of the parents, who were Amish and didn't want their children to have a high-school education. *Yoder* isn't pertinent to our case because the parents based their claim on the free-exercise clause of the First Amendment rather than on the due process clause. *Meyer* and *Pierce,* however, establish the principle that the

"liberty" that the due process clauses protect includes a degree of parental control over children's education.

But those cases are remote from the present case in two pertinent respects. They are about a state's right to deny, in effect, the option of private education, a denial that is a greater intrusion on parental control of their children than limiting parents' involvement in the activities of the public school that their children attend. ***969** And they concern the rights of parents acting together rather than the rights retained by a divorced parent whose ex-spouse has sole custody of the children and has not joined in the noncustodial parent's claim. In both respects the parental claim in this case is weaker. It is weaker because the challenge is to only one parent's control, the other's remaining unimpaired. It is also weaker because the state interest is stronger. Nebraska's interest in forbidding private schools to teach foreign languages was tenuous to the point of weirdness, while Oregon's project of forcing all children to attend public schools implied a hostility to private education that had no footing in American traditions or educational policy. Quite apart from parental interests, the statist character and conformist consequences of giving the state a monopoly of education sapped Oregon's policy of constitutional weight.

The defendants in the present case are not denying parents the right to send their children to private schools that will not be arbitrarily forbidden to teach subjects of which the state disapproves. They are not prohibiting home schooling. They are not even denying *the parents* the opportunities that parents commonly enjoy to participate in the education of their children; they are denying these opportunities only to one parent, and that the one who has no custodial rights.

It is difficult for a school to accommodate the demands of parents when they are divorced. The school does not know what rights each of the parents has. It knows which parent has custody, because that parent's address is the student's address, but unless it consults the divorce decree it won't know what rights the other parent has. And since physical and legal custody are different, *In re Custody of Peterson,* 112 Ill.2d 48, 96 Ill.Dec. 690, 491 N.E.2d 1150, 1152 (1986); *In re Howard ex rel. Bailey,* 343 Ill.App.3d 1201, 279 Ill.Dec. 201, 799 N.E.2d 1004, 1005 (2003), the school will not even know whether the parent with whom the child lives has joint or, as here, sole custody.

These difficulties are compounded by the scope of the federal constitutional right that Crowley is claiming. It is one thing to say that parents have a right to enroll their children in a private school that will retain a degree of autonomy and thus be free to teach a foreign language, or evolution, or human sexual biology, without prohibition by the state. It is another thing to say that they have a constitutional right to school records, or to be playground monitors, or to attend school functions. Schools have valid interests in limiting the parental presence —as, indeed, do children, who in our society are not supposed to be the slaves of their parents. Imagine if a parent insisted on sitting in on each of her child's classes in order to monitor the teacher's performance or on vetoing curricular choices, texts, and assignments.

Federal judges are ill equipped by training or experience to draw the line in the right place, and litigation over where to draw it would be bound to interfere with the educational mission. It would do so not only by increasing schools' legal fees but also and more ominously by making school administrators and teachers timid because fearful of being entangled in suits by wrathful parents rebuffed in their efforts to superintend their children's education. Interests of constitutional weight and dignity are on both sides of the ledger because academic freedom, which is an aspect of freedom of speech, includes the interest of educational institutions, public as well as private, in controlling their own destiny and thus in freedom from intrusive judicial regulation. *Grutter v. Bollinger,* 539 U.S. 306, 324, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); ***970** *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Chicago Board of Education v. Substance, Inc.,* 354 F.3d 624, 630–31 (7th Cir.2003); *Osteen v. Henley,* 13 F.3d 221, 225–26 (7th Cir.1993); *Bickerstaff v. Vassar College,* 196 F.3d 435, 455–56 (2d Cir.1999); *EEOC v. Amego, Inc.,* 110 F.3d 135, 145 (1st Cir.1997). Paradoxically, in *Meyer* and *Pierce* the state was trying to weaken or encumber private education while here the plaintiff is trying to fasten a constitutional albatross to the neck of a public school.

The intrusion on public education to which Crowley is inviting the federal judiciary is magnified when the right of participation in a child's public-school education is claimed by a noncustodial parent. Of course divorce does not sever the parental relation and by doing so extinguish the fundamental rights that go with it; the state could not "divorce" Crowley from his children unless he were a menace to them. 705 ILCS 405/2–21; 750 ILCS 50/8; *In re D.C.,* 209 Ill.2d 287, 282 Ill.Dec. 848, 807 N.E.2d 472, 476 (2004); *In re Cheyenne S.,* 351 Ill.App.3d 1042, 287 Ill.Dec. 383, 815 N.E.2d 1186, 1190–91 (2004); *Quinn v. Neal,* 998 F.2d

526, 532 n. 6 (7th Cir.1993) (Illinois law). Divorce has become so common that it appears that today as many as 10 percent of all schoolchildren are the children of divorced parents. See http://www.census.gov/population /socdemo/hh-fam/cps2003/tabC3–all.pdf. It does not follow that a public school is to be charged with knowledge of the contents of the divorce decrees of its students' divorced parents or that it must allow itself to be dragged into fights between such parents over their children. On the contrary, the more children of divorced parents there are, the greater the burden on schools of arbitrating the quarrels of divorced parents.

Granted, there is no allegation that Crowley and his ex-wife are actually at loggerheads over the education of their children. If they were, Crowley would be denied standing to sue by *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), the recent "under God" pledge of allegiance case. The Court described it as a case in which the plaintiff "wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and [the mother] disagree .... [I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Id.* at 2311–12. *Newdow* should not be overread to extinguish the constitutional rights of noncustodial parents. Mr. Newdow's right to try to argue his daughter out of believing in God was not in issue. It was *her* right to religious freedom that was in issue and that he was suing to enforce, and all the Court held was that he lacked standing to do so, at least in the face of the custodial parent's objection.

In the procedural posture of the present case we cannot assume that the divorced parents are fighting over their children's education; and anyway the issue is not Crowley's standing to sue on behalf of his children. But common sense tells us that he and his ex-wife are not cooperating, since she has not joined in his demands on the school.

It is also apparent—indeed it is a part of the complaint with its state law claims and its appended divorce decree—that Crowley has rights under state law that weaken the need to recognize a federal constitutional right. Illinois law entitles him to copies of the children's school records, and the divorce ***971** decree makes clear that he has not waived that right and also that he is entitled to enlist his wife's cooperation in furthering any legitimate concerns that he has about his children's education. No doubt most divorced parents want to have as little to do with each other as possible. But that interest is no greater than the state's interest in keeping its schools free as far as possible from becoming mired in the sequelae of divorce.

An example will flag another flaw in Crowley's case. Were Mrs. Crowley to move out of School District No. 100, then, since she has sole custody of the children, they would move with her. Suppose her new locale lacked a decent public school and so she enrolled the children in a private school. Because a private school is not a public agency, Mr. Crowley would have no constitutional right to participate in his children's education at their new school. What this example highlights is that in the divorce decree Mr. Crowley surrendered the only federal constitutional right vis-à-vis the education of one's children that the cases as yet recognize, and that is the right to choose the school and if it is a private school to have a choice among different types of school with different curricula, educational philosophies, and sponsorship (e.g., secular versus sectarian). It is not a right to participate in the school's management—a right inconsistent with preserving the autonomy of educational institutions, which is itself, as we have noted, an interest of constitutional dignity.

The distinction is illuminated by cases that discuss other aspects of parents' constitutional rights. *Troxel v. Granville,* 530 U.S. 57, 65–73, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), invalidated a state law that conferred broad discretion on the state's courts to override a custodial parent's wish to limit (not eliminate) visits by her children's grandparents. The case has a dual significance for the present case. First, it recognizes that one aspect of the parental right is a right against other relatives—a right to prevent a tug of war over the children—in this case Mrs. Crowley's right to decide what school the children shall attend. Second, it suggests the strength that the parental interest must attain to achieve constitutional status. At stake in *Troxel* was Mrs. Granville's control of her children, contested by the grandparents and the court that sided with them. At stake in *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), another case in which a state law was invalidated as an infringement of parental liberty, was the parental right itself. See also *Stanley v. Illinois,* 405 U.S. 645, 646–52, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). At stake in the present case is the slighter interest of Mr. Crowley in micromanaging his children's education at the school properly chosen for them.

So we greatly doubt that a noncustodial divorced parent has a federal constitutional right to participate in his children's education at the level of detail claimed by the plaintiff. But if we are wrong it cannot change the outcome of this case. As should be apparent from our discussion, the existence of the right that Crowley asserts is not established law, and McKinney is therefore immune from having to pay damages for violating that right. The school district is not entitled to immunity. But the complaint makes clear that Jordan's (and hence the school district's) participation in McKinney's acts was limited to not doing anything about them. Inaction by a public agency is insufficient participation in a subordinate's misconduct to make the agency liable in a suit under 42 U.S.C. § 1983 unless the policymaking level at the agency has deliberately decided to take no action against, and thus in effect to condone, to ratify, the misconduct ***972** and so adopt it as the agency's (unofficial) policy. *City of Canton v. Harris,* 489 U.S. 378, 388–89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Lenard v. Argento,* 699 F.2d 874, 886 (7th Cir.1983); *Berry v. Baca,* 379 F.3d 764, 767 (9th Cir.2004); *Daskalea v. District of Columbia,* 227 F.3d 433, 441 (D.C.Cir.2000). And that is not alleged.

We turn to Crowley's double-barreled equal protection claims. He argues first that McKinney discriminates against noncustodial parents. The complaint strongly suggests that McKinney's refusal to allow Crowley access to school records, school premises, and so forth was motivated not by Crowley's status as a noncustodial parent but by animosity toward Crowley arising from the latter's criticisms of the Hiawatha school and its management—that is, McKinney. Insofar as the claim does allege discrimination against noncustodial parents as such, it merely recharacterizes the due process claim as an equal protection claim and encounters the same objections and the same defense of immunity.

That animosity we just mentioned is, however, the pivot on which Crowley's other equal protection claim turns—the claim that he has been singled out by a public official for adverse treatment because of the official's personal hostility toward him. In so claiming Crowley invokes the "class of one" equal protection cases, most recently *Tuffendsam v. Dearborn County Board of Health,* 385 F.3d 1124, 1127 (7th Cir.2004), where we noted that our cases have articulated two standards for determining whether a "class of one" violation has been shown. The first, set forth in *Hilton v. City of Wheeling,* 209 F.3d 1005, 1008 (7th Cir.2000), requires "evidence that the defendant deliberately sought to deprive [the plaintiff] of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." The second allows a class-of-one case to be proved simply by showing that the defendant had without a rational basis intentionally treated the plaintiff differently from others similarly situated. But as we went on to explain in *Tuffendsam,* "these divergent strands ... can ... be woven together by noting that intentionality is an ambiguous concept, shading at one end into mere knowledge of likely consequences and at the other into a desire for those consequences. The [defendant] 'intentionally' treated the plaintiff worse than it treated her predecessors and neighbors in the sense that it knew—it had to know—that its pattern of enforcement was uneven. But it did not 'intentionally' treat the plaintiff worse in the sense of wanting her to be made worse off than those others. And it is the latter sense in which a 'class of one' case requires a showing that government 'intentionally' treated the plaintiff worse than others." 385 F.3d at 1127.

If McKinney would not have treated Crowley as he did had it not been for his strong personal dislike of the latter, he denied him the equal protection of the laws under either formulation. Denied it prima facie, that is to say; for animus is not a sufficient condition for a class-of-one claim to succeed. If McKinney, however much he disliked Crowley, would have acted the same way toward him had he not disliked him, perhaps because Crowley's behavior was disrupting school discipline, then the concurrence of an improper motive would not condemn the act. *Palmer v. Thompson,* 403 U.S. 217, 224–26, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971); *Grossbaum v. Indianapolis–Marion County Building Authority,* 100 F.3d 1287, 1293 (7th Cir.1996); *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL–CIO,* 643 F.2d 445, 454 n. 11 (7th Cir.1981). And that may well be the case. But we have only the complaint to go on. As this claim was adequately pleaded, the dismissal of it on the pleadings was premature.

***973** And likewise the dismissal of the First Amendment claim. The district judge thought that Crowley was alleging only a personal dispute with McKinney and Jordan. The Constitution does not protect a public employee from workplace retaliation for statements that were intended not to alter public opinion or beliefs but merely to resolve a personal grievance on favorable terms. *Connick v. Myers,* 461 U.S. 138, 146–47, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Kokkinis v. Ivkovich,* 185 F.3d 840, 843–44 (7th Cir.1999); *Cobb v. Pozzi,* 363 F.3d 89, 101–02 (2d Cir.2004). And there is no doubt that most of the criticisms that

Crowley made of the defendants are correctly described as "personal." But we cannot overlook the allegation in the complaint that "in the years leading up to the acts complained of in this Complaint, Plaintiff had been, at times, openly critical of Hiawatha School, District # 100 and, by implication, the leadership and direction of Superintendent Jordan and Defendant McKinney, at public meetings." So the criticisms preceded the specific dispute and were expressed not merely openly but at public meetings. The next paragraph of the complaint, moreover, states that "the Plaintiff has *also* questioned and criticized McKinney and Jordan directly" about the school's "inadequate responses to incidents of Plaintiff's son being bullied," etc., and the word we've italicized indicates a transition to the criticisms that were incidental to Crowley's specific grievance over the school's failure as he saw it to do right by his son. The latter criticisms may not be protected by the First Amendment, but the former are.

Because we are reversing the dismissal of two of the federal claims, the district court should reinstate the supplemental state claims. If on remand the federal claims are again dismissed before trial, the court will of course be free to again relinquish jurisdiction over the state claims.

Affirmed in Part, Reversed in Part, and Remanded.

WOOD, Circuit Judge, dissenting in part, concurring in part. This case is about a father's constitutional right to participate meaningfully in the upbringing of his children. The question, as I see it, is whether the state (in this case through the agency of a local school district and its principal) may effectively terminate a noncustodial father's parental rights, through measures that deprive him altogether from the most important activity in which children under the age of eighteen engage: their education. The majority sees no federal constitutional dimension in the deprivations that the school district has imposed upon Daniel Crowley, notwithstanding the existence of Supreme Court cases directly recognizing these kinds of parental rights and notwithstanding the fact that its assumptions about the degree to which his parental rights have been circumscribed by virtue of his divorce decree are exaggerated at best, mistaken at worst. Unless we are to create a new exception to cases brought under 42 U.S.C. § 1983 for actions like this that conceivably could be addressed by state family law courts—an action that I believe to be beyond this court's authority, even if the Supreme Court might choose to take this step some day—Crowley is entitled to proceed on his liberty claims. To the extent that the majority opinion holds otherwise, I dissent. I concur in the majority's conclusion that Crowley has stated an equal protection claim and a First Amendment claim that must be reinstated, along with his supplemental state claims.

The difference between the majority and myself goes to the heart of one's understanding of the Due Process Clause's protection of certain fundamental liberties. The majority acknowledges the "trio" of ***974** Supreme Court decisions that recognize constitutional rights of parents with respect in particular to the education of their children: *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). (If these cases have something to say about other "privacy" rights, such as the right to choose whether to have an abortion, see *Roe v. Wade,* 410 U.S. 113, 152–53, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), surely they have even more to say about the topic directly at issue—namely, parental rights in education.)

Contrary to the majority's suggestion, this line of cases is not remote from the present case in any respect. First, even if they were about the state's right to deny parents the right to choose one form of education for their children—private education—the present case is about the state's ability to deny a parent's right to participate at all in the free public education to which every child in the State of Illinois is entitled. See Ill. Const. Art. 10 § 1. I would be hard pressed to characterize the latter as somehow "less important" than deprivation of the choice to use private schools. Second, the majority gleans from the earlier cases the proposition that they concern only the rights of parents acting together. But there is nothing at all in those decisions that hints at such a distinction. As I discuss in a moment, the Supreme Court's cases over the course of the last hundred years have all looked in the opposite direction, by recognizing and supporting the rights of less traditional parents.

In fact, as a sheer matter of *realpolitik,* the majority's rule courts disaster for an enormous number of children in this country whose parents have become divorced. For example, in the provisional data presented on a state-by-state basis for 2003 published by the National Vital Statistics Reports, we learn that in Illinois that year there were 82,076 marriages and 34,553 divorces (that is, 42% of the number of marriages). Illinois, however, has a divorce rate on the low end of the spectrum. In Texas, the numbers are 167,341 marriages and

80,092 divorces (48%); in New York there were 120,754 marriages and 62,294 divorces (52%); in Colorado there were 36,387 marriages and 19,280 divorces (53%); and in Florida there were 155,240 marriages and 84,496 divorces (54%). National Vital Statistics Reports, vol. 52, no. 22, June 10, 2004, Table 3, available at http://www.cdc.gov/nchs/ data/ nvsr/nvsr52/ nvsr52_22.pdf. (Unfortunately the table does not present aggregate national figures, because some states do not furnish divorce statistics.) To take a common phrase out of context, the majority's rule would result in quite a few children "left behind," in the sense that the states could with impunity deprive one of the two parents of the right to participate in the child's education.

In fact, as I have already noted, the principle that the "liberty" protected by the Due Process clauses includes a parent's right to control the upbringing and education of his children is well-established. Moreover, as the majority acknowledges, "divorce does not sever the parental relation and by doing so extinguish the fundamental rights that go along with it; the state could not 'divorce' Crowley from his children unless he were a menace to them." *Ante* at 970. And lest there remain any question whether a noncustodial parent's rights evaporate after relinquishing custody, the majority opinion correctly notes that the Supreme Court's recent decision in *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), "should not be overread to extinguish the constitutional ***975** rights of noncustodial parents." *Ante* at 970.

Notwithstanding its nod toward these principles, the majority implies that a noncustodial parent's fundamental rights are not entitled to the same degree of protection as those of the custodial parent. Nothing in the Constitution, however, supports such a proposition. While a state may limit any parent's access to and responsibility for his children, the Court has emphasized that parental rights may not be extinguished arbitrarily. *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). Getting somewhat closer to our case, the Court has also rejected the claim that the relationship between natural parents and children born out of wedlock is not worthy of equal constitutional protection. See *Stanley v. Ill.,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (holding that an unwed father retains the fundamental interest and right to raise his children and the law cannot refuse to recognize those family relationships not "legitimized" by a marriage ceremony); *Caban v. Mohammed,* 441 U.S. 380, 394, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) (striking down a New York law permitting an unwed mother, but not an unwed father, to block the adoption of their child on equal protection grounds). Even where the Court has rejected an unwed father's challenge to an adoption, it did so not on the basis of his status, but rather on the basis of whether a relationship exists *at all* between the father and his children. See *Quilloin v. Walcott,* 434 U.S. 246, 256, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (holding that the protected interests of a father not fully committed to parenthood and thus possessing only a potential relationship with his child are less significant than those of a parent who has assumed that responsibility); *Lehr v. Robertson,* 463 U.S. 248, 261–62, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (same).

These cases tell us that a noncustodial parent's interests are no less significant than those of other parents. There is no question that Crowley is fully committed to parenthood—he seeks to continue to develop the relationships he has had with his children since their birth. Nor are there any allegations that he is unfit to continue in his role as a parent. Perhaps the majority is concerned by the entirely hypothetical prospect of having to "arbitrat[e] the quarrels of divorced parents," but as it readily acknowledges, the right Crowley seeks to assert is not incompatible with the custodial parent's exercise of her rights. *Ante* at 970.

Even if there were some tension between the rights of the two parents, it does not follow that the Constitution affords lesser protection to a noncustodial parent. As is the case with the property component of the Due Process clause, the Constitution does not create liberty interests; it merely protects interests created elsewhere, usually under state law. See, *e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Paul v. Davis,* 424 U.S. 693, 710, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). We must therefore look to state law to see what parental rights Crowley retained after his divorce. See *Newdow, supra,* 542 U.S. at ——, 124 S.Ct. at 2311 (looking to state law to determine whether a noncustodial father's right to inculcate his daughter with his religious beliefs and bring a claim on her behalf was extinguished under a divorce decree).

Under Illinois law, divorce does not automatically extinguish all parental rights. See 750 ILCS § 5/602.1(a) ("[T]he dissolution ***976** of marriage ... or the parents living separate and apart shall not diminish parental powers, rights, and

responsibilities except as the court for good reason may determine" under the best interest of the child standard). Nor does it limit a noncustodial parent's right to participate in his or her children's education. To the contrary: section 5 of the Illinois School Student Records Act (ISSRA) provides that "a parent shall have the right to inspect and copy all school student permanent and temporary records of that parent's child," and only restricts this right in the case of a parent "who is prohibited by an order of protection from inspecting or obtaining school records of a student pursuant to the Illinois Domestic Violence Act of 1986." 105 ILCS 10/5(a); see also 105 ILCS 10/2(g) (" 'Parent' means a person who is the natural parent of the student or other person who has the primary responsibility for the care and upbringing of the student.").

The statute addresses both sides of the coin: after conferring on the parent the right to inspect and copy his child's school records, it imposes on the school the obligation to comply with a noncustodial parent's request to exercise this right. See 105 ILCS 5/10–21.8 ("In the absence of any court order to the contrary to require that, upon the request of either parent of a pupil whose parents are divorced, copies of the following: reports or records which reflect the pupil's academic progress, reports of the pupil's emotional and physical health, notices of school-initiated parent-teacher conference, notices of major-school sponsored events, such as open houses, which involve pupil-parent interaction, and copies of school calendar regarding the child which are furnished by the school district to one parent be furnished by mail to the other parent.").

The default rule in Illinois is thus one that recognizes a noncustodial parent's right to participate in his children's education. Crowley's parental rights thus extend at least that far, unless there is something in his divorce decree to the contrary. There is not. The Crowleys' martial settlement agreement, incorporated in their divorce decree, provides that both parents "shall have joint and equal rights of access to [their children's] records that are maintained by third parties, including ... their education ... records." Crowley expressly retains the right to receive information concerning school activities, as the agreement provides that "[e]ach party shall direct the children's school authorities to promptly advise each of them of their children's grades and progress in school and of all school meetings, functions and activities that are open to attendance by parents." Thus, under both state law and the divorce decree, Crowley has the right to participate in his children's education. Nothing suggests that his status as the noncustodial parent dilutes that right at all.

Crowley's complaint, which we must accept as true for present purposes, alleges that the defendants engaged in a pattern of conduct that amounted to a complete deprivation of this right. Not only is he barred from school grounds during the day and excluded from class and school functions open to attendance by all parents, but his requests for his children's school records and calendars, to which he is entitled by law, were also denied. Furthermore, the school also refuses to respond to his concerns about the safety of his children or to his inquiries regarding whether his children were in attendance on a particular day. These actions amount to an absolute barrier to Crowley's right to participate in his children's education. How can he exercise this right when he does not know what his children are being taught or even whether his children are in school?

***977** The majority justifies its holding in part by a concern for the school's interest in academic freedom, but nothing that Crowley is seeking would interfere at all with the educational mission of the school. He has no quarrel with the school's curriculum. Nor does he seek any extraordinary privileges, such as the right to sit in his children's classes to monitor the teacher's performance, or the right to dictate what or how his children will be taught. Rather, he challenges only his exclusion from activities and information that are available to all other parents, under whatever neutral criteria the school has chosen to adopt.

The majority's fears about disruption brought about by a parent's request for his children's school records—an intrusion it finds magnified when the request comes from a noncustodial parent—are wholly unsupported by Illinois law. A school has little discretion in this matter, because the rules are set by state law. It need not consult a divorce decree or inquire into the relationship between the parents to determine whether the noncustodial parent retains the right to this information. Instead, under the statute, it is required to proceed on the assumption that this right has not been extinguished in the absence of a court order stating the contrary. See 105 ILCS 5/10–21.8 ("[A] school board shall not ... refuse to mail copies of reports, records, notices or other documents regarding a pupil to the parent of the pupil ... unless the school board first has been furnished with a certified copy of the court order prohibiting the release of such reports, records, notices or other documents to that parent."). Unless or until the school receives such a certified copy of a

court order, it knows what it must do: furnish the information to both parents, custodial and noncustodial alike.

The existence of these Illinois laws might make one ask why Crowley turned to the federal court to redress this grievance, instead of going to either the Illinois court that granted his divorce or to any competent Illinois court empowered to enforce the obligations created by state law. The short answer is that there is no general exhaustion requirement that governs cases under § 1983—a proposition the Supreme Court has recognized for many years. See, *e.g.*, *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (once a wrong has properly been characterized as a constitutional tort, the fact that it may also be redressable under state law does not bar the victim from bringing an action under § 1983); *Patsy v. Bd. of Regents of State of Fla.,* 457 U.S. 496, 516, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (no administrative exhaustion requirement for § 1983 claims). The question is therefore whether there is something about Crowley's case that would justify an exception to that general rule.

In the area of takings law, the Supreme Court has crafted a ripeness rule that has an effect similar to that of an exhaustion requirement: it has held that a claim of an unconstitutional taking is not ripe until the governmental entity charged with implementing the regulatory scheme has reached a final decision. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Given the primary responsibility that states have for the field of family law, *cf.* 13B Wright, Miller & Cooper § 3609 (2d ed.1984) (discussing the judicially created limitation on diversity jurisdiction for domestic relations cases), perhaps the Supreme Court might hold some day that a parental rights claim of the type Crowley is pressing is not ripe until state remedies have been exhausted.

There is no doubt that Illinois provides a wide range of remedies that might produce ***978** the result he wants. Under the ISSRA, Crowley has the right to seek injunctive relief in state court for the violation of the Act allegedly committed by the school district when it denied him access to his children's school record. ISSRA § 9(a), 105 ILCS 10/9(a) ("Any person aggrieved by any violation of this Act may institute an action for injunctive relief in the Circuit Court of the County in which the violation has occurred or the Circuit Court of the County in which the school is located."); see *John K. v. Bd. of Educ. for Sch. Dist. No. 65,* 152 Ill.App.3d 543, 105 Ill.Dec. 512, 504 N.E.2d 797, 802 (1987), *appeal denied,* 115 Ill.2d 542, 110 Ill.Dec. 457, 511 N.E.2d 429 (1987). Crowley can also bring a claim against school district officers for their failure to discharge their duties. See 105 ILCS 5/22–8 ("If any county superintendent, trustee, director, or other officer negligently or wilfully fails or refuses to make, furnish or communicate statistics and information, or fails to discharge any other duties enjoined upon him, at the time and in the manner required by this Act, he shall be guilty of a petty offense and shall be liable to a fine of not less than $25, to be recovered before any circuit court at the suit of any person on complaint in the name of the People of the State of Illinois, and when collected the fine shall be paid to the county superintendent of schools."). Finally, if the source of the problem is in the divorce decree itself, Crowley has the right to return to that court and seek a modification of the decree.

The only problem with this theory is the not-so-small flaw that it flies in the face of well-established rules governing a person's right to invoke § 1983 in federal court to redress violations of federal constitutional or statutory law. I merely note the possibility because, when all is said and done, the thrust of the majority's opinion seems to be that such a solution would be preferable. But it is not for us to reject an otherwise sound claim under § 1983 just because it overlaps to a greater or lesser degree with state remedies.

When the Supreme Court invalidated an Oregon law requiring parents to send their children to public school, it explained that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce,* 268 U.S. at 535, 45 S.Ct. 571. Depriving a parent of all information concerning his children's education such that he is effectively shut out of this aspect of parenting conflicts with that long-established right. I would therefore find that Crowley has stated a claim, and that Principal McKinney is not entitled to qualified immunity. I respectfully dissent from this portion of the opinion, and I concur in the majority's decision to remand the equal protection and First Amendment claims and to reinstate the supplemental state claims.

All Citations

400 F.3d 965, 196 Ed. Law Rep. 50

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89 S.Ct. 733
Supreme Court of the United States

John F. TINKER and Mary Beth Tinker, Minors, etc., et al., Petitioners,
v.
DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT et al.

No. 21.
|
Argued Nov. 12, 1968.
|
Decided Feb. 24, 1969.

Synopsis

Action against school district, its board of directors and certain administrative officials and teachers to recover nominal damages and obtain an injunction against enforcement of a regulation promulgated by principals of schools prohibiting wearing of black armbands by students while on school facilities. The United States District Court for the Southern District of Iowa, Central Division, 258 F.Supp. 971, dismissed complaint and plaintiffs appealed. The Court of Appeals for the Eighth Circuit, 383 F.2d 988, considered the case en banc and affirmed without opinion when it was equally divided and certiorari was granted. The United States Supreme Court, Mr. Justice Fortas, held that, in absence of demonstration of any facts which might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities or any showing that disturbances or disorders on school premises in fact occurred when students wore black armbands on their sleeves to exhibit their disapproval of Vietnam hostilities, regulation prohibiting wearing armbands to schools and providing for suspension of any student refusing to remove such was an unconstitutional denial of students' right of expression of opinion.

Reversed and remanded.

Mr. Justice Black and Mr. Justice Harlan dissented.

Attorneys and Law Firms

****735** ***503** Dan Johnston, Des Moines, Iowa, for petitioners.

Allan A. Herrick, Des Moines, Iowa, for respondents.

Opinion

***504** Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under s 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld ***505** the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school disipline. 258 F.Supp.

971 (1966). The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited unless it 'materially and substantially interfere(s) with the requirements of appropriate discipline in the operation of the school.' Burnside v. Byars, 363 F.2d 744, 749 (1966).[1]

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion, 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942, 88 S.Ct. 1050, 19 L.Ed.2d 1130 (1968).

****736** I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Cf. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' ***506** which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent.[2] See also ***507** Pierce v. Society of Sisters, etc., 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948); Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 220, 97 L.Ed. 216 (1952) (concurring opinion); Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); Shelton v. Tucker, 364 U.S. 479, 487, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960); Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967); Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

****737** In West Virginia State Board of Education v. Barnette, supra, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.' 319 U.S., at 637, 63 S.Ct. at 1185.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See Epperson v. Arkansas, supra, 393 U.S. at 104, 89 S.Ct. at 270; Meyer v. Nebraska, supra, 262 U.S. at 402, 43 S.Ct. at 627. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, ***508** to hair style, or deportment. Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 (C.A.5th Cir. 1968); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538, 30 A.L.R. 1212

(1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is ***509** the basis of our national strength and of the independence and vigor of Americans ****738** who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. Burnside v. Byars, supra, 363 F.2d at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.[3]

***510** On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.[4] It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.[5])

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing ****739** of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement ***511** in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin,

speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' Burnside v. Byars, supra, 363 F.2d at 749.

In Meyer v. Nebraska, supra, 262 U.S. at 402, 43 S.Ct. at 627, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to 'foster a homogeneous people.' He said:
'In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a ***512** state without doing violence to both letter and spirit of the Constitution.'

This principle has been repeated by this Court of numerous occasions during the intervening years. In Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629, Mr. Justice Brennan, speaking for the Court, said:
"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, (364 U.S. 479), at 487 (81 S.Ct. 247, 5 L.Ed.2d 231). The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.[6] This is not only an inevitable ****740** part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on ***513** the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars, supra, 363 F.2d at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (C.A.5th Cir. 1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. Cf. ***514** Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C.1967) (orderly protest meeting on state college campus); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (D.C.M.D.Ala.1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guarantees.
As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of

a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

****741** We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I ***515** cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195. I continue to hold the view I expressed in that case: '(A) State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.' Id., at 649—650, 88 S.Ct. at 1285—1286 (concurring in result.) Cf. Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645.
Mr. Justice WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in Burnside v. Byars, 363 F.2d 744, 748 (C.A.5th Cir. 1966), a case relied upon by the Court in the matter now before us.

Mr. Justice BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools * * *' in the United States is in ultimate effect transferred to the Supreme Court.[1] The Court brought ***516** this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way 'from kindergarten through high school.' Here the constitutional right to 'political expression' asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion it relies upon the following grounds for holding ****742** unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is 'symbolic speech' which is 'akin to 'pure speech" and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise 'symbolic speech' as long as normal school functions ***517** are not 'unreasonably' disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable.'

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., e.g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—'symbolic' or 'pure'—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be

spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965), for example, the Court clearly stated that the rights of free speech and assembly 'do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.'

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration.' ***518** Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker 'self-conscious' in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually 'disrupt' the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.[2]

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F.Supp. 971. Holding that the protest was akin to speech, ****743** which is protected by the First ***519** and Fourteenth Amendments, that court held that the school order was 'reasonable' and hence constitutional. There was at one time a line of cases holding 'reasonableness' as the court saw it to be the test of a 'due process' violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and Bartels v. Iowa, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the 'reasonableness' constitutional test dead on the battlefield, so much so that this Court in Ferguson v. Skrupa, 372 U.S. 726, 729, 730, 83 S.Ct. 1028, 1030—1031, 10 L.Ed.2d 93, after a thorough review of the old cases, was able to conclude in 1963:

'There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

* * * * * *

'The doctrine that prevailed in Lochner (Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937), Coppage (Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441), Adkins (Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785), Burns (Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813), and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.'

The Ferguson case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they 'shock the conscience' or that they are ***520** 'unreasonable,' 'arbitrary,' 'irrational,' 'contrary to fundamental 'decency,'' or some other flexible term without precise bound-aries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept.

Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 1179, 87 L.Ed. 1628, clearly rejecting the 'reasonableness' test, held that the Fourteenth Amendment made the First applicable to the States, and that the two forbade a State to compel little schoolchildren to salute the United States flag when they had religious scruples against doing so.[3] Neither **744 Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; *521 Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697; nor Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637, related to schoolchildren at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and Thornhill, Edwards, and Brown relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, and Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149, cited by the Court as a 'compare,' indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the Meyer and Bartels 'reasonableness-due process-McReynolds' constitutional test.

I deny, therefore, that it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.' Even Meyer did not hold that. It makes no reference to 'symbolic speech' at all; what it did was to strike down as 'unreasonable' and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it or in legal jargon that it 'shocked the Court's conscience,' 'offended its sense of justice, or' was 'contrary to fundamental concepts of the English-speaking world,' as the Court has sometimes said. See, e.g. Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, and Irvine v. California, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of *522 speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, e.g., Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471; Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed. 149.

In my view, teachers in state-controlled public schools are hired to teach there. Although Mr. Justice McReynolds may have intimated to the contrary in Meyer v. Nebraska, supra, certainly a teacher is not paid to go into school and teach **745 subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or not of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

The true principles on this whole subject were in my judgment spoken by Mr. Justice McKenna for the Court in Waugh v. Mississippi University in 237 U.S. 589, 596—597, 35 S.Ct. 720, 723, 59 L.Ed. 1131. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's *523 freedom of assembly clause. The law was attacked as violative of due process and of the privileges and immunities clause and as a deprivation of property and of liberty, under the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and order. This Court rejected all the 'fervid' pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments. The Court in its next to the last paragraph made this statement which has complete relevance for us today:

'It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not

be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the state and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state and annul its regulations upon disputable considerations of their wisdom or necessity.' (Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by 'symbolic' ***524** speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war 'distracted from that singleness of purpose which the state (here Iowa) desired to exist in its public educational institutions.' Here the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few ****746** other issues over have. Of course students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily ***525** refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school ***526** systems[4] in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

Mr. Justice HARLAN, dissenting.

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting

the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition ****747** that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

All Citations

393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, 49 O.O.2d 222

Footnotes

1 In Burnside, the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear 'freedom buttons.' It is instructive that in Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them and created much disturbance.

2 Hamilton v. Regents of University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military 'science' could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, e.g., West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); Dixon v. Alabama State Board of Education, 294 F.2d 150 (C.A.5th Cir. 1961); Knight v. State Board of Education, 200 F.Supp. 174 (D.C.M.D.Tenn.1961); Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (D.C.M.D.Ala.1967). See also Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595 (1960); Note, Academic Freedom, 81 Harv.L.Rev. 1045 (1968).

3 The only suggestions of fear of disorder in the report are these:

'A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control.'

'Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed.'

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; and regulation was directed against 'the principle of the demonstration' itself. School authorities simply felt that 'the schools are no place for demonstrations,' and if the students 'didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools.'

4 The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that '(t)he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views.' 258 F.Supp., at 972—973.

5 After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that 'we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one.'

6 In Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C.S.C.1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966).

1 The petition for certiorari here presented this single question:

'Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum.'

2 The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A—2, col. 1: 'BELLINGHAM, Mass. (AP)—Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election.

"I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that if he is elected any legal contract entered into by the park commissioner would be void because he is a juvenile.'

'Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record.'

3 In Cantwell v. Connecticut, 310 U.S. 296, 303—304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), this Court said:

'The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.'

4 Statistical Abstract of the United States (1968), Table No. 578, p. 406.

108 S.Ct. 562
Supreme Court of the United States

HAZELWOOD SCHOOL DISTRICT, et al., Petitioners
v.
Cathy KUHLMEIER et al.

No. 86–836.
|
Argued Oct. 13, 1987.
|
Decided Jan. 13, 1988.

Synopsis

Staff members of high school newspaper filed First Amendment action seeking injunctive relief, money damages and declaration that First Amendment rights were violated by censorship of certain articles. The United States District Court for the Eastern District of Missouri, John F. Nangle, Chief Judge, denied injunctive relief, 596 F.Supp. 1422, and held that students' First Amendment rights were not violated, 607 F.Supp. 1450. Students appealed. The Court of Appeals, Heaney, Circuit Judge, reversed, 795 F.2d 1368. Defendants petitioned for writ of certiorari. The Supreme Court, Justice White, held that: (1) high school paper that was published by students in journalism class did not qualify as "public forum," so that school officials retained right to impose reasonable restrictions on student speech in paper, and (2) high school principal's decision to excise two pages from student newspaper, on ground that articles unfairly impinged on privacy rights of pregnant students and others, did not violate students' speech rights.

Judgment of Court of Appeals reversed.

Justice Brennan, dissented and filed opinion, in which Justice Marshall and Justice Blackmun joined.

Opinion on remand, 840 F.2d 596.

****564** *Syllabus*[*]

***260** Respondents, former high school students who were staff members of the school's newspaper, filed suit in Federal District Court against petitioners, the school district and school officials, alleging that respondents' First Amendment rights were violated by the deletion from a certain issue of the paper of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because the page proofs he was furnished identified by name (deleted by the teacher from the final version) a student who complained of her father's conduct, and the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication. Believing that there was no time to make necessary changes in the articles if the paper was to be issued before the end of the school year, the principal directed that the pages on which they appeared be withheld from publication even though other, unobjectionable articles were included on such pages. The District Court held that no First Amendment violation had occurred. The Court of Appeals reversed.

Held: Respondents' First Amendment rights were not violated. Pp. 567–572.

(a) First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. Pp. 567–568.

(b) The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums ***261** only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not deviate

from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate ****565** the paper's contents in any reasonable manner. Pp. 567–569.

(c) The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, distinguished. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. Pp. 569–571.

(d) The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper. Pp. 571–572.

795 F.2d 1368 (CA8 1986), reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. ——.

Attorneys and Law Firms

Robert P. Baine, Jr., argued the cause for petitioners. With him on the briefs were *John Gianoulakis* and *Robert T. Haar.*

Leslie D. Edwards argued the cause and filed a brief for respondents.*

* *Ronald A. Zumbrun* and *Anthony T. Caso* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Janet L. Benshoof, John A. Powell, Steven R. Shapiro,* and *Frank Susman;* for the American Society of Newspaper Editors et al. by *Richard M. Schmidt, Jr.;* for People for the American Way by *Marvin E. Frankel;* for the NOW Legal Defense and Education Fund et al. by *Martha L. Minow, Sarah E. Burns,* and *Marsha Levick;* for the Planned Parenthood Federation of America, Inc., et al. by *Eve W. Paul;* and for the Student Press Law Center et al. by *J. Marc Abrams.*

Briefs of *amici curiae* were filed for the National School Boards Association et al. by *Gwendolyn H. Gregory, August W. Steinhilber, Thomas A. Shannon,* and *Ivan B. Gluckman;* and for the School Board of Dade County, Florida, by *Frank A. Howard, Jr.,* and *Johnny Brown.*

Opinion

***262** Justice WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982–1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982–1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper—such as supplies, textbooks, ***263** and a portion of the journalism teacher's salary—were borne entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982–1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed ****566** the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. App. to Pet. for Cert. 38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run ***264** and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce.[1] He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred. 607 F.Supp. 1450 (1985).

The District Court concluded that school officials may impose restraints on students' speech in activities that are " 'an integral part of the school's educational function' "—including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has " 'a substantial and reasonable basis.' " *Id.,* at 1466 (quoting *Frasca v. Andrews,* 463 F.Supp. 1043, 1052 (EDNY 1979)). The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." 607 F.Supp., at 1466. The court held that Reynolds' action was also justified "to avoid the impression that [the school] endorses ***265** the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. *Ibid.* The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." *Id.,* at 1467. Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring ****567** that those stories be modified to address his concerns, based on his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question." *Id.,* at 1466.

The Court of Appeals for the Eighth Circuit reversed. 795 F.2d 1368 (1986). The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," *id.,* at 1373, but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." *Id.,* at 1372. The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when " 'necessary to avoid material and substantial interference with school work or discipline ... or the rights of others.' " *Id.,* at 1374 (quoting

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969)).

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." 795 F.2d, at 1375. School officials were entitled to censor the articles on the ground that ***266** they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the school. The court concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper.

We granted certiorari, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987), and we now reverse.

II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker, supra,* 393 U.S., at 506, 89 S.Ct., at 736. They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," 393 U.S., at 512–513, 89 S.Ct., at 739–740—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.,* at 509, 89 S.Ct., at 738.

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 3164, 92 L.Ed.2d 549 (1986), and must be "applied in light of the special characteristics of the school environment." *Tinker, supra,* 393 U.S., at 506, 89 S.Ct., at 736; cf. *New Jersey v. T.L.O.,* 469 U.S. 325, 341–343, 105 S.Ct. 733, 743–744, 83 L.Ed.2d 720 (1985). A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser, supra,* 478 U.S., at 685, 106 S.Ct., at 3165, even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner ***267** that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." 478 U.S., at 685–686, 106 S.Ct., at 3165. We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *id.,* at 683, 106 S.Ct., at 3164, rather than with the ****568** federal courts. It is in this context that respondents' First Amendment claims must be considered.

A

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). Cf. *Widmar v. Vincent,* 454 U.S. 263, 267–268, n. 5, 102 S.Ct. 269, 273, n. 5, 70 L.Ed.2d 440 (1981). Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47, 103 S.Ct. 948, 956, 74 L.Ed.2d 794 (1983), or by some segment of the public, such as student organizations. *Id.,* at 46, n. 7, 103 S.Ct., at 955, n. 7 (citing *Widmar v. Vincent*). If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. 460 U.S., at 46, n. 7, 103 S.Ct., at 955, n. 7. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985).

***268** The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy

348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.,* at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Ibid.* Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982–1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum.*" 607 F.Supp., at 1453. For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum,* including its content." *Ibid.* Moreover, after ***269** each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that ****569** they had believed that they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." *Id.,* at 1456. These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum, see 795 F.2d, at 1372–1373, is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." App. 22. One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum.[2] Finally, ***270** that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." App. 11. A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," *Cornelius,* 473 U.S., at 802, 105 S.Ct., at 3449–3450, that existed in cases in which we found public forums to have been created. See *id.,* at 802–803, 105 S.Ct., at 3449–3450 (citing *Widmar v. Vincent,* 454 U.S., at 267, 102 S.Ct., at 273; *Madison School District v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 174, n. 6, 97 S.Ct. 421, 426, n. 6, 50 L.Ed.2d 376 (1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 555, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975)). School officials did not evince either "by policy or by practice," *Perry Education Assn.,* 460 U.S., at 47, 103 S.Ct., at 956, any intent to open the pages of Spectrum to "indiscriminate use," *ibid.,* by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," *id.,* at 46, 103 S.Ct., at 955, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. *Ibid.* It is this standard, rather than our decision in *Tinker,* that governs this case.

B

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the ****570** question whether the First Amendment requires a school affirmatively ***271** to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[3]

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," *Fraser,* 478 U.S., at 685, 106 S.Ct., at 3165, not only from speech that would "substantially interfere with [its] work ... or impinge upon the rights of other students," *Tinker,* 393 U.S., at 509, 89 S.Ct., at 738, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.[4] A school must be able to set high standards for ***272** the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser, supra,* 478 U.S., at 683, 106 S.Ct., at 3164, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954).

****571** Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination ***273** of student expression.[5] Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.[6]

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, *e.g., Board of Education of Hendrick Hudson Central School Dist. v. Rowley,* 458 U.S. 176, 208, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982); *Wood v. Strickland,* 420 U.S. 308, 326, 95 S.Ct. 992, 1003, 43 L.Ed.2d 214 (1975); *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968). It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," *ibid.,* as to require judicial intervention to protect students' constitutional rights.[7]

***274** III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students'

anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in ****572** the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14–year–old freshmen ***275** and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982–1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.[8]

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent ***276** replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.[9]

****573** The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

***277** Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a ... forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution...." 795 F.2d 1368, 1373 (CA8 1986). "[A]t the beginning of each school year," *id.,* at 1372, the student journalists published a Statement of Policy—tacitly approved each year by school authorities—announcing their expectation that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment.... Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." App. 26 (quoting *Tinker v. Des Moines Independent Community*

School Dist., 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1969)).[1] The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." App. 22 (Board Policy 348.51).

***278** This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles—comprising two full pages—of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption. 795 F.2d, at 1371.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

I

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. See *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system...." ****574** *Ambach v. Norwick,* 441 U.S. 68, 77, 99 S.Ct. 1589, 1595, 60 L.Ed.2d 49 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of " 'community values.' " *Board of Education v. Pico,* 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982) (plurality opinion) (citation omitted).

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved ***279** the "daily operation of school systems" to the States and their local school boards. *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968); see *Board of Education v. Pico, supra,* 457 U.S., at 863–864, 102 S.Ct., at 2806. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution. See *e.g., Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (striking state statute that forbade teaching of evolution in public school unless accompanied by instruction on theory of "creation science"); *Board of Education v. Pico, supra* (school board may not remove books from library shelves merely because it disapproves of ideas they express); *Epperson v. Arkansas, supra* (striking state-law prohibition against teaching Darwinian theory of evolution in public school); *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (public school may not compel student to salute flag); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (state law prohibiting the teaching of foreign languages in public or private schools is unconstitutional).

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better. ***280** Even the maverick who sits in class passively sporting a symbol of protest against a government policy, cf. *Tinker v. Des Moines Independent School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government

policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," *id.,* at 511, 89 S.Ct., at 739, that "strangle the free mind at its source," *West Virginia Board of Education v. Barnette, supra,* 319 U.S., at 637, 63 S.Ct., at 1185. The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically ****575** coextensive with the rights of adults in other settings," *Fraser, supra,* 478 U.S., at 682, 106 S.Ct., at 3164, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker, supra,* 393 U.S., at 506, 89 S.Ct., at 736. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell v. Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.,* at 309, 60 S.Ct., at 906, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker,* this Court struck the balance. We held that official censorship of student expression—there the suspension of several students until they removed their armbands protesting the Vietnam war—is unconstitutional unless the ***281** speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others...." 393 U.S., at 513, 89 S.Ct., at 740. School officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.,* at 508, 89 S.Ct., at 737. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.,* at 509, 89 S.Ct., at 738, or an unsavory subject, *Fraser, supra,* 478 U.S., at 688–689, 106 S.Ct., at 3167–3168 (BRENNAN, J., concurring in judgment), does not justify official suppression of student speech in the high school.

This Court applied the *Tinker* test just a Term ago in *Fraser, supra,* upholding an official decision to discipline a student for delivering a lewd speech in support of a student-government candidate. The Court today casts no doubt on *Tinker* 's vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." *Ante,* at 569. On the other hand is censorship of expression that arises in the context of "school-sponsored ... expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Ibid.*

The Court does not, for it cannot, purport to discern from our precedents the distinction it creates. One could, I suppose, readily characterize the students' symbolic speech in *Tinker* as "personal expression that happens to [have] occur[red] on school premises," although *Tinker* did not even hint that the personal nature of the speech was of any (much less dispositive) relevance. But that same description could not by any stretch of the imagination fit Fraser's speech. He did not just "happen" to deliver his lewd speech to an ad hoc gathering on the playground. As the second paragraph of *Fraser* evinces, if ever a forum for student expression was "school-sponsored," Fraser's was:

> ***282** "Fraser ... delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students ... attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a *school-sponsored* educational program in self-government." *Fraser,* 478 U.S., at 677, 106 S.Ct., at 3161 (emphasis added).

Yet, from the first sentence of its analysis, see *id.,* at 680, 106 S.Ct., at 3162–3163, *Fraser* faithfully applied *Tinker.*

Nor has this Court ever intimated a distinction between personal and school-sponsored speech in any other context. Particularly telling is this Court's heavy reliance on *Tinker* in two cases of First Amendment infringement on state college campuses. See *Papish v. University of Missouri Board of Curators,* 410 U.S. 667, 671, n. 6, 93 S.Ct. 1197, 1199, n. 6, 35 L.Ed.2d 618 (1973) *(* ****576** *per curiam); Healy v. James,* 408 U.S. 169, 180, 189, and n. 18, 191, 92 S.Ct. 2338, 2345, 2350, and n. 18, 2351, 33 L.Ed.2d 266 (1972). One involved the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization, see *Papish, supra,* 410 U.S., at 667–668, 93 S.Ct., at 1197–1198, and the other involved the denial of university recognition and concomitant benefits to a political student organization, see *Healy, supra,* 408 U.S., at 174,

176, 181–182, 92 S.Ct., at 2342, 2343, 2346–2347. Tracking *Tinker* 's analysis, the Court found each act of suppression unconstitutional. In neither case did this Court suggest the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

II

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need ***283** to dissociate itself from student expression. *Ante,* at 569–570. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

A

The Court is certainly correct that the First Amendment permits educators "to assure that participants learn whatever lessons the activity is designed to teach...." *Ante,* at 570. That is, however, the essence of the *Tinker* test, not an excuse to abandon it. Under *Tinker,* school officials may censor only such student speech as would "materially disrup[t]" a legitimate curricular function. Manifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that "is designed to teach" something—than when it arises in the context of a noncurricular activity. Thus, under *Tinker,* the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. See *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530, 544–545, 100 S.Ct. 2326, 2337, 65 L.Ed.2d 319 (1980) (STEVENS, J., concurring in judgment). That is not because some more stringent standard applies in the curricular context. (After all, this Court applied the same standard whether the students in *Tinker* wore their armbands to the "classroom" or the "cafeteria." 393 U.S., at 512, 89 S.Ct., at 740.) It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for ... student speech that is disseminated under [the school's] auspices...." *Ante,* at 570. But we need not abandon *Tinker* ***284** to reach that conclusion; we need only apply it. The enumerated criteria reflect the skills that the curricular newspaper "is designed to teach." The educator may, under *Tinker,* constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrup[t]" the newspaper's curricular purpose.

The same cannot be said of official censorship designed to shield the *audience* or dissociate the *sponsor* from the expression. Censorship so motivated might well serve (although, as I demonstrate *infra,* at —— – ——, cannot legitimately serve) some other school purpose. But it in no way furthers ****577** the curricular purposes of a student *newspaper,* unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

The Court relies on bits of testimony to portray the principal's conduct as a pedagogical lesson to Journalism II students who "had not sufficiently mastered those portions of the ... curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals ..., and 'the legal, moral, and ethical restrictions imposed upon journalists....' " *Ante,* at 572. In that regard, the Court attempts to justify censorship of the article on teenage pregnancy on the basis of the principal's judgment that (1) "the [pregnant] students' anonymity was not adequately protected," despite the article's use of aliases; and (2) the judgment that "the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents...." *Ante,* at 571. Similarly, the Court finds in the principal's decision to censor the divorce article a journalistic lesson that the author should have given the father of one student an "opportunity to defend himself" against her charge that (in the Court's words) he "chose ***285** 'playing cards with the guys' over home and family...." *Ante,* at 572.

But the principal never consulted the students before censoring their work. "[T]hey learned of the deletions when

the paper was released....” 795 F.2d, at 1371. Further, he explained the deletions only in the broadest of generalities. In one meeting called at the behest of seven protesting Spectrum staff members (presumably a fraction of the full class), he characterized the articles as “ ‘too sensitive’ for ‘our immature audience of readers,’ ” 607 F.Supp. 1450, 1459 (ED Mo.1985), and in a later meeting he deemed them simply “inappropriate, personal, sensitive and unsuitable for the newspaper,” *ibid.* The Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible. If he did, a fact that neither the District Court nor the Court of Appeals found, the lesson was lost on all but the psychic Spectrum staffer.

B

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is “unsuitable for immature audiences.” *Ante,* at 570 (footnote omitted). Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to “potentially sensitive topics” (like “the particulars of teenage sexual activity”) or unacceptable social viewpoints (like the advocacy of “irresponsible se[x] or conduct otherwise inconsistent with ‘the shared values of a civilized social order’ ”) through school-sponsored student activities. *Ante,* at 570 (citation omitted).

Tinker teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as “thought police” stifling discussion of all but state-approved topics and advocacy of all ***286** but the official position. See also *Epperson v. Arkansas,* 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Otherwise educators could transform students into “closed-circuit recipients of only that which the State chooses to communicate,” *Tinker,* 393 U.S., at 511, 89 S.Ct., at 739, and cast a perverse and impermissible “pall of orthodoxy over the classroom,” *Keyishian v. Board of Regents,* 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967). Thus, the State cannot constitutionally prohibit its high school students from recounting in the locker room “the particulars of [their] teenage ****578** sexual activity,” nor even from advocating “irresponsible se[x]” or other presumed abominations of “the shared values of a civilized social order.” Even in its capacity as educator the State may not assume an Orwellian “guardianship of the public mind,” *Thomas v. Collins,* 323 U.S. 516, 545, 65 S.Ct. 315, 329, 89 L.Ed. 430 (1945) (Jackson, J., concurring).

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity.[2] The former would constitute unabashed and unconstitutional viewpoint ***287** discrimination, see *Board of Education v. Pico,* 457 U.S., at 878–879, 102 S.Ct., at 2813–2814 (BLACKMUN, J., concurring in part and concurring in judgment), as well as an impermissible infringement of the students' “ ‘right to receive information and ideas,’ ” *id.,* at 867, 102 S.Ct., at 2808 (plurality opinion) (citations omitted); see *First National Bank v. Bellotti,* 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978).[3] Just as a school board may not purge its state-funded library of all books that “ ‘offen[d] [its] social, political and moral tastes,’ ” 457 U.S., at 858–859, 102 S.Ct., at 2804 (plurality opinion) (citation omitted), school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

Official censorship of student speech on the ground that it addresses “potentially sensitive topics” is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, “potential topic sensitivity” is a vaporous nonstandard—like “ ‘public welfare, peace, safety, health, decency, good order, morals or convenience,’ ” *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969), or “ ‘general welfare of citizens,’ ” *Staub v. Baxley,* 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1958)—that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not ***288** object. In part because of those dangers, this Court has consistently condemned any scheme allowing a state official boundless ****579** discretion in licensing speech from

a particular forum. See, *e.g., Shuttlesworth v. Birmingham, supra,* 394 U.S., at 150–151, and n. 2, 89 S.Ct., at 938–939, and n. 2; *Cox v. Louisiana,* 379 U.S. 536, 557–558, 85 S.Ct. 453, 465–466, 13 L.Ed.2d 471 (1965); *Staub v. Baxley, supra,* 355 U.S., at 322–324, 78 S.Ct., at 282–283.

The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was the potential sensitivity of "teenage sexual activity." *Ante,* at 570. Yet the District Court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topi[c] in *Spectrum.*" 607 F.Supp., at 1467. That much is also clear from the same principal's approval of the "squeal law" article on the same page, dealing forthrightly with "teenage sexuality," "the use of contraceptives by teenagers," and "teenage pregnancy," App. 4–5. If topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable. It is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate "irresponsible sex." See *ante,* at 570.

C

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." *Ante,* at 570. Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the armbands in *Tinker,* "happens to occur on the school premises," *ante,* at 569. Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood ***289** of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.

But " '[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' " *Keyishian v. Board of Regents,* 385 U.S., at 602, 87 S.Ct., at 683 (quoting *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)). Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that "[a]ll ... editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," App. 26; or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

III

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup [tion of] classwork," *Tinker,* 393 U.S., at 513, 89 S.Ct., at 740. Nor did the censorship fall within the category that *Tinker* described as necessary to prevent student expression from "inva[ding] the rights of others," *ibid.* If that term is to have any content, it must be limited to rights that are protected by law. "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," 795 F.2d, at 1376, a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated ****580** fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression." ***290** *Tinker, supra,* 393 U.S., at 508, 89 S.Ct., at 737. And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal. See 795 F.2d, at 1375–1376.

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools" *Speiser v. Randall,* 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958); see *Keyishian v. Board of Regents, supra,* 385 U.S., at 602, 87 S.Ct., at 683, the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt

for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

IV

The Court opens its analysis in this case by purporting to reaffirm *Tinker* 's time-tested proposition that public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " *Ante,* at 567 (quoting *Tinker, supra,* 393 U.S., at 506, 89 S.Ct., at 736). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," *Board of Education v. Pico,* 457 U.S., at 880, 102 S.Ct., at 2814 (BLACKMUN, J., concurring in part and concurring in judgment), and "that our Constitution is a living reality, not parchment preserved under glass," ***291** *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex.,* 462 F.2d 960, 972 (CA5 1972), the Court today "teach[es] youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette,* 319 U.S., at 637, 63 S.Ct., at 1185. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

All Citations

484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592, 56 USLW 4079, 43 Ed. Law Rep. 515, 14 Media L. Rep. 2081

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The two pages deleted from the newspaper also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. Reynolds testified that he had no objection to these articles and that they were deleted only because they appeared on the same pages as the two objectionable articles.

2 The Statement also cited *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), for the proposition that "[o]nly speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore be prohibited." App. 26. This portion of the Statement does not, of course, even accurately reflect our holding in *Tinker.* Furthermore, the Statement nowhere expressly extended the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper. The dissent apparently finds as a fact that the Statement was published annually in Spectrum; however, the District Court was unable to conclude that the Statement appeared on more than one occasion. In any event, even if the Statement says what the dissent believes that it says, the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming.

3 The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with *Papish v. University of Missouri Board of Curators,* 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973) *(per curiam)*, which involved an off-campus "underground" newspaper that school officials merely had allowed to be sold on a state university campus.

4 The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser.* We disagree. The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly rather than on any propensity of the speech to "materially disrup [t] classwork or involv[e] substantial disorder or invasion of the rights of others." 393 U.S., at 513, 89 S.Ct., at 740. Indeed, the *Fraser* Court cited as "especially relevant" a portion of Justice Black's dissenting opinion in *Tinker* " 'disclaim[ing] any purpose ... to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American

public school system to public school students.' " 478 U.S., at 686, 106 S.Ct., at 3166 (quoting 393 U.S., at 526, 89 S.Ct., at 746). Of course, Justice Black's observations are equally relevant to the instant case.

5 We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid "invasion of the rights of others," 393 U.S., at 513, 89 S.Ct., at 740, except where that speech could result in tort liability to the school.

6 We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds. See *Baughman v. Freienmuth,* 478 F.2d 1345 (CA4 1973); *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex.,* 462 F.2d 960 (CA5 1972); *Eisner v. Stamford Board of Education,* 440 F.2d 803 (CA2 1971).

7 A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. See, *e.g., Nicholson v. Board of Education, Torrance Unified School Dist.,* 682 F.2d 858 (CA9 1982); *Seyfried v. Walton,* 668 F.2d 214 (CA3 1981); *Trachtman v. Anker,* 563 F.2d 512 (CA2 1977), cert. denied, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978); *Frasca v. Andrews,* 463 F.Supp. 1043 (EDNY 1979). We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.

8 The reasonableness of Principal Reynolds' concerns about the two articles was further substantiated by the trial testimony of Martin Duggan, a former editorial page editor of the St. Louis Globe Democrat and a former college journalism instructor and newspaper adviser. Duggan testified that the divorce story did not meet journalistic standards of fairness and balance because the father was not given an opportunity to respond, and that the pregnancy story was not appropriate for publication in a high school newspaper because it was unduly intrusive into the privacy of the girls, their parents, and their boyfriends. The District Court found Duggan to be "an objective and independent witness" whose testimony was entitled to significant weight. 607 F.Supp. 1450, 1461 (ED Mo.1985).

9 It is likely that the approach urged by the dissent would as a practical matter have far more deleterious consequences for the student press than does the approach that we adopt today. The dissent correctly acknowledges "[t]he State's prerogative to dissolve the student newspaper entirely." *Post,* at 578. It is likely that many public schools would do just that rather than open their newspapers to all student expression that does not threaten "materia[l] disrup[tion of] classwork" or violation of "rights that are protected by law," *post,* at 579, regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be.

1 The Court suggests that the passage quoted in the text did not "exten [d] the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper" because the passage did not expressly mention them. *Ante,* at 569, n. 2. It is hard to imagine why the Court (or anyone else) might expect a passage that applies categorically to "a student-press publication," composed almost exclusively of "news and feature articles," to mention those categories expressly. Understandably, neither court below so limited the passage.

2 The Court quotes language in *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), for the proposition that " '[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.' " *Ante,* at 567 (quoting 478 U.S., at 683, 106 S.Ct., at 3164). As the discussion immediately preceding that quotation makes clear, however, the Court was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content.* See, *e.g., Fraser,* 478 U.S., at 683, 106 S.Ct., at 3164 ("[T]he 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others"). In fact, the *Fraser* Court coupled its first mention of "society's ... interest in teaching students the boundaries of *socially appropriate behavior,*" with an acknowledgment of "[t]he undoubted freedom to advocate unpopular and controversial views in schools and *classrooms,*" *id.,* at 681, 106 S.Ct., at 3163 (emphasis added). See also *id.,* at 689, 106 S.Ct., at 3167 (BRENNAN, J.,

concurring in judgment) ("Nor does this case involve an attempt by school officials to ban written materials they consider 'inappropriate' for high school students" (citation omitted)).

3 Petitioners themselves concede that " '[c]ontrol over access' " to Spectrum is permissible only if " 'the distinctions drawn ... are viewpoint neutral.' " Brief for Petitioners 32 (quoting *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 (1985)).

126 S.Ct. 1951
Supreme Court of the United States

Gil GARCETTI et al., Petitioners,

v.

Richard CEBALLOS.

No. 04–473.
|
Argued March 21, 2006.
|
Decided May 30, 2006.

Synopsis

Background: Deputy district attorney filed § 1983 complaint against county and supervisors at district attorneys' office, alleging that he was subject to adverse employment actions in retaliation for engaging in protected speech, that is, for writing a disposition memorandum in which he recommended dismissal of a case on the basis of purported governmental misconduct. The United States District Court for the Central District of California, A. Howard Matz, J., granted defendants' motion for summary judgment, and district attorney appealed. The Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 361 F.3d 1168, reversed and remanded. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Kennedy, held that:

when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline, and

here, district attorney did not speak as a citizen when he wrote his memo and, thus, his speech was not protected by the First Amendment.

Reversed and remanded.

Justice Stevens filed a dissenting opinion.

Justice Souter filed a dissenting opinion in which Justices Stevens and Ginsburg joined.

Justice Breyer filed a dissenting opinion.

****1953 *410** *Syllabus*[*]

Respondent Ceballos, a supervising deputy district attorney, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit made serious misrepresentations, Ceballos relayed his findings to his supervisors, petitioners here, and followed up with a disposition memorandum recommending dismissal. Petitioners nevertheless proceeded with the prosecution. At a hearing on a defense motion to challenge the warrant, Ceballos recounted his observations about the affidavit, but the trial court rejected the challenge. Claiming that petitioners then retaliated against him for his memo in violation of the First and Fourteenth Amendments, Ceballos filed a 42 U.S.C. § 1983 suit. The District Court granted petitioners summary judgment, ruling, *inter alia,* that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. Reversing, the Ninth Circuit held that the memo's allegations were protected under the First Amendment analysis in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, and *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708.

Held: When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. Pp. 1957 – 1962.

(a) Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *Pickering, supra,* at 568, 88 S.Ct. 1731. If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. See *Connick, supra,* at 147, 103 S.Ct. 1684. If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering, supra,* at 568, 88 S.Ct. 1731. This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without

a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Cf. *Connick, supra,* at 143, 103 S.Ct. 1684. Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra,* at 147, 103 S.Ct. 1684. Pp. 1957 – 1959.

(b) Proper application of the Court's precedents leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail. The dispositive factor here is not that Ceballos expressed his views inside his office, rather than publicly, see, *e.g., Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619, nor that the memo concerned the subject matter of his employment, see, *e.g., Pickering, supra,* at 573, 88 S.Ct. 1731. Rather, the controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the First Amendment provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700. This result is consistent with the Court's prior emphasis on the potential societal value of employee speech and on affording government employers sufficient discretion to manage their operations. Ceballos' proposed contrary rule, adopted by the Ninth Circuit, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in the Court's precedents. The doctrinal anomaly the Court of Appeals perceived in compelling public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties misconceives the theoretical underpinnings of this Court's decisions and is unfounded as a practical matter. Pp. 1959 – 1962.

(c) Exposing governmental inefficiency and misconduct is a matter of considerable significance, and various measures have been adopted to protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. These include federal and state whistle-blower protection laws and labor codes and, for government attorneys, rules of conduct and constitutional obligations apart from the First Amendment. However, the Court's precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job. P. 1962.

361 F.3d 1168, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 1962. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post,* p. 1963. BREYER, J., filed a dissenting opinion, *post,* p. 1973.

Attorneys and Law Firms

Dan Himmelfarb, for the United States as amicus curiae, by special leave of the Court, supporting the petitioners.

Bonnie E. Robin-Vergeer, for respondent.

Cindy S. Lee, Counsel of Record, Jin S. Choi, Franscell, Strickland, Roberts & Lawrence, Glendale, California, Office Of The County Counsel, Raymond G. Fortner, Jr., County Counsel, Philip S. Miller, Assistant County Counsel, Doraine F. Meyer, Senior Deputy County Counsel, Los Angeles, California, Counsel for Petitioners.

Cindy S. Lee, Counsel of Record, Jin S. Choi, Franscell, Strickland, Roberts & Lawrence, Glendale, California, Counsel for Petitioners Admitted to the Bar of the Supreme Court on July 17, 1998.

Bonnie I. Robin-Vergeer, Counsel of Record, Scott L. Nelson, Brian Wolfman, Public Citizen Litigation Group, Washington, DC, Humberto Guizar Moreno, Becerra, Guerrero & Casillas, Montebello, CA, Counsel for Respondent.

Opinion

Justice KENNEDY delivered the opinion of the Court.

***413** It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he ***414** had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained ****1956** Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted ***415** his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, 42 U.S.C. § 1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First

Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." 361 F.3d 1168, 1173 (C.A.9 2004). In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick, supra,* 103 S.Ct. 1684. *Connick* instructs courts to begin by considering ***416** whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id.,* at 146–147, 103 S.Ct. 1684. The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." 361 F.3d, at 1174. The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.,* at 1174–1175 (citing cases including ****1957** *Roth v. Veteran's Admin. of Govt. of United States,* 856 F.2d 1401 (C.A.9 1988)).

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering, supra,* at 568, 88 S.Ct. 1731. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See 361 F.3d, at 1180. The court further concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable. See *id.,* at 1181–1182.

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id.,* at 1185. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.,* at 1187. In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest ***417** in the content of that speech that gives rise to a First Amendment right." *Id.,* at 1189.

We granted certiorari, 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005), and we now reverse.

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick,* 461 U.S., at 143, 103 S.Ct. 1684. That dogma has been qualified in important respects. See *id.,* at 144–145, 103 S.Ct. 1684. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e.g., Pickering, supra,* at 568, 88 S.Ct. 1731; *Connick, supra,* at 147, 103 S.Ct. 1684; *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *United States v. Treasury Employees,* 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U.S., at 566, 88 S.Ct. 1731. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.,* at 568, 88 S.Ct. 1731. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.,* at 572–573, 88 S.Ct. 1731 (footnote omitted). Thus, the

Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly ***418** greater than its interest in limiting a similar contribution ****1958** by any member of the general public." *Id.,* at 573, 88 S.Ct. 1731.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.,* at 568, 88 S.Ct. 1731. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra,* at 147, 103 S.Ct. 1684. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering,* 391 U.S., at 568, 88 S.Ct. 1731. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors ... to furnish grounds for dismissal." *Id.,* at 569., 88 S.Ct. 1731 The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. ***419** *Connick, supra,* at 143, 103 S.Ct. 1684 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra,* at 147, 103 S.Ct. 1684 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its ****1959** holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U.S., at 573, 88 S.Ct. 1731. It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.,* at 572, 88 S.Ct. 1731. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. ***420** See, *e.g., San Diego v. Roe,* 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Employees,* 513 U.S., at 470, 115 S.Ct. 1003 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when

employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g., Rankin,* 483 U.S., at 384, 107 S.Ct. 2891 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick,* 461 U.S., at 154, 103 S.Ct. 1684.

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e.g., Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public ***421** employees like "any member of the general public," *Pickering,* 391 U.S., at 573, 88 S.Ct. 1731, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e.g., ibid.; Givhan, supra,* at 414, 99 S.Ct. 693. As the Court noted in *Pickering:* "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S., at 572, 88 S.Ct. 1731. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were ****1960** made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor' "). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe ***422** any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions made by the speaker in *Pickering,* whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra,* at 1958 – 1959. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of

protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure ***423** that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or ****1961** misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. See 361 F.3d, at 1176. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering, supra,* 88 S.Ct. 1731, or discussing politics with a co-worker, see ***424** *Rankin,* 483 U.S. 378, 107 S.Ct. 2891. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post,* at 1965, n. 2 (SOUTER, J., dissenting). The proper inquiry is a practical one. ****1962** Formal job descriptions often bear little resemblance to the duties an employee actually is ***425** expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post,* at 1969 – 1970. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional

interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick,* public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U.S., at 149, 103 S.Ct. 1684. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. See, *e.g.,* 5 U.S.C. § 2302(b)(8); Cal. Govt.Code Ann. § 8547.8 (West 2005); Cal. Lab.Code Ann. § 1102.5 (West Supp.2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e.g.,* Cal. Rule Prof. Conduct 5–110 (2005) ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). These imperatives, as well as obligations arising from any ***426** other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, dissenting.

The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties," *ante,* at 1955, is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided," *ante,* at 1960 – 1961. But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?[*]

****1963** ***427** As Justice SOUTER explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. See *id.,* at 413–416, 99 S.Ct. 693. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in Justice SOUTER's dissenting opinion it is surely "misguided."

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, dissenting.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante,* at 1960. I respectfully dissent. ***428** I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests

in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, *e.g., Schenck v. Pro–Choice Network of Western N. Y.,* 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). At the other extreme, ****1964** a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good ***429** reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill,* 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), we followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, 439 U.S., at 413–414, 99 S.Ct. 693, and the same point was clear in *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). That case was decided, in part, with reference to the *Pickering* framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. *Madison* noted that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." ***430** 429 U.S., at 174–175, 97 S.Ct. 421. In each case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and *Givhan* stands for the same conclusion even when the speech is not addressed to the public at large. Cf. *Pegram v. Herdrich,* 530 U.S. 211, 225, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) (recognizing that, factually, a ****1965** trustee under the Employee Retirement Income Security Act of 1974 can both act as ERISA fiduciary and act on behalf of the employer).

The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction,[1] and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection

to any speech uttered "pursuant to ... official duties," *ante,* at 1960.

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public ***431** value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.[2]

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in ****1966** speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's "object ... to unite [m]y avocation and my vocation";[3] these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.[4] There is no question that public employees speaking on matters they are obliged to address would generally ***433** place a high value on a right to speak, as any responsible citizen would.

Nor is there any reason to raise the counterintuitive question whether the public interest in hearing informed employees evaporates when they speak as required on some subject at the core of their jobs. Last Term, we recalled the public value that the *Pickering* Court perceived in the speech of public employees as a class: "Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego v. Roe,* 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) *(per curiam)* (citation omitted). This is not a whit less true when an employee's job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory ****1967** report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)

Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out ***434** coherently through the ranks. "Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Ante,* at 1960. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before, *supra,* at 1965? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job

responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. See n. 4, *supra*. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.

Two reasons in particular make me think an adjustment using the basic *Pickering* balancing scheme is perfectly feasible here. First, the extent of the government's legitimate authority over subjects of speech required by a public job ***435** can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on 42 U.S.C. § 1983 (or *Bivens* ****1968** *v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)) before they get filed, the standard itself would sift them out at the summary-judgment stage.[5]

My second reason for adapting *Pickering* to the circumstances at hand is the experience in Circuits that have recognized claims like Ceballos's here. First Amendment protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation. There has indeed been some: as represented by Ceballos's lawyer at oral argument, each year over the last five years, approximately 70 cases in the different Courts of Appeals and approximately 100 in the various District Courts. Tr. of Oral Arg. 58–59. But even these figures reflect a readiness to litigate that might well have been cooled by my view about ***436** the importance required before *Pickering* treatment is in order.

For that matter, the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made "pursuant to ... official duties," *ante,* at 1960. In fact, the majority invites such litigation by describing the enquiry as a "practical one," *ante,* at 1961, apparently based on the totality of employment circumstances.[6] See n. 2, *supra*. Are prosecutors' discretionary statements about cases addressed to the press on the courthouse steps made "pursuant to their official duties"? Are government nuclear scientists' complaints to their supervisors about a colleague's improper handling of radioactive materials made "pursuant" to duties?

II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistle-blower statutes.

A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see *ante,* at 1960, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects, see *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The majority invokes the interpretation set out in *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), of *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), which ***437** held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning, *id.,* at 192–200, 111 S.Ct. 1759. We have read *Rust* to mean that "when the government appropriates ****1969** public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger, supra,* at 833, 115 S.Ct. 2510.

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to "promote a particular policy" by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 542, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust.* Unlike the doctors in *Rust,* Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust,* and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.

***438** It is not, of course, that the district attorney lacked interest of a high order in what Ceballos might say. If his speech undercut effective, lawful prosecution, there would have been every reason to rein him in or fire him; a statement that created needless tension among law enforcement agencies would be a fair subject of concern, and the same would be true of inaccurate statements or false ones made in the course of doing his work. But these interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*. Nor did the county petitioners here even make such a claim in their answer to Ceballos's complaint, see n. 13, *infra*.

The fallacy of the majority's reliance on *Rosenberger's* understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante,* at 1960.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to ... official duties." See *Grutter v. Bollinger,* 539 U.S. 306, 329, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ("We have long recognized that, given the ****1970** important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional ***439** tradition"); *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools' " (quoting *Shelton v. Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960))); *Sweezy v. New Hampshire,* 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state and national statutes protecting government whistle-blowers from vindictive bosses. See *ante,* at 1962. But even if I close my eyes to the tenet that " '[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law,' " *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,*

518 U.S. 668, 680, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), the majority's counsel to rest easy fails on its own terms.[7]

***440** To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan,* for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she was fired after a private conversation with the school principal. In any event, the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. Westman & N. Modesitt, Whistleblowing: Law of Retaliatory Discharge 67–75, 281–307 (2d ed.2004). Some state statutes protect all government workers, including the employees of municipalities and other subdivisions;[8] others stop at state employees.[9] Some limit protection ****1971** to employees who tell their bosses before they speak out;[10] others forbid bosses from imposing any requirement to warn.[11] As for the federal Whistleblower Protection Act of 1989, ***441** 5 U.S.C. § 1213 *et seq.* (2000 ed. and Supp. III), current case law requires an employee complaining of retaliation to show that " 'a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee [could] reasonably conclude that the actions of the government evidence gross mismanagement,' " *White v. Department of Air Fornce,* 391 F.3d 1377, 1381 (C.A.Fed.2004) (quoting *Lachance v. White,* 174 F.3d 1378, 1381 (C.A.Fed.1999), cert. denied, 528 U.S. 1153, 120 S.Ct. 1157, 145 L.Ed.2d 1069 (2000)). And federal employees have been held to have no protection for disclosures made to immediate supervisors, see *Willis v. Department of Agriculture,* 141 F.3d 1139, 1143 (C.A.Fed.1998); *Horton v. Department of Navy,* 66 F.3d 279, 282 (C.A.Fed.1995), cert. denied, 516 U.S. 1176, 116 S.Ct. 1271, 134 L.Ed.2d 218 (1996), or for statements of facts publicly known already, see *Francisco v. Office of Personnel Management,* 295 F.3d 1310, 1314 (C.A.Fed.2002). Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, *Huffman v. Office of Personnel Management,* 263 F.3d 1341, 1352 (C.A.Fed.2001), the very speech that the majority says will be covered by "the powerful network of legislative enactments ... available to those who seek to expose wrongdoing," *ante,* at 1962.[12] My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

III

The Court remands because the Court of Appeals considered only the disposition memorandum and because Ceballos ***442** charges retaliation for some speech apparently outside the ambit of utterances "pursuant to their official duties." When the Court of Appeals takes up this case once again, it should consider some of the following facts that escape emphasis in the majority opinion owing to its focus.[13] Ceballos says he sought his position out of a personal commitment to perform civic work. After showing his superior, petitioner Frank Sundstedt, the disposition memorandum at issue in this case, Ceballos complied with Sundstedt's direction to tone down some accusatory rhetoric out of ****1972** concern that the memorandum would be unnecessarily incendiary when shown to the Sheriff's Department. After meeting with members of that department, Ceballos told his immediate supervisor, petitioner Carol Najera, that he thought *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), obliged him to give the defense his internal memorandum as exculpatory evidence. He says that Najera responded by ordering him to write a new memorandum containing nothing but the deputy sheriff's statements, but that he balked at that. Instead, he proposed to turn over the existing memorandum with his own conclusions redacted as work product, and this is what he did. The issue over revealing his conclusions arose again in preparing for the suppression hearing. Ceballos maintains that Sundstedt ordered Najera, representing the prosecution, to give the trial judge a full picture of the circumstances, but that Najera told Ceballos he would suffer retaliation if he testified that the affidavit contained intentional fabrications. In any event, Ceballos's testimony generally stopped short of his own conclusions. After the hearing, the trial judge denied the motion to suppress, explaining that he found grounds independent of the challenged material sufficient to show probable cause for the warrant.

***443** Ceballos says that over the next six months his supervisors retaliated against him[14] not only for his written reports, see *ante,* at 1956, but also for his spoken statements to them and his hearing testimony in the pending criminal case.

While an internal grievance filed by Ceballos challenging these actions was pending, Ceballos spoke at a meeting of the Mexican–American Bar Association about misconduct of the Sheriff's Department in the criminal case, the lack of any policy at the District Attorney's Office for handling allegations of police misconduct, and the retaliatory acts he ascribed to his supervisors. Two days later, the office dismissed Ceballos's grievance, a result he attributes in part to his bar association speech.

Ceballos's action against petitioners under 42 U.S.C. § 1983 claims that the individuals retaliated against him for exercising his First Amendment rights in submitting the memorandum, discussing the matter with Najera and Sundstedt, testifying truthfully at the hearing, and speaking at the bar meeting.[15] As I **1973 mentioned, the Court of Appeals *444 saw no need to address the protection afforded to Ceballos's statements other than the disposition memorandum, which it thought was protected under the *Pickering* test. Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation shown for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense, and the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process.

Justice BREYER, dissenting.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or Justice SOUTER's answer to the question presented.

I

I begin with what I believe is common ground:

(1) Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently *445 depending upon the general category of activity. Compare, *e.g., Burson v. Freeman,* 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality opinion) (political speech), with *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (commercial speech), and *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (government speech).

(2) Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the First Amendment does not offer protection. *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Where the employee speaks "as a citizen ... upon matters of public concern," the First Amendment offers protection but only where the speech survives a screening test. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). That test, called, in legal shorthand, "*Pickering* balancing," requires a judge to "balance ... the interests" of the employee "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Ibid.* See also *Connick, supra,* at 142, 103 S.Ct. 1684.

**1974 (4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely, when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

*446 II

The majority answers the question by holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante,* at

1960. In a word, the majority says, "never." That word, in my view, is too absolute.

Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." *Ibid.* And I agree that the Constitution does not seek to "displac[e] ... managerial discretion by judicial supervision." *Ante,* at 1961. Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 544, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and ***447** in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also *Polk County v. Dodson,* 454 U.S. 312, 321, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, 106 Yale L.J. 151, 172 (1996) ("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Brady, supra.* So, for example, might a prison doctor have a similar constitutionally related professional obligation ****1975** to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here.

III

While I agree with much of Justice SOUTER's analysis, I believe that the constitutional standard he enunciates fails ***448** to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government should prevail unless the employee (1) "speaks on a matter of unusual importance," and (2) "satisfies high standards of responsibility in the way he does it." *Ante,* at 1967 (dissenting opinion). Justice SOUTER adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Ibid.*

There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment. This aspect of Justice

SOUTER's "adjustment" of "the basic *Pickering* balancing scheme," *ibid.,* is similar to the Court's present insistence that speech be of "legitimate news interest" when the employee speaks only as a private citizen, see *San Diego v. Roe,* 543 U.S. 77, 83–84, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) *(per curiam)*. It gives no extra weight to the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties.

Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these ***449** categories bear any obvious relation to the constitutional importance of protecting the job-related speech at issue.

The underlying problem with this breadth of coverage is that the standard (despite predictions that the government is likely to *prevail* in the balance unless the speech concerns "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," *ante,* at 1967 (SOUTER, J., dissenting)), does not avoid the judicial need to *undertake the balance* in the first place. And this form of judicial activity—the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests—itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his ****1976** basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted.

At the same time, the list of categories substantially overlaps areas where the law already provides nonconstitutional protection through whistle-blower statutes and the like. See *ante,* at 1962 (majority opinion); *ante,* at 1970 – 1971 (SOUTER, J., dissenting). That overlap diminishes the need for a constitutional forum and also means that adoption of the test would authorize Federal Constitution-based legal actions that threaten to upset the legislatively struck (or administratively struck) balance that those statutes (or administrative procedures) embody.

IV

I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. ***450** But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

With respect, I dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* See, *e.g., Branton v. Dallas,* 272 F.3d 730 (C.A.5 2001) (police internal investigator demoted by police chief after bringing the false testimony of a fellow officer to the attention of a city official); *Miller v. Jones,* 444 F.3d 929, 936 (C.A.7 2006) (police officer demoted after opposing the police chief's attempt to "us[e] his official position to coerce a financially independent organization into a potentially ruinous merger"); *Delgado v. Jones,* 282 F.3d 511 (C.A.7 2002) (police officer sanctioned for reporting criminal activity that implicated a local political figure who was a good friend of the police chief); *Herts v. Smith,* 345 F.3d 581 (C.A.8 2003) (school district official's contract was not renewed after she gave frank testimony about the district's desegregation efforts); *Kincade v. Blue Springs,* 64 F.3d 389 (C.A.8 1995) (engineer fired

after reporting to his supervisors that contractors were failing to complete dam-related projects and that the resulting dam might be structurally unstable); *Fox v. District of Columbia,* 83 F.3d 1491, 1494 (C.A.D.C.1996) (D.C. Lottery Board security officer fired after informing the police about a theft made possible by "rather drastic managerial ineptitude").

1 It seems stranger still in light of the majority's concession of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper. *Ante,* at 1961.

2 I do not say the value of speech "pursuant to ... duties" will always be greater, because I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school. Hence today's rule presents the regrettable prospect that protection under *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), may be diminished by expansive statements of employment duties.

The majority's response, that the enquiry to determine duties is a "practical one," *ante,* at 1961, does not alleviate this concern. It sets out a standard that will not discourage government employers from setting duties expansively, but will engender litigation to decide which stated duties were actual and which were merely formal.

3 R. Frost, Two Tramps in Mud Time, Collected Poems, Prose, & Plays 251, 252 (R. Poirier & M. Richardson eds.1995).

4 Not to put too fine a point on it, the Human Resources Division of the Los Angeles County District Attorney's Office, Ceballos's employer, is telling anyone who will listen that its work "provides the personal satisfaction and fulfillment that comes with knowing you are contributing essential services to the citizens of Los Angeles County." Career Opportunities, http://da.co.la.ca.us/hr/default.htm (all Internet materials as visited May 25, 2006, and available in Clerk of Court's case file).

The United States expresses the same interest in identifying the individual ideals of a citizen with its employees' obligations to the Government. See Brief as *Amicus Curiae* 25 (stating that public employees are motivated to perform their duties "to serve the public"). Right now, for example, the U.S. Food and Drug Administration is appealing to physicians, scientists, and statisticians to work in the Center for Drug Evaluation and Research, with the message that they "can give back to [their] community, state, and country by making a difference in the lives of Americans everywhere." Career Opportunities at CDER: You Can Make a Difference, http:// www.fda.gov/cder/ career/default.htm. Indeed, the Congress of the United States, by concurrent resolution, has previously expressly endorsed respect for a citizen's obligations as the prime responsibility of Government employees: "Any person in Government Service should: ... [p]ut loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department," and shall "[e]xpose corruption wherever discovered," Code of Ethics for Government Service, H. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat. B12. Display of this Code in Government buildings was once required by law, 94 Stat. 855; this obligation has been repealed, Office of Government Ethics Authorization Act of 1996, Pub.L. 104–179, § 4, 110 Stat. 1566.

5 As I also said, a public employer is entitled (and obliged) to impose high standards of honesty, accuracy, and judgment on employees who speak in doing their work. These criteria are not, however, likely to discourage meritless litigation or provide a handle for summary judgment. The employee who has spoken out, for example, is unlikely to blame himself for prior bad judgment before he sues for retaliation.

6 According to the majority's logic, the litigation it encourages would have the unfortunate result of "demand[ing] permanent judicial intervention in the conduct of governmental operations," *ante,* at 1961.

7 Even though this Court has recognized that 42 U.S.C. § 1983 "does not authorize a suit for every alleged violation of federal law," *Livadas v. Bradshaw,* 512 U.S. 107, 132, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994), the rule is that " § 1983 remains a generally and presumptively available remedy for claimed violations of federal law," *id.,* at 133, 114 S.Ct. 2068. Individual enforcement under § 1983 is rendered unavailable for alleged violations of federal law when the underlying

statutory provision is part of a federal statutory scheme clearly incompatible with individual enforcement under § 1983. See *Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119–120, 125 S.Ct. 1453, 161 L.Ed.2d 316 (2005).

8 Del.Code Ann., Tit. 29, § 5115 (2003); Fla. Stat. § 112.3187 (2003); Haw.Rev.Stat. § 378–61 (1993); Ky.Rev.Stat. Ann. § 61.101 (West 2005); Mass. Gen. Laws, ch. 149, § 185 (West 2004); Nev.Rev.Stat. § 281.611 (2003); N.H.Rev.Stat. Ann. § 275–E:1 (Supp.2005); Ohio Rev.Code Ann. § 4113.51 (Lexis 2001); Tenn.Code Ann. § 50–1–304 (2005).

9 Ala.Code § 36–26A–1 *et seq.* (2001); Colo.Rev.Stat. § 24–50.5–101 *et seq.* (2004); Iowa Code § 70A.28 *et seq.* (2005); Kan. Stat. Ann. § 75–2973 (2003 Cum.Supp.); Mo.Rev.Stat. § 105.055 (2004 Cum.Supp.); N.C. Gen.Stat. Ann. § 126–84 (Lexis 2003); Okla. Stat., Tit. 74, § 840–2.5 *et seq.* (West Supp.2005); Wash. Rev.Code § 42.40.010 (2004); Wyo. Stat. Ann. § 9–11–102 (2003).

10 Idaho Code § 6–2104(1)(a) (Lexis 2004); Me.Rev.Stat. Ann., Tit. 26, § 833(2) (1988); Mass. Gen. Laws, ch. 149, § 185(c)(1) (West 2004); N.H.Rev.Stat. Ann. § 275–E:2(II) (1999); N.J. Stat. Ann. § 34:19–4 (West 2000); N.Y. Civ. Serv. Law Ann. § 75–b(2)(b) (West 1999); Wyo. Stat. Ann. § 9–11–103(b) (2003).

11 Kan. Stat. Ann. § 75–2973(d)(2) (2003 Cum.Supp.); Ky.Rev.Stat. Ann. § 61.102(1) (West 2005); Mo.Rev.Stat. § 105.055(2) (2004 Cum.Supp.); Okla. Stat., Tit. 74, § 840–2.5(B)(4) (West 2005 Supp.); Ore.Rev.Stat. § 659A.203(1)(c) (2003).

12 See n. 4, *supra*.

13 This case comes to the Court on the motions of petitioners for summary judgment, and as such, "[t]he evidence of [Ceballos] is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

14 Sundstedt demoted Ceballos to a trial deputy; his only murder case was reassigned to a junior colleague with no experience in homicide matters, and no new murder cases were assigned to him; then-District Attorney Gil Garcetti, relying in part on Sundstedt's recommendation, denied Ceballos a promotion; finally, Sundstedt and Najera transferred him to the office's El Monte Branch, requiring longer commuting. Before transferring Ceballos, Najera offered him a choice between transferring and remaining at the Pomona Branch prosecuting misdemeanors instead of felonies. When Ceballos refused to choose, Najera transferred him.

15 The county petitioners' position on these claims is difficult to follow or, at least, puzzling. In their motion for summary judgment, they denied that any of their actions was responsive to Ceballos's criticism of the sheriff's affidavit. *E.g.,* App. 159–160, 170–172 (maintaining that Ceballos was transferred to the El Monte Branch because of the decreased workload in the Pomona Branch and because he was next in a rotation to go there to serve as a "filing deputy"); *id.,* at 160, 172–173 (contending that Ceballos's murder case was reassigned to a junior colleague to give that attorney murder trial experience before he was transferred to the Juvenile Division of the District Attorney's Office); *id.,* at 161–162, 173–174 (arguing that Ceballos was denied a promotion by Garcetti despite Sundstedt's stellar review of Ceballos, when Garcetti was unaware of the matter in *People v. Cuskey,* the criminal case for which Ceballos wrote the pertinent disposition memorandum). Their reply to Ceballos's opposition to summary judgment however, shows that petitioners argued for a *Pickering* assessment (for want of a holding that Ceballos was categorically disentitled to any First Amendment protection) giving great weight in their favor to workplace disharmony and distrust caused by Ceballos's actions. *E.g.,* App. 477–478.

127 S.Ct. 2618
Supreme Court of the United States

Deborah MORSE et al., Petitioners,

v.

Joseph FREDERICK.

No. 06–278.
|
Argued March 19, 2007.
|
Decided June 25, 2007.

Synopsis

Background: High school student brought § 1983 action against principal and school board, alleging that his First Amendment rights had been violated by ten day suspension for waving banner at off-campus, school-approved, activity. The United States District Court for the District of Alaska, John W. Sedwick, Chief Judge, granted summary judgment for defendants. Student appealed. The United States Court of Appeals for the Ninth Circuit, 439 F.3d 1114, vacated. Certiorari was granted.

The Supreme Court, Chief Justice Roberts, held that principal did not violate student's right to free speech by confiscating banner she reasonably viewed as promoting illegal drug use.

Reversed and remanded.

Justice Thomas filed concurring opinion.

Justice Alito filed concurring opinion, in which Justice Kennedy joined.

Justice Breyer filed opinion concurring in the judgment in part and dissenting in part.

Justice Stevens filed dissenting opinion, in which Justices Souter and Ginsburg joined.

****2619** ***393** *Syllabus*[*]

At a school-sanctioned and school-supervised event, petitioner Morse, the high school principal, saw students unfurl a banner stating "BONG HiTS 4 JESUS," which she regarded as promoting illegal ****2620** drug use. Consistent with established school policy prohibiting such messages at school events, Morse directed the students to take down the banner. When one of the students who had brought the banner to the event—respondent Frederick—refused, Morse confiscated the banner and later suspended him. The school superintendent upheld the suspension, explaining, *inter alia,* that Frederick was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. Petitioner school board also upheld the suspension. Frederick filed suit under 42 U.S.C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted petitioners summary judgment, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's speech rights. The Ninth Circuit reversed. Accepting that Frederick acted during a school-authorized activity and that the banner expressed a positive sentiment about marijuana use, the court nonetheless found a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption. It also concluded that Morse was not entitled to qualified immunity because Frederick's right to display the banner was so clearly established that a reasonable principal in Morse's position would have understood that her actions were unconstitutional.

Held: Because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick. Pp. 2623 – 2629.

(a) Frederick's argument that this is not a school speech case is rejected. The event in question occurred during normal school hours and was sanctioned by Morse as an approved social event at which the district's student conduct rules expressly applied. Teachers and administrators were among the students and were charged with supervising them. Frederick stood among other students across the street from ***394** the school and directed his banner toward the school, making it plainly visible to most students. Under these circumstances, Frederick cannot claim he was not at school. Pp. 2623 – 2625.

(b) The Court agrees with Morse that those who viewed the banner would interpret it as advocating or promoting

illegal drug use, in violation of school policy. At least two interpretations of the banner's words—that they constitute an imperative encouraging viewers to smoke marijuana or, alternatively, that they celebrate drug use—demonstrate that the sign promoted such use. This pro-drug interpretation gains further plausibility from the paucity of alternative meanings the banner might bear. Pp. 2624 – 2626.

(c) A principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. In *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, the Court declared, in holding that a policy prohibiting high school students from wearing antiwar armbands violated the First Amendment, *id.,* at 504, 89 S.Ct. 733, that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school," *id.,* at 513, 89 S.Ct. 733. The Court in *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549, however, upheld the suspension of a student who delivered a high school assembly speech employing "an elaborate, graphic, and explicit sexual metaphor," ****2621** *id.,* at 678, 106 S.Ct. 3159. Analyzing the case under *Tinker,* the lower courts had found no disruption, and therefore no basis for discipline. 478 U.S., at 679–680, 106 S.Ct. 3159. This Court reversed, holding that the school was "within its permissible authority in imposing sanctions ... in response to [the student's] offensively lewd and indecent speech." *Id.,* at 685, 106 S.Ct. 3159. Two basic principles may be distilled from *Fraser*. First, it demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.,* at 682, 106 S.Ct. 3159. Had Fraser delivered the same speech in a public forum outside the school context, he would have been protected. See *id.,* at 682–683, 106 S.Ct. 3159. In school, however, his First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker, supra,* at 506, 89 S.Ct. 733. Second, *Fraser* established that *Tinker's* mode of analysis is not absolute, since the *Fraser* Court did not conduct the "substantial disruption" analysis. Subsequently, the Court has held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,' ... the nature of those rights is what is appropriate for children in school," *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655–656, 115 S.Ct. 2386, 132 L.Ed.2d 564, and has recognized that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" ***395** interest, *id.,* at 661, 115 S.Ct. 2386. Drug abuse by the Nation's youth is a serious problem. For example, Congress has declared that part of a school's job is educating students about the dangers of drug abuse, see, *e.g.,* the Safe and Drug–Free Schools and Communities Act of 1994, and petitioners and many other schools have adopted policies aimed at implementing this message. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, poses a particular challenge for school officials working to protect those entrusted to their care. The "special characteristics of the school environment," *Tinker,* 393 U.S., at 506, 89 S.Ct. 733, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse. *Id.,* at 508, 509, 89 S.Ct. 733, distinguished. Pp. 2625 – 2629.

439 F.3d 1114, reversed and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 2629. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 2636. BREYER, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 2638. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 2643.

Attorneys and Law Firms

Kenneth W. Starr, Los Angeles, CA, for petitioners.

Edwin S. Kneedler, for the United States as amicus curiae, by special leave of the Court, supporting petitioners.

Kenneth W. Starr, Counsel of Record, Rick Richmond, Eric W. Hagen, Kirkland & Ellis LLP, Los Angeles, CA, for Petitioners.

Steven R. Shapiro, Catherine N. Crump, ACLU Foundation, Jonathan B. Miller, New York, New York, Douglas K. Mertz, Counsel of Record, Mertz Law Office, Juneau, Alaska, Jason Brandeis, ACLU of Alaska Foundation, Anchorage, Alaska, for Respondent.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***396** At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive ***397** with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment,' " *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Tinker, supra,* at 506, 89 S.Ct. 733). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau–Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22–23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14–foot banner bearing the phrase: "BONG HiTS 4 JESUS." App. to Pet. for Cert. 70a. The large banner was easily readable by the students on the other side of the street.

***398** Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she ****2623** thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors ...." *Id.,* at 53a. In addition, Juneau School Board Policy No. 5850 subjects "[p]upils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program. *Id.,* at 58a.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (eight days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." *Id.,* at 63a. He further explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs." *Id.,* at 61a.

The superintendent continued:

> "The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst ***399** of a school activity, for the benefit of television cameras covering

> the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use." *Id.,* at 61a–62a.

Relying on our decision in *Fraser, supra,* the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." App. to Pet. for Cert. 62a (internal quotation marks omitted). The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U.S.C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." App. to Pet. for Cert. 36a–38a. Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity." *Id.,* at 37a.

The Ninth Circuit reversed. Deciding that Frederick acted during a "school-authorized activit[y]," and "proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court nonetheless found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption." 439 F.3d 1114, 1118, 1121–1123 (2006). The court further concluded that Frederick's ****2624** right to display his banner was ***400** so "clearly established" that a reasonable principal in Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity. *Id.,* at 1123–1125.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. 549 U.S. 1075, 127 S.Ct. 722, 166 L.Ed.2d 559 (2006). We resolve the first question against Frederick, and therefore have no occasion to reach the second.[1]

II

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. See App. 22–23 (Principal Morse); App. to Pet. for Cert. 63a (superintendent); *id.,* at 69a (school board); *id.,* at 34a–35a (District Court); 439 F.3d, at 1117 (Ninth Circuit). The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," App. 22–23, and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for ***401** student conduct," App. to Pet. for Cert. 58a. Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Id.,* at 63a. There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, see *Porter v. Ascension Parish School Bd.,* 393 F.3d 608, 615, n. 22 (C.A.5 2004), but not on these facts.

III

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." 439 F.3d, at 1117–1118. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be ****2625** widely understood by high school students and others as referring to smoking marijuana." App. 24. She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"—in violation of school policy.

Id., at 25; see *ibid.* ("I told Frederick and the other members of his group to put the banner down because I felt that it violated the [school] policy against displaying ... material that advertises or promotes use of illegal drugs").

***402** We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits ..."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. See *Guiles v. Marineau,* 461 F.3d 320, 328 (C.A.2 2006) (discussing the present case and describing the sign as "a clearly pro-drug banner").

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." 439 F.3d, at 1116. The dissent similarly refers to the sign's message as "curious," *post,* at 2643 (opinion of STEVENS, J.), "ambiguous," *ibid.,* "nonsense," *post,* at 2644, "ridiculous," *post,* at 2646, "obscure," *post,* at 2646, "silly," *post,* at 2649, "quixotic," *ibid.,* and "stupid," *ibid.* Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." *Post,* at 2649. But that is a description of Frederick's *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue," *post,* at 2651, as if to suggest ***403** that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, see *post,*at 2650 – 2651, this is plainly not a case about political debate over the criminalization of drug use or possession.

IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker,* this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S., at 506, 89 S.Ct. 733. *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students ****2626** nonetheless wore armbands to school, they were suspended. *Id.,* at 504, 89 S.Ct. 733. The students sued, claiming that their First Amendment rights had been violated, and this Court agreed.

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.,* at 513, 89 S.Ct. 733. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id.,* at 514, 89 S.Ct. 733. Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black,* 538 U.S. 343, 365, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (plurality opinion). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid ***404** the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker,* 393 U.S., at 509, 510, 89 S.Ct. 733. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.,* at 508, 89 S.Ct. 733.

This Court's next student speech case was *Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." *Id.,* at 678,

106 S.Ct. 3159. Analyzing the case under *Tinker,* the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. 478 U.S., at 679–680, 106 S.Ct. 3159. This Court reversed, holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.,* at 685, 106 S.Ct. 3159.

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." *Id.,* at 680, 106 S.Ct. 3159. But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate." *Id.,* at 683, 106 S.Ct. 3159. Cf. *id.,* at 689, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express").

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other ***405** settings." *Id.,* at 682, 106 S.Ct. 3159. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. See *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Fraser, supra,* at 682–683, 106 S.Ct. 3159. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school ****2627** environment." *Tinker, supra,* at 506, 89 S.Ct. 733. Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker, supra,* at 514, 89 S.Ct. 733. See *Kuhlmeier,* 484 U.S., at 271, n. 4, 108 S.Ct. 562 (disagreeing with the proposition that there is "no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser,*" and noting that the holding in *Fraser* was not based on any showing of substantial disruption).

Our most recent student speech case, *Kuhlmeier,* concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S., at 271, 108 S.Ct. 562. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under *Tinker,* ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1375 (C.A.8 1986). This Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier,* 484 U.S., at 273, 108 S.Ct. 562.

Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged ***406** that schools may regulate some speech "even though the government could not censor similar speech outside the school." *Id.,* at 266, 108 S.Ct. 562. And, like *Fraser,* it confirms that the rule of *Tinker* is not the only basis for restricting student speech.[2]

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,' ... the nature of those rights is what is appropriate for children in school." *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655–656, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (quoting *Tinker, supra*, at 506, 89 S.Ct. 733). In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey v. T.L. O.,* 469 U.S. 325, 340, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). See *Vernonia, supra,* at 656, 115 S.Ct. 2386 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere ..."); *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls,* 536 U.S. 822, 829–830, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (" 'special needs' inhere in the public school context"; ****2628** "[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights ... are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children") (quoting *Vernonia,* 515 U.S., at 656, 115 S.Ct. 2386; citation and some internal quotation marks omitted)).

***407** Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. *Id.,* at 661, 115 S.Ct. 2386. Drug abuse can cause severe and permanent damage to the health and well-being of young people:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.,* at 661–662[, 115 S.Ct. 2386] (citations and internal quotation marks omitted).

Just five years ago, we wrote: "The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse." *Earls, supra,* at 834, and n. 5, 122 S.Ct. 2559.

The problem remains serious today. See generally 1 National Institute on Drug Abuse, National Institutes of Health, Monitoring the Future: National Survey Results on Drug Use, 1975–2005, Secondary School Students (2006). About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. *Id.,* at 99. Nearly one in four 12th graders has used an illicit drug in the past month. *Id.,* at 101. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Youth Risk Behavior Surveillance—United States, 2005, 55 Morbidity and Mortality Weekly Report, Surveillance Summaries, No. SS–5, p. 19 (June 9, 2006).

***408** Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, Brief for United States as *Amicus Curiae* 1, and required that schools receiving federal funds under the Safe and Drug–Free Schools and Communities Act of 1994 certify that their drug-prevention programs "convey a clear and consistent message that ... the illegal use of drugs [is] wrong and harmful," 20 U.S.C. § 7114(d)(6) (2000 ed., Supp. IV).

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. See Pet. for Cert. 17–21. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. *Earls, supra,* at 840, 122 S.Ct. 2559 (BREYER, J., concurring). Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

****2629** The "special characteristics of the school environment," *Tinker,* 393 U.S., at 506, 89 S.Ct. 733, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.,* at 508, 509, 89 S.Ct. 733. The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, App. 92–95; App. to Pet. ***409** for Cert. 53a, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. See Reply Brief for Petitioners 14–15. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing "serious violence to the First Amendment" by authorizing "viewpoint discrimination," *post,* at 2644, 2645, the dissent concludes that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting," *post,* at 2646. Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting "imminent" lawless action. See *post,* at 2646 ("[I]t

is possible that our rigid imminence requirement ought to be relaxed at schools"). And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. See *post,* at 2643. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

* * *

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled ***410** his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

The Court today decides that a public school may prohibit speech advocating illegal ****2630** drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), is without basis in the Constitution.

I

The First Amendment states that "Congress shall make no law ... abridging the freedom of speech." As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech; instead, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); see also *Cox v. Louisiana,* 379 U.S. 536, 554, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student ***411** speech in public schools. Although colonial schools were exclusively private, public education proliferated in the early 1800's. By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. W. Reese, America's Public Schools: From the Common School to "No Child Left Behind" 11–12 (2005) (hereinafter Reese). If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them.[1] They did not.

A

During the colonial era, private schools and tutors offered the only educational opportunities for children, and teachers managed classrooms with an iron hand. R. Butts & L. Cremin, A History of Education in American Culture 121, 123 (1953) (hereinafter Butts). Public schooling arose, in part, as a way to educate those too poor to afford private schools. See Kaestle & Vinovskis, From Apron Strings to ABCs: Parents, Children, and Schooling in Nineteenth–Century Massachusetts, 84 Am. J. Sociology S39, S49 (Supp.1978). Because public schools were initially created as substitutes for private schools, when States developed public education systems in the early 1800's, no one doubted the government's ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled "a core of common values" in students and taught them self-control. Reese 23; A. Potter & G. Emerson, The School and ***412** the Schoolmaster: A Manual 125 (1843) ("By its discipline it contributes, insensibly, to generate a spirit of subordination to lawful authority, a power of self-control, and a habit of postponing present indulgence to a greater future good ..."); D. Parkerson & J. Parkerson, The Emergence of the Common School in the U.S. Countryside 6 (1998) (hereinafter Parkerson) (noting that early education activists,

such as Benjamin Rush, believed public schools "help[ed] control the innate selfishness of the individual").

Teachers instilled these values not only by presenting ideas but also through ****2631** strict discipline. Butts 274–275. Schools punished students for behavior the school considered disrespectful or wrong. Parkerson 65 (noting that children were punished for idleness, talking, profanity, and slovenliness). Rules of etiquette were enforced, and courteous behavior was demanded. Reese 40. To meet their educational objectives, schools required absolute obedience. C. Northend, The Teacher's Assistant or Hints and Methods in School Discipline and Instruction 44, 52 (1865) ("I consider a school judiciously governed, where order prevails; where the strictest sense of propriety is manifested by the pupils towards the teacher, and towards each other ..." (internal quotation marks omitted)).[2]

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.

***413** B

Through the legal doctrine of *in loco parentis,* courts upheld the right of schools to discipline students, to enforce rules, and to maintain order.[3] Rooted in the English common law, *in loco parentis* originally governed the legal rights and obligations of tutors and private schools. 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed"). Chancellor James Kent noted the acceptance of the doctrine as part of American law in the early 19th century. 2 J. Kent, Commentaries on American Law *205, *206–*207 ("So the power allowed by law to the parent over the person of the child may be delegated to a tutor or instructor, the better to accomplish the purpose of education").

As early as 1837, state courts applied the *in loco parentis* principle to public schools:

> "One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and ***414** to reform bad habits .... The teacher is the substitute of the parent; ... and in the exercise of these delegated duties, ****2632** is invested with his power." *State v. Pendergrass,* 19 N.C. 365, 365–366 (1837).

Applying *in loco parentis,* the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order. *Sheehan v. Sturges,* 53 Conn. 481, 483–484, 2 A. 841, 842 (1885). Thus, in the early years of public schooling, schools and teachers had considerable discretion in disciplinary matters:

> "To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power .... He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board." *Patterson v. Nutter,* 78 Me. 509, 511, 7 A. 273, 274 (1886).[4]

A review of the case law shows that *in loco parentis* allowed schools to regulate student speech as well. Courts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals. For example, the Vermont Supreme Court upheld the corporal punishment of a student who called his teacher *"Old Jack Seaver"* in ***415** front of other students. *Lander v. Seaver,* 32 Vt. 114, 115 (1859). The court explained its decision as follows:

> "[L]anguage used to other scholars to stir up disorder and subordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school; all such or similar acts tend directly to impair the usefulness of the school, the welfare of the scholars and the authority of the master. By common consent and by the universal custom in our New England schools, the master has always been deemed to have the right to punish such offences. Such power is essential to the preservation of order, decency, decorum and good government in schools." *Id.,* at 121.

Similarly, the California Court of Appeal upheld the expulsion of a student who gave a speech before the student body that criticized the administration for having an unsafe building "because of the possibility of fire." *Wooster v. Sunderland,* 27 Cal.App. 51, 52, 148 P. 959 (1915). The punishment was appropriate, the court stated, because the speech "was intended to discredit and humiliate the board in the eyes of the students, and tended to impair the discipline of the school." *Id.,* at 55, 148 P., at 960. Likewise, the Missouri Supreme Court explained that a "rule which forbade the use of profane language [and] quarrelling" "was not only reasonable, but necessary to the orderly conduct of the school." *Deskins v. Gose,* 85 Mo. 485, 487, 488 (1885). And the Indiana Supreme Court upheld the punishment of a student who made distracting demonstrations in class for "a breach of good deportment." *Vanvactor v. State,* 113 Ind. 276, 281, 15 N.E. 341, 343 (1888).[5]

**2633 *416 The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way. It merely limited the imposition of excessive physical punishment. In this area, the case law was split. One line of cases specified that punishment was wholly discretionary as long as the teacher did not act with legal malice or cause permanent injury. *E.g., Boyd v. State,* 88 Ala. 169, 170–172, 7 So. 268, 269 (1890) (allowing liability where the "punishment inflicted is immoderate, or excessive, and ... it was induced by legal *malice*, or wickedness of motive"). Another line allowed courts to intervene where the corporal punishment was "*clearly* excessive." *E.g., Lander, supra,* at 124. Under both lines of cases, courts struck down only punishments that were excessively harsh; they almost never questioned the substantive restrictions on student conduct set by teachers and schools. *E.g., Sheehan, supra,* at 483–484, 2 A., at 842; *Gardner v. State,* 4 Ind. 632, 635 (1853); *Anderson v. State,* 40 Tenn. 455, 456 (1859); *Hardy v. James,* 5 Ky. Op. 36 (1872).[6]

II

Tinker effected a sea change in students' speech rights, extending them well beyond traditional bounds. The case *417 arose when a school punished several students for wearing black armbands to school to protest the Vietnam War. 393 U.S., at 504, 89 S.Ct. 733. Determining that the punishment infringed the students' First Amendment rights, this Court created a new standard for students' freedom of speech in public schools:

> "[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." *Id.,* at 509[, 89 S.Ct. 733] (internal quotation marks omitted).

Accordingly, unless a student's speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable. *Ibid.* ("[The school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

Justice Black dissented, criticizing the Court for "subject[ing] all the public **2634 schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.,* at 525, 89 S.Ct. 733. He emphasized the instructive purpose of schools: "[T]axpayers send children to school on the premise that at their age they need to learn, not teach." *Id.,* at 522, 89 S.Ct. 733. In his view, the Court's decision "surrender[ed] control of the American public school system to public school students." *Id.,* at 526, 89 S.Ct. 733.

Of course, *Tinker's* reasoning conflicted with the traditional understanding of the judiciary's role in relation to public schooling, a role limited by *in loco parentis*. Perhaps for that reason, the Court has since scaled back *Tinker's* standard, or rather set the standard aside on an ad hoc basis. In *418 *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 677, 678, 106 S.Ct. 3159, 92 L.Ed.2d 549 1986), a public school suspended a student for delivering a speech that contained "an elaborate, graphic, and explicit sexual metaphor." The Court of Appeals found that the speech caused no disruption under the *Tinker* standard, and this Court did not question that holding. 478 U.S., at 679–680, 106 S.Ct. 3159. The Court nonetheless permitted the school to punish the student because of the objectionable content of his speech. *Id.,* at 685, 106 S.Ct. 3159 ("A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students"). Signaling at least a partial break with *Tinker, Fraser* left the regulation of indecent student speech to local schools.[7] 478 U.S., at 683, 106 S.Ct. 3159.

Similarly, in *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), the Court

made an exception to *Tinker* for school-sponsored activities. The Court characterized newspapers and similar school-sponsored activities "as part of the school curriculum" and held that "[e]ducators are entitled to exercise greater control over" these forms of student expression. 484 U.S., at 271, 108 S.Ct. 562. Accordingly, the Court expressly refused to apply *Tinker's* standard. 484 U.S., at 272–273, 108 S.Ct. 562. Instead, for school-sponsored activities, the Court created a new standard that permitted school regulations of student speech that are "reasonably related to legitimate pedagogical concerns." *Id.,* at 273, 108 S.Ct. 562.

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker,* but we neither overrule it nor offer an explanation of when it operates and when it does not. *Ante,* at 2626 – 2629. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the ***419** Constitution does not afford students a right to free speech in public schools.

III

In light of the history of American public education, it cannot seriously be suggested that the First Amendment "freedom of speech" encompasses a student's right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect ****2635** from students. And courts routinely deferred to schools' authority to make rules and to discipline students for violating those rules. Several points are clear: (1) Under *in loco parentis,* speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.

It might be suggested that the early school speech cases dealt only with slurs and profanity. But that criticism does not withstand scrutiny. First, state courts repeatedly reasoned that schools had discretion to impose discipline to maintain order. The substance of the student's speech or conduct played no part in the analysis. Second, some cases involved punishment for speech on weightier matters, for instance a speech criticizing school administrators for creating a fire hazard. See *Wooster,* 27 Cal.App., at 52–53, 148 P., at 959. Yet courts refused to find an exception to *in loco parentis* even for this advocacy of public safety.

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. Cf. ***420** *Hamilton v. Regents of Univ. of Cal.,* 293 U.S. 245, 262, 55 S.Ct. 197, 79 L.Ed. 343 1934) ("California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course ..."); *id.,* at 266, 55 S.Ct. 197 (Cardozo, J., concurring). If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment.[8] Instead, it imposed ****2636** a new and malleable standard: Schools could not inhibit student speech unless it "substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." 393 U.S., at 509, 89 S.Ct. 733 (internal quotation marks omitted). Inherent ***421** in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. See *id.,* at 517–518, 89 S.Ct. 733 (Black, J., dissenting) (arguing that the armbands in fact caused a disruption). Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.

And because *Tinker* utterly ignored the history of public education, courts (including this one) routinely find it necessary to create ad hoc exceptions to its central premise. This doctrine of exceptions creates confusion without fixing the underlying problem by returning to first principles. Just as I cannot accept *Tinker's* standard, I cannot subscribe to *Kuhlmeier's* alternative. Local school boards, not the courts, should determine what pedagogical interests are "legitimate"

and what rules "reasonably relat[e]" to those interests. 484 U.S., at 273, 108 S.Ct. 562.

Justice Black may not have been "a prophet or the son of a prophet," but his dissent in *Tinker* has proved prophetic. 393 U.S., at 525, 89 S.Ct. 733. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools. "Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools." Dupre, Should Students Have Constitutional Rights? Keeping Order in the Public Schools, 65 Geo. Wash. L.Rev. 49, 50 (1996). We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either "[g]ibberish," *ante,* at 2625, or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to "surrender control of the American public school system to public school students." *Tinker, supra,* at 526, 89 S.Ct. 733 (Black, J., dissenting).

* * *

***422** I join the Court's opinion because it erodes *Tinker's* hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

Justice ALITO, with whom Justice KENNEDY joins, concurring.

I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." See *post,* at 2649 (STEVENS, J., dissenting).

The opinion of the Court correctly reaffirms the recognition in *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), of the fundamental principle that students do not "shed their constitutional rights to freedom of speech ****2637** or expression at the schoolhouse gate." The Court is also correct in noting that *Tinker,* which permits the regulation of student speech that threatens a concrete and "substantial disruption," *id.,* at 514, 89 S.Ct. 733, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.

But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to *Tinker,* the decision in the present case allows the restriction of speech advocating illegal drug use; *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as ***423** part of a high school program; and *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." See Brief for Petitioners 21; Brief for United States as *Amicus Curiae* 6. This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The "educational

mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

***424** The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental ****2638** actors standing *in loco parentis*.

For these reasons, any argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.

***425** In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. See *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)*. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker's* "substantial disruption" standard permits school officials to step in before actual violence erupts. See 393 U.S., at 508–509, 89 S.Ct. 733.

Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

JUSTICE BREYER, concurring in the judgment in part and dissenting in part.

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more.

I

Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. In part that is because the question focuses upon specific content narrowly defined: May a school board punish students for speech that advocates drug use and, if so, when? At the same time, the underlying facts suggest that Principal Morse acted as she did not simply because of the specific content ***426** and viewpoint of Joseph Frederick's speech but also because of the surrounding context and manner in which Frederick expressed his views. To say that school officials might reasonably prohibit students during school-related events from unfurling 14–foot banners (with any kind of irrelevant or inappropriate message) designed to attract attention from television cameras seems unlikely to undermine basic First Amendment principles. But to hold, as the Court does, that "schools may take steps to safeguard those entrusted to ****2639** their care from speech that can reasonably be regarded as encouraging illegal drug use" (and that "schools" may "restrict student expression that they reasonably regard as promoting illegal drug use") is quite a different matter. *Ante,* at 2622, 2629. This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.

One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court's rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging *illegal* drug use." *Ante,* at 2622 (emphasis added). But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

Legal principles must treat like instances alike. Those principles do not permit treating "drug use" separately without a satisfying explanation of why drug use is *sui generis*. ***427** To say that illegal drug use is harmful to students, while surely true, does not itself constitute a satisfying explanation because there are many such harms. During a real war, one less metaphorical than the war on drugs, the Court declined an opportunity to draw narrow subject-matter-based lines. Cf. *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (holding students cannot be compelled to recite the Pledge of Allegiance during World War II). We should decline this opportunity today.

Although the dissent avoids some of the majority's pitfalls, I fear that, if adopted as law, it would risk significant interference with reasonable school efforts to maintain discipline. What is a principal to do when a student unfurls a 14–foot banner (carrying an irrelevant or inappropriate message) during a school-related event in an effort to capture the attention of television cameras? Nothing? In my view, a principal or a teacher might reasonably view Frederick's conduct, in this setting, as simply beyond the pale. And a school official, knowing that adolescents often test the outer boundaries of acceptable behavior, may believe it is important (for the offending student and his classmates) to establish when a student has gone too far.

Neither can I simply say that Morse may have taken the right action (confiscating Frederick's banner) but for the wrong reason ("drug speech"). Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence. As the majority rightly points out, the circumstances here called for a quick decision. See *ante,* at 2629 (noting that "Morse had to decide to act—or not act—on the spot"). But this consideration is better understood in terms of qualified immunity than of the First Amendment. See *infra,* at 2623 – 2626.

All of this is to say that, regardless of the outcome of the constitutional determination, a decision on the underlying First Amendment issue is both difficult and unusually portentous. ***428** And that is a reason ****2640** for us *not to decide* the issue unless we must.

In some instances, it is appropriate to decide a constitutional issue in order to provide "guidance" for the future. But I cannot find much guidance in today's decision. The Court makes clear that school officials may "restrict" student speech that promotes "illegal drug use" and that they may "take steps" to "safeguard" students from speech that encourages "illegal drug use." *Ante,* at 2622, 2625. Beyond "steps" that prohibit the unfurling of banners at school outings, the Court does not explain just what those "restrict[ions]" or those "steps" might be.

Nor, if we are to avoid the risk of interpretations that are too broad or too narrow, is it easy to offer practically valuable guidance. Students will test the limits of acceptable behavior in myriad ways better known to schoolteachers than to judges; school officials need a degree of flexible authority to respond to disciplinary challenges; and the law has always considered the relationship between teachers and students special. Under these circumstances, the more detailed the Court's supervision becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse. Yet no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.

In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of "qualified immunity." See Pet. for Cert. 23–28. The principle of qualified immunity fits this case perfectly and, by saying so, we would diminish the risk of bringing about the adverse consequences I have identified. More importantly,

we should also adhere to a basic constitutional obligation by avoiding unnecessary decision of constitutional questions. See *Ashwander v.* ***429** *TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

II

A

The defense of "qualified immunity" requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The defense is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

Qualified immunity applies here and entitles Principal Morse to judgment on Frederick's monetary damages claim because she did not clearly violate the law during her confrontation with the student. At the time of that confrontation, *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), indicated that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not "materially and substantially disrupt the work and discipline of the school"; *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), indicated that school officials could restrict a student's freedom to give a ****2641** school assembly speech containing an elaborate sexual metaphor; and *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), indicated that school officials could restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption. None of these cases clearly governs the case at hand.

The Ninth Circuit thought it "clear" that these cases did not permit Morse's actions. See 439 F.3d 1114, 1124 (2006). That is because, in the Ninth Circuit's view, this case involved ***430** neither lewd speech, cf. *Fraser, supra,* nor school–sponsored speech, cf. *Kuhlmeier, supra,* and hence *Tinker's* substantial disruption test must guide the inquiry. See 439 F.3d, at 1123. But unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply. See, *e.g., Guiles v. Marineau,* 461 F.3d 320, 326 (C.A.2 2006) ("It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser,* or whether it applies only to political speech or to political viewpoint-based discrimination"); *Baxter v. Vigo Cty. School Corp.,* 26 F.3d 728, 737 (C.A.7 1994) (pointing out that *Fraser* "cast some doubt on the extent to which students retain free speech rights in the school setting"). Indeed, the fact that this Court divides on the constitutional question (and that the majority reverses the Ninth Circuit's constitutional determination) strongly suggests that the answer as to how to apply prior law to these facts was unclear.

The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid "order of battle" decisionmaking requirement that this Court imposed upon lower courts in *Saucier v. Katz,* 533 U.S. 194, 201–202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). In *Saucier,* the Court wrote that lower courts' "first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Id.,* at 200, 121 S.Ct. 2151. Only if there is a constitutional violation can lower courts proceed to consider whether the official is entitled to "qualified immunity." See *ibid.*

I have previously explained why I believe we should abandon *Saucier's* order-of-battle rule. See *Scott v. Harris,* 550 U.S. 372, 387 – 389, 127 S.Ct. 1769, 1780–1781, 167 L.Ed.2d 666 (2007) (concurring opinion); *Brosseau v. Haugen,* 543 U.S. 194, 201–202, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (same). Sometimes the rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitutional ***431** issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should "not ... pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944).

This last point warrants amplification. In resolving the underlying constitutional question, we produce several differing opinions. It is utterly unnecessary to do so. Were we

to decide this case on the ground of qualified immunity, our decision would be *unanimous,* for the dissent concedes that Morse should not be held liable in damages for confiscating Frederick's banner. *Post,* at 2643 (opinion of STEVENS, J.). And the "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to ****2642** decide more." *PDK Labs., Inc. v. Drug Enforcement Admin.,* 362 F.3d 786, 799 (C.A.D.C.2004) (Roberts, J., concurring in part and concurring in judgment).

If it is *Saucier* that tempts this Court to adhere to the rigid "order of battle" that binds lower courts, it should resist that temptation. *Saucier* does not bind this Court. Regardless, the rule of *Saucier* has generated considerable criticism from both commentators and judges. See Leval, Judging Under the Constitution: Dicta About Dicta, 81 N. Y. U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane v. Brookline Police Dept.,* 315 F.3d 65, 69–70 (C.A.1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed"); *Lyons v. Xenia,* 417 F.3d 565, 580–584 (C.A.6 2005) (Sutton, J., concurring). While *Saucier* justified its rule by contending that it was necessary to permit constitutional law to develop, see 533 U.S., at 201, 121 S.Ct. 2151, this concern is overstated because overruling *Saucier* would not mean that the law *prohibited* judges ***432** from passing on constitutional questions, only that it did not *require* them to do so. Given that *Saucier* is a judge-made procedural rule, *stare decisis* concerns supporting preservation of the rule are weak. See, *e.g., Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules").

Finally, several Members of this Court have previously suggested that *always* requiring lower courts first to answer constitutional questions is misguided. See *County of Sacramento v. Lewis,* 523 U.S. 833, 859, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (STEVENS, J., concurring in judgment) (resolving the constitutional question first is inappropriate when that "question is both difficult and unresolved"); *Bunting v. Mellen,* 541 U.S. 1019, 1025, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (SCALIA, J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review ... or else drop any pretense at requiring the ordering in every case"); *Saucier, supra,* at 210, 121 S.Ct. 2151 (GINSBURG, J., concurring in judgment) ("The two-part test today's decision imposes holds large potential to confuse"); *Siegert v. Gilley,* 500 U.S. 226, 235, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (KENNEDY, J., concurring in judgment) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first"). I would end the failed *Saucier* experiment now.

B

There is one remaining objection to deciding this case on the basis of qualified immunity alone. The plaintiff in this case has sought not only damages; he has also sought an injunction requiring the school district to expunge his suspension from its records. A "qualified immunity" defense applies in respect to damages actions, but not to injunctive relief. See, *e.g.,* ***433** *Wood v. Strickland,* 420 U.S. 308, 314, n. 6, 95 S.Ct. 992, 43 L.Ed.2d 214 1975). With respect to that claim, the underlying question of constitutionality, at least conceivably, remains.

I seriously doubt, however, that it does remain. At the plaintiff's request, the school superintendent reviewed Frederick's 10–day suspension. The superintendent, ****2643** in turn, reduced the suspension to the eight days that Frederick had served before the appeal. But in doing so the superintendent noted that several actions independent of Frederick's speech supported the suspension, including the plaintiff's disregard of a school official's instruction, his failure to report to the principal's office on time, his "defiant [and] disruptive behavior," and the "belligerent attitude" he displayed when he finally reported. App. to Pet. for Cert. 65a. The superintendent wrote that "were" he to "concede" that Frederick's "speech ... is protected ..., the remainder of his behavior was not excused." *Id.,* at 66a.

The upshot is that the school board's refusal to erase the suspension from the record may well be justified on non-speech-related grounds. In addition, plaintiff's counsel appeared to agree with the Court's suggestion at oral argument that Frederick "would not pursue" injunctive relief if he prevailed on the damages question. Tr. of Oral Arg. 46–48. And finding that Morse was entitled to qualified immunity would leave only the question of injunctive relief.

Given the high probability that Frederick's request for an injunction will not require a court to resolve the constitutional issue, see *Ashwander,* 297 U.S., at 347, 56 S.Ct. 466 (Brandeis, J., concurring), I would decide only the qualified immunity question and remand the rest of the case for an initial consideration.

Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau–Douglas High School (JDHS). On January ***434** 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message—"BONG HiTS 4 JESUS"—to his fellow students. He just wanted to get the camera crews' attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14–foot banner, even if it had merely proclaimed "Glaciers Melt!"

I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. See *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," *ante,* at 2622, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, see *ante,* at 2625 – 2628; and second, that deterring drug use by schoolchildren is a valid and terribly important interest, see *ante,* at 2627 – 2629. As to the first, I take the Court's point that the message on Frederick's banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS' rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to ****2644** minors." App. to Pet. for Cert. 53a. But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student ***435** speech that was never meant to persuade anyone to do anything.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed.

I

In December 1965, we were engaged in a controversial war, a war that "divided this country as few other issues ever have." *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 524, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (Black, J., dissenting). Having learned that some students planned to wear black armbands as a symbol of opposition to the country's involvement in Vietnam, officials of the Des Moines public school district adopted a policy calling for the suspension of any student who refused to remove the armband. As we explained when we considered the propriety of that policy, "[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.,* at 508, 89 S.Ct. 733. The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment. *Id.,* at 509, 89 S.Ct. 733 (internal quotation marks omitted).

Justice Harlan dissented, but not because he thought the school district could censor a message with which it disagreed. ***436** Rather, he would have upheld the district's rule only because the students never cast doubt on the district's antidisruption justification by proving that the rule was motivated "by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion." *Id.,* at 526, 89 S.Ct. 733.

Two cardinal First Amendment principles animate both the Court's opinion in *Tinker* and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> "Discrimination against speech because of its message is presumed to be unconstitutional .... When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828–829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (citation omitted).

****2645** Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg v. Ohio,* 395 U.S. 444, 449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)* (distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action").

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality. 393 U.S., at 509, 89 S.Ct. 733 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was ***437** caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained" (internal quotation marks omitted)). As other federal courts have long recognized, under *Tinker,*

> "regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. ... *Tinker* requires a specific and significant fear of disruption, *not just some remote apprehension of disturbance*." *Saxe v. State College Area School Dist.,* 240 F.3d 200, 211 (C.A.3 2001) (Alito, J.) (emphasis added).

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. See *ante,* at 2629 ("[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use"). The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner, see App. 25—a viewpoint, incidentally, that Frederick has disavowed, see *id.,* at 28. Unlike our recent decision in *Tennessee Secondary School Athletic Assn. v. Brentwood Academy, ante*, at 296, 127 S.Ct. 2489, 2493, 168 L.Ed.2d 166, 2007 WL 1773196 (plurality opinion), see also *ante,* at 2637 –2638 (ALITO, J., concurring), the Court's holding in this case strikes at "the heart of the First Amendment" because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint. "If there is a bedrock principle underlying the First Amendment, ***438** it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

It is also perfectly clear that "promoting illegal drug use," *ante,* at 2629, comes nowhere close to proscribable "incitement to imminent lawless action." *Brandenburg,* 395 U.S., at 449, 89 S.Ct. 1827. Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship:

> "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. ... Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the ****2646** advocacy would be immediately acted on." *Whitney v. California,* 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) (footnote omitted).

No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, "ha[s] no chance of starting a present conflagration." *Gitlow v. New York,* 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (dissenting opinion).

II

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment ***439** finds no support in our case law and is inimical to the values protected by the First Amendment.[1] See *infra,* at 2650 – 2651.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on "any assembly or public expression that ... advocates the use of substances that are illegal to minors ...." App. to Pet. for Cert. 53a. Given that the relationship between schools and students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while conventional speech may be restricted only when likely to "incit[e] ... imminent lawless action," *Brandenburg,* 395 U.S., at 449, 89 S.Ct. 1827, it is possible that our rigid imminence requirement ought to be relaxed at schools. See *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

But it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively —and not very reasonably—thinks is tantamount to express advocacy. Cf. *Masses Pub. Co. v. Patten,* 244 F. 535, 540, 541 (S.D.N.Y.1917) (Hand, J.) (distinguishing sharply between "agitation, legitimate as such," and "the direct advocacy" of unlawful conduct). Even the school recognizes the paramount need to hold the line between, on the one hand, nondisruptive speech that merely expresses a viewpoint that is unpopular or contrary to the school's preferred message, and on the other hand, advocacy of an illegal or unsafe course of ***440** conduct. The district's prohibition of drug advocacy is a gloss on a more general rule that is otherwise quite tolerant of nondisruptive student speech:

> "Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.
>
> "The Board will not permit the conduct on school premises of any willful ****2647** activity ... that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors ...." App. to Pet. for Cert. 53a; see also *ante,* at 2623 (opinion of the Court) (quoting rule in part).

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willful[ly]" infringed on anyone's rights or interfered with any of the school's educational programs.[2] On its face, then, the rule gave Frederick wide berth "to express [his] ideas and opinions" so long as they did not amount to "advoca[cy]" of drug use. App. to Pet. for Cert. 53a. If the school's rule is, by hypothesis, a valid one, it is valid only insofar as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that "sweep[s] in a great variety of conduct under a general and indefinite characterization" may not leave "too wide a discretion in its ***441** application." *Cantwell v. Connecticut,* 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

But instead of demanding that the school make such a showing, the Court punts. Figuring out just *how* it punts is tricky; "[t]he mode of analysis [it] employ[s] ... is not entirely clear," see *ante,* at 2626. On occasion, the Court suggests it is deferring to the principal's "reasonable" judgment that Frederick's sign qualified as drug advocacy.[3] At other times, the Court seems to say that *it* thinks the banner's message constitutes express advocacy.[4] Either way, its approach is indefensible.

To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or

otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, see ***442** *Brandenburg,* 395 U.S., at 447–448, 89 S.Ct. 1827, yet would permit a listener's ****2648** perceptions to determine which speech deserved constitutional protection.[5]

Such a peculiar doctrine is alien to our case law. In *Abrams v. United States,* 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919), this Court affirmed the conviction of a group of Russian "rebels, revolutionists, [and] anarchists," *id*., at 617–618, 40 S.Ct. 17 (internal quotation marks omitted), on the ground that the leaflets they distributed were thought to "incite, provoke and encourage resistance to the United States," *id.,* at 617, 40 S.Ct. 17 (internal quotation marks omitted). Yet Justice Holmes' dissent—which has emphatically carried the day—never inquired into the reasonableness of the United States' judgment that the leaflets would likely undermine the war effort. The dissent instead ridiculed that judgment: "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." *Id.,* at 628, 40 S.Ct. 17. In *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (opinion for the Court by Rutledge, J.), we overturned the conviction of a union organizer who violated a restraining order prohibiting him from exhorting workers. In so doing, we held that the distinction between advocacy and incitement could not depend on how one of those workers might have understood the organizer's speech. That would "pu[t] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may ***443** be drawn as to his intent and meaning." *Id*., at 535, 65 S.Ct. 315. In *Cox v. Louisiana,* 379 U.S. 536, 543, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), we vacated a civil rights leader's conviction for disturbing the peace, even though a Baton Rouge sheriff had "deem[ed]" the leader's "appeal to ... students to sit in at the lunch counters to be 'inflammatory.' " We never asked if the sheriff's in-person, on-the-spot judgment was "reasonable." Even in *Fraser,* we made no inquiry into whether the school administrators reasonably thought the student's speech was obscene or profane; we rather satisfied ourselves that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person." 478 U.S., at 683, 106 S.Ct. 3159. Cf. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" (internal quotation marks omitted)).[6]

****2649** ***444** To the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use—in other words, that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that. *Ante,* at 2625 (positing that the banner might mean, alternatively, " '[Take] bong hits,' " " 'bong hits [are a good thing],' " or " '[we take] bong hits' "). Frederick's credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything.[7] But most importantly, it takes real imagination to read a "cryptic" message (the Court's characterization, not mine, see *ante,* at 2624 – 2625) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Even if advocacy could somehow be wedged into Frederick's obtuse reference to marijuana, that advocacy was at best subtle and ambiguous. There is abundant precedent, including another opinion The Chief Justice announces ***445** today, for the proposition that when the "First Amendment is implicated, the tie goes to the speaker," *Federal Election Comm'n v. Wisconsin Right to Life, Inc., post*, at 474, 127 S.Ct. 2652, 168 L.Ed.2d 329, 2007 WL 1804336, *17 (principal opinion), and that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy ... we give the benefit of the doubt to speech, not censorship," *post,* at 2674. If this were a close case, the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message.

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use.[8] See **2650 *Tinker,* 393 U.S., at 511, 89 S.Ct. 733 ("[Students] may not be confined to the expression of those sentiments that are officially approved"). If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting **446 drugs. See also *ante,* at 2639 (BREYER, J., concurring in judgment in part and dissenting in part).

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." App. to Pet. for Cert. 53a; see also App. 83 (expressly defining " 'drugs' " to include "all alcoholic beverages"). Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

III

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message. Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others—fighting words, obscenity, and commercial speech, to name a few. Rather than reviewing our opinions discussing such categories, I mention two personal recollections that have no doubt influenced my conclusion that it would be profoundly unwise to create special rules for speech about drug and alcohol use.

**447 The Vietnam War is remembered today as an unpopular war. During its early stages, however, "the dominant opinion" that Justice Harlan mentioned in his *Tinker* dissent regarded opposition to the war as unpatriotic, if not treason. 393 U.S., at 526, 89 S.Ct. 733. That dominant opinion strongly supported the prosecution of several of those who demonstrated in Grant Park during the 1968 Democratic Convention in Chicago, see *United States v. Dellinger,* 472 F.2d 340 (C.A.7 1972), and the **2651 vilification of vocal opponents of the war like Julian Bond, cf. *Bond v. Floyd,* 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). In 1965, when the Des Moines students wore their armbands, the school district's fear that they might "start an argument or cause a disturbance" was well founded. *Tinker,* 393 U.S., at 508, 89 S.Ct. 733. Given that context, there is special force to the Court's insistence that "our Constitution says we must take th[at] risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.,* at 508–509, 89 S.Ct. 733 (citation omitted). As we now know, the then-dominant opinion about the Vietnam War was not etched in stone.

Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of **448 bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana,[9] and of the majority of voters in each of the several States that tolerate medicinal uses of the product,[10] lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be

better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney,* 274 U.S., at 377, 47 S.Ct. 641 (Brandeis, J., concurring); *Abrams,* 250 U.S., at 630, 40 S.Ct. 17 (Holmes, J., dissenting); *Tinker,* 393 U.S., at 512, 89 S.Ct. 733. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Justice BREYER would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is the rather significant one that it is inadequate to decide the case before us. Qualified immunity shields public officials from money damages only. See *Wood v. Strickland,* 420 U.S. 308, 314, n. 6, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. App. 13. Justice BREYER's proposed decision on qualified immunity grounds would dispose of the damages claims, but Frederick's other claims would remain unaddressed. To get around that problem, Justice BREYER hypothesizes that Frederick's suspension—the target of his request for injunctive relief—"may well be justified on non-speech-related grounds." See *post,* at 2643 (opinion concurring in judgment in part and dissenting in part). That hypothesis was never considered by the courts below, never raised by any of the parties, and is belied by the record, which nowhere suggests that the suspension would have been justified solely on non-speech-related grounds.

2 The dissent's effort to find inconsistency between our approach here and the opinion in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S.Ct. 2652, 2007 WL 1804336 (2007), see *post,* at 2649, overlooks what was made clear in *Tinker, Fraser,* and *Kuhlmeier*: Student First Amendment rights are "applied in light of the special characteristics of the school environment." *Tinker,* 393 U.S., at 506, 89 S.Ct. 733. See *Fraser,* 478 U.S., at 682, 106 S.Ct. 3159; *Kuhlmeier,* 484 U.S., at 266, 108 S.Ct. 562. And, as discussed above, *supra,* at 2625, there is no serious argument that Frederick's banner is political speech of the sort at issue in *Wisconsin Right to Life*.

1 Although the First Amendment did not apply to the States until at least the ratification of the Fourteenth Amendment, most state constitutions included free-speech guarantees during the period when public education expanded. *E.g.,* Cal. Const., Art. I, § 9 (1849); Conn. Const., Art. I, § 5 (1818); Ind. Const., Art. I, § 9 (1816).

2 Even at the college level, strict obedience was required of students: "The English model fostered absolute institutional control of students by faculty both inside and outside the classroom. At all the early American schools, students lived and worked under a vast array of rules and restrictions. This one-sided relationship between the student and the college mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from medieval Christian theology and the unique legal privileges afforded the university corporation." Note, 44 Vand. L.Rev. 1135, 1140 (1991) (footnote omitted).

3 My discussion is limited to elementary and secondary education. In these settings, courts have applied the doctrine of *in loco parentis* regardless of the student's age. See, *e.g., Stevens v. Fassett,* 27 Me. 266, 281 (1847) (holding that a student over the age of 21 is "liab[le] to punishment" on the same terms as other students if he "present[s] himself as a pupil, [and] is received and instructed by the master"); *State v. Mizner,* 45 Iowa 248, 250–252 (1876) (same); *Sheehan*

v. Sturges, 53 Conn. 481, 484, 2 A. 841, 843 (1885) (same). Therefore, the fact that Frederick was 18 and not a minor under Alaska law, 439 F.3d 1114, 1117, n. 4 (C.A.9 2006), is inconsequential.

4 Even courts that did not favor the broad discretion given to teachers to impose corporal punishment recognized that the law provided it. *Cooper v. McJunkin,* 4 Ind. 290, 291 (1853) (stating that "[t]he public seem to cling to a despotism in the government of schools which has been discarded everywhere else").

5 Courts also upheld punishment when children refused to speak after being requested to do so by their teachers. See *Board of Ed. v. Helston,* 32 Ill.App. 300, 305–307 (1890) (upholding the suspension of a boy who refused to provide information about who had defaced the school building); cf. *Sewell v. Board of Ed. of Defiance Union School,* 29 Ohio St. 89, 92 (1876) (upholding the suspension of a student who failed to complete a rhetorical exercise in the allotted time).

6 At least nominally, this Court has continued to recognize the applicability of the *in loco parentis* doctrine to public schools. See *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 654, 655, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination .... They are subject ... to the control of their parents or guardians. When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them" (citation omitted)); *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 684, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis,* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech").

7 Distancing itself from *Tinker's* approach, the *Fraser* Court quoted Justice Black's dissent in *Tinker*. 478 U.S., at 686, 106 S.Ct. 3159.

8 The *Tinker* Court claimed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." 393 U.S., at 506, 89 S.Ct. 733. But the cases the Court cited in favor of that bold proposition do not support it. *Tinker* chiefly relies upon *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (striking down a law prohibiting the teaching of German). However, *Meyer* involved a challenge by a *private* school, *id.,* at 396, 43 S.Ct. 625, and the *Meyer* Court was quick to note that no "challenge [has] been made of the State's power to prescribe a curriculum for institutions which it supports," *id.,* at 402, 43 S.Ct. 625. *Meyer* provides absolutely no support for the proposition that free-speech rights apply within schools operated by the State. And notably, *Meyer* relied as its chief support on the *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), line of cases, 262 U.S., at 399, 43 S.Ct. 625, a line of cases that has long been criticized, *United Haulers Assn., Inc. v. Oneida–Herkimer Solid Waste Management Authority,* 550 U.S. 330, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). *Tinker* also relied on *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). *Pierce* has nothing to say on this issue either. *Pierce* simply upheld the right of parents to send their children to private school. *Id*., at 535, 45 S.Ct. 571.

1 I also seriously question whether such a ban could really be enforced. Consider the difficulty of monitoring student conversations between classes or in the cafeteria.

2 It is also relevant that the display did not take place "on school premises," as the rule contemplates. App. to Pet. for Cert. 53a. While a separate district rule does make the policy applicable to "social events and class trips," *id.,* at 58a, Frederick might well have thought that the Olympic Torch Relay was neither a "social event" (for example, prom) nor a "class trip."

3 See *ante,* at 2622 (stating that the principal "reasonably regarded" Frederick's banner as "promoting illegal drug use"); *ante,* at 2624 (explaining that "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one"); *ante,* at 2625 (asking whether "a principal may ... restrict student speech ... when that speech is reasonably viewed as promoting illegal drug use"); *ante,* at 2629 (holding that "schools [may] restrict student expression that they reasonably regard as promoting illegal drug use"); see also *ante,* at 2636 (ALITO, J., concurring) ("[A] public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use").

4 See *ante,* at 2625 ("We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs"); *ante,* at 2629 (observing that "[w]e have explained our view" that "Frederick's banner constitutes promotion of illegal drug use").

5 The reasonableness of the view that Frederick's message was unprotected speech is relevant to ascertaining whether qualified immunity should shield the principal from liability, not to whether her actions violated Frederick's constitutional rights. Cf. *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted").

6 This same reasoning applies when the interpreter is not just a listener, but a legislature. We have repeatedly held that "[d]eference to a legislative finding" that certain types of speech are inherently harmful "cannot limit judicial inquiry when First Amendment rights are at stake," reasoning that "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843, 844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); see also *Whitney v. California,* 274 U.S. 357, 378–379, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) ("[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution .... Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature"). When legislatures are entitled to no deference as to whether particular speech amounts to a "clear and present danger," *id.,* at 379, 47 S.Ct. 641, it is hard to understand why the Court would so blithely defer to the judgment of a single school principal.

7 In affirming Frederick's suspension, the district superintendent acknowledged that Frederick displayed his message "for the benefit of television cameras covering the Torch Relay." App. to Pet. for Cert. 62a.

8 The Court's opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska. The State Supreme Court held in 1975 that Alaska's Constitution protects the right of adults to possess less than four ounces of marijuana for personal use. *Ravin v. State,* 537 P.2d 494. In 1990, the voters of Alaska attempted to undo that decision by voting for a ballot initiative recriminalizing marijuana possession. Initiative Proposal No. 2, §§ 1–2 (effective Mar. 3, 1991), 11 Alaska Stat., p. 872 (2006). At the time Frederick unfurled his banner, the constitutionality of that referendum had yet to be tested. It was subsequently struck down as unconstitutional. See *Noy v. State,* 83 P.3d 538 (App.2003). In the meantime, Alaska voters had approved a ballot measure decriminalizing the use of marijuana for medicinal purposes, 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), 11 Alaska Stat., p. 883 (codified at Alaska Stat. §§ 11.71.190, 17.37.010–17.37.080), and had rejected a much broader measure that would have decriminalized marijuana possession and granted amnesty to anyone convicted of marijuana-related crimes, see 2000 Ballot Measure No. 5 (failed Nov. 7, 2000), 11 Alaska Stat., p. 886.

9 See *Gonzales v. Raich,* 545 U.S. 1, 21, n. 31, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (citing a Government estimate "that in 2000 American users spent $10.5 *billion* on the purchase of marijuana").

10 *Id.,* at 5, 125 S.Ct. 2195 (noting that "at least nine States ... authorize the use of marijuana for medicinal purposes").

141 S.Ct. 2038
Supreme Court of the United States.

MAHANOY AREA SCHOOL DISTRICT, Petitioner
v.
B. L., a Minor, BY AND THROUGH Her Father, Lawrence LEVY and Her Mother, Betty Lou Levy

No. 20-255
|
Argued April 28, 2021
|
Decided June 23, 2021

Synopsis

Background: Public high school student brought action against school district, alleging that her suspension from junior varsity cheerleading squad based on her use of profanity in a social media post, made off campus and on a Saturday, violated the First Amendment. The United States District Court for the Middle District of Pennsylvania, A. Richard Caputo, Senior District Judge, 376 F.Supp.3d 429, granted student's motion for summary judgment. District appealed. The Court of Appeals for the Third Circuit, Krause, Circuit Judge, 964 F.3d 170, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

the special characteristics that give schools additional license to regulate student speech do not always disappear when a school regulates speech that takes place off campus, but

in the present case, the school violated student's First Amendment rights when it suspended her from the junior varsity cheerleading squad.

Affirmed.

Justice Alito filed a concurring opinion in which Justice Gorsuch joined.

Justice Thomas filed a dissenting opinion.

***2040** *Syllabus*[*]

Mahanoy Area High School student B. L. failed to make the school's varsity cheerleading squad. While visiting a local convenience store over the weekend, B. L. posted two images on Snapchat, a social media application for smartphones that allows users to share temporary images with selected friends. B. L.'s posts expressed frustration with the school and the school's cheerleading squad, and one contained vulgar language and gestures. When school officials learned of the posts, they suspended B. L. from the junior varsity cheerleading squad for the upcoming year. After unsuccessfully seeking to reverse that punishment, B. L. and her parents sought relief in federal court, arguing *inter alia* that punishing B. L. for her speech violated the First Amendment. The District Court granted an injunction ordering the school to reinstate B. L. to the cheerleading team. Relying on *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, to grant B. L.'s subsequent motion for summary judgment, the District Court found that B. L.'s punishment violated the First Amendment because her Snapchat posts had not caused substantial disruption at the school. The Third Circuit affirmed the judgment, but the panel majority reasoned that *Tinker* did not apply because schools had no special license to regulate student speech occurring off campus.

Held: While public schools may have a special interest in regulating some off-campus student speech, the special interests offered by the school are not sufficient to overcome B. L.'s interest in free expression in this case. Pp. 2044 – 2048.

(a) In *Tinker*, we indicated that schools have a special interest in regulating on-campus student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S., at 513, 89 S.Ct. 733. The special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Circumstances that may implicate a school's regulatory interests include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices. Pp. 2044 – 2045.

(b) But three features of off-campus speech often, even if not always, distinguish schools' efforts to regulate off-campus speech. *First*, a school will rarely stand *in loco parentis* when a student speaks off campus. *Second*, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. *Third*, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy. Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. Pp. 2045 – 2047.

(c) The school violated B. L.'s First Amendment rights when it suspended her from the junior varsity cheerleading squad. Pp. 2046 – 2048.

(1) B. L.'s posts are entitled to First Amendment protection. The statements made in B. L.'s Snapchats reflect criticism of the rules of a community of which B. L. forms a part. And B. L.'s message did not involve features that would place it outside the First Amendment's ordinary protection. Pp. 2046 – 2047.

(2) The circumstances of B. L.'s speech diminish the school's interest in regulation. B. L.'s posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. P. 2047.

(3) The school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community is weakened considerably by the fact that B. L. spoke outside the school on her own time. B. L. spoke under circumstances where the school did not stand *in loco parentis*. And the vulgarity in B. L.'s posts encompassed a message of criticism. In addition, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Pp. 2047 – 2048.

(4) The school's interest in preventing disruption is not supported by the record, which shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. App. 82–83. This alone does not satisfy *Tinker's* demanding standards. Pp. 2047 – 2048.

(5) Likewise, there is little to suggest a substantial interference in, or disruption of, the school's efforts to maintain cohesion on the school cheerleading squad. P. 2048.

964 F.3d 170, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, KAGAN, GORSUCH, KAVANAUGH and BARRETT, JJ., joined. ALITO, J., filed a concurring opinion, in which GORSUCH, J., joined. THOMAS, J., filed a dissenting opinion.

Attorneys and Law Firms

Michael I. Levin, David W. Brown, Levin Legal Group, P.C., Huntingdon Valley, PA, Lisa S. Blatt, Counsel of Record, Sarah M. Harris, Eden Schiffmann, William D. Ferraro, Kristen A. Dewilde, Williams & Connolly LLP, Washington, DC, for Petitioner.

David D. Cole, American Civil Liberties Union Foundation, Washington, D.C., Jennesa Calvo-Friedman, Vera Eidelman, Arianna Demas, American Civil Liberties Union Foundation, New York, NY, Seth F. Kreimer, Philadelphia, PA, Witold J. Walczak, Counsel of Record, Sara J. Rose, American Civil Liberties Union of Pennsylvania, Pittsburgh, PA, Arleigh P. Helfer III, Theresa E. Loscalzo, Schnader Harrison Segal & Lewis LLP, Philadelphia, PA, for Respondents.

Opinion

Justice BREYER delivered the opinion of the Court.

***2042** A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the ***2043** school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment. Although we do not agree with

the reasoning of the Third Circuit panel's majority, we do agree with its conclusion that the school's disciplinary action violated the First Amendment.

I

A

B. L. (who, together with her parents, is a respondent in this case) was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B. L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B. L. did not accept the coach's decision with good grace, particularly because the squad coaches had placed an entering freshman on the varsity team.

That weekend, B. L. and a friend visited the Cocoa Hut, a local convenience store. There, B. L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B. L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B. L. had about 250 "friends") to view the images for a 24 hour period.

The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." App. 20. The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley-face emoji. *Id.*, at 21.

B. L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B. L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B. L.'s posts. *Id.*, at 83–84. Questions about the posts persisted during an Algebra class taught by one of the two coaches. *Id.*, at 83.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year. B. L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team. In response, B. L., together with her parents, filed this lawsuit in Federal District Court.

B

The District Court found in B. L.'s favor. It first granted a temporary restraining order and a preliminary injunction ordering the school to reinstate B. L. to the cheerleading team. In granting B. L.'s subsequent ***2044** motion for summary judgment, the District Court found that B. L.'s Snapchats had not caused substantial disruption at the school. Cf. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Consequently, the District Court declared that B. L.'s punishment violated the First Amendment, and it awarded B. L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.

On appeal, a panel of the Third Circuit affirmed the District Court's conclusion. See 964 F.3d 170, 194 (2020). In so doing, the majority noted that this Court had previously held in *Tinker* that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of " 'pure speech' " on school property during the school day. 393 U.S., at 505–506, 514, 89 S.Ct. 733. In reaching its conclusion in *Tinker*, this Court emphasized that there was no evidence the student protest would "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.*, at 509, 89 S.Ct. 733. But the Court also said that: "[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guarantee of freedom of speech." *Id.*, at 513, 89 S.Ct. 733.

Many courts have taken this statement as setting a standard —a standard that allows schools considerable freedom on campus to discipline students for conduct that the First Amendment might otherwise protect. But here, the panel majority held that this additional freedom did "not apply to off-campus speech," which it defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." 964 F.3d at 189. Because B. L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B. L. for engaging in a form of pure speech.

A concurring member of the panel agreed with the majority's result but wrote that the school had not sufficiently justified disciplining B. L. because, whether the *Tinker* standard did or did not apply, B. L.'s speech was not substantially disruptive.

C

The school district filed a petition for certiorari in this Court, asking us to decide "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." Pet. for Cert. I. We granted the petition.

II

We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." *Tinker*, 393 U.S., at 506, 89 S.Ct. 733; see also *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 794, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) ("[M]inors are entitled to a significant measure of First Amendment protection" (alteration in original; internal quotation marks omitted)). But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (internal quotation mark omitted). One such characteristic, ***2045** which we have stressed, is the fact that schools at times stand *in loco parentis*, *i.e.*, in the place of parents. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986).

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see *id.*, at 685, 106 S.Ct. 3159; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse v. Frederick*, 551 U.S. 393, 409, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007); and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, see *Kuhlmeier*, 484 U.S., at 271, 108 S.Ct. 562.

Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S., at 513, 89 S.Ct. 733. These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B. L. herself and the *amici* supporting her would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones. Brief for Respondents 36–37. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B. L.'s proposed rule. See Tr. of Oral Arg. 71, 85.

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule. That rule, basically, if not entirely, would deny the off-campus applicability of *Tinker's* highly general statement about the nature of a school's special interests. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

***2046** We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

III

Consider B. L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B. L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B. L.'s posts, while crude, did not amount to fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). And while B. L. used vulgarity, her speech was not obscene as this Court has understood that term. See *Cohen v. California*, 403 U.S. 15, 19–20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). To the contrary, B. ***2047** L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. See *id.*, at 24, 91 S.Ct. 1780; cf. *Snyder v. Phelps*, 562 U.S. 443, 461, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate"); *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) ("The inappropriate ... character of a statement is irrelevant to the question whether it deals with a matter of public concern").

Consider too when, where, and how B. L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained, *supra*, at 2046 – 2047) diminish the school's interest in punishing B. L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. See App. 35 (indicating that coaches removed B. L. from the cheer team because "there was profanity in [her] Snap and it was directed towards cheerleading"); see also *id.*, at 27, 47, and n. 9, 78, 82. The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time. See *Morse*, 551 U.S., at 405, 127 S.Ct. 2618 (clarifying that although a school can regulate a student's use of sexual innuendo in a speech given within the school, if the student "delivered the same speech in a public forum outside the school context, it would have been protected"); see also *Fraser*, 478 U.S., at 688, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) (noting that if the student in *Fraser* "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate").

B. L. spoke under circumstances where the school did not stand *in loco parentis*. And there is no reason to believe B. L.'s parents had delegated to school officials their own control of B. L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*, 393 U.S., at 514, 89 S.Ct. 733. Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra ***2048** class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. App. 82–83. But when one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking ... about it," she responded simply, "No." *Id.*, at 84. As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S., at 509, 89 S.Ct. 733. The alleged disturbance here does not meet *Tinker*'s demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. One of the coaches testified that the school decided to suspend B. L., not because of any specific negative impact upon a particular member of the school community, but "based on the fact that there was negativity put out there that could impact students in the school." App. 81. There is little else, however, that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have previously said, simple "undifferentiated fear or apprehension ... is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S., at 508, 89 S.Ct. 733.

It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. See *Tyson & Brother v. Banton*, 273 U.S. 418, 447, 47 S.Ct. 426, 71 L.Ed. 718 (1927) (Holmes, J., dissenting). "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental

societal values are truly implicated." *Cohen*, 403 U.S., at 25, 91 S.Ct. 1780.

* * *

Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, resembling those of the panel's concurring opinion, we nonetheless agree that the school violated B. L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

It is so ordered.

Justice ALITO, with whom Justice GORSUCH joins, concurring.

I join the opinion of the Court but write separately to explain my understanding of the Court's decision and the framework within which I think cases like this should be analyzed. This is the first case in which we have considered the constitutionality of a public school's attempt to regulate true off-premises student speech,[1] and therefore ***2049** it is important that our opinion not be misunderstood.[2]

I

The Court holds—and I agree—that: the First Amendment permits public schools to regulate *some* student speech that does not occur on school premises during the regular school day;[3] this authority is more limited than the authority that schools exercise with respect to on-premises speech;[4] courts should be "skeptical" about the constitutionality of the regulation of off-premises speech;[5] the doctrine of *in loco parentis* "rarely" applies to off-premises speech;[6] public school students, like all other Americans, have the right to express "unpopular" ideas on public issues, even when those ideas are expressed in language that some find " ' inappropriate ' " or " ' hurtful ' ";[7] public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government;[8] the Mahanoy Area High School violated B. L.'s First Amendment rights when it punished her for the messages she posted on her own time while away from school premises; and the judgment of the Third Circuit must therefore be affirmed.

I also agree that it is not prudent for us to attempt at this time to "set forth a broad, highly general First Amendment rule" governing all off-premises speech. *Ante*, at 2045. But in order to understand what the Court has held, it is helpful to consider the framework within which efforts to regulate off-premises speech should be analyzed.

II

I start with this threshold question: Why does the First Amendment ever allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not ***2050** attend a public school? As the Court recognized in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), when a public school regulates student speech, it acts as an arm of the State in which it is located. Suppose that B. L. had been enrolled in a private school and did exactly what she did in this case—send out vulgar and derogatory messages that focused on her school's cheerleading squad. The Commonwealth of Pennsylvania would have had no legal basis to punish her and almost certainly would not have even tried. So why should her status as a public school student give the Commonwealth any greater authority to punish her speech?

Our cases involving the regulation of student speech have not directly addressed this question. All those cases involved either in-school speech or speech that was tantamount to in-school speech. See n. 1, *supra*. And in those cases, the Court appeared to take it for granted that "the special characteristics of the school environment" justified special rules. *Morse v. Frederick*, 551 U.S. 393, 397, 403, 405, 406, n. 2, 408, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (internal quotation marks omitted); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (internal quotation marks omitted); *Tinker*, 393 U.S., at 506, 89 S.Ct. 733.

Why the Court took this for granted is not hard to imagine. As a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject. See *Kuhlmeier*, 484 U.S., at 279, 108 S.Ct. 562 (Brennan, J., dissenting) ("The young polemic who stands on a soapbox during calculus class to deliver

an eloquent political diatribe interferes with the legitimate teaching of calculus"). In addition, when a teacher asks a question, the teacher must have the authority to insist that the student respond to that question and not some other question, and a teacher must also have the authority to speak without interruption and to demand that students refrain from interrupting one another. Practical necessity likewise dictates that teachers and school administrators have related authority with respect to other in-school activities like auditorium programs attended by a large audience. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("A high school assembly ... is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students"); *id.*, at 689, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner"); see also *Kuhlmeier*, 484 U.S., at 279, 108 S.Ct. 562 (Brennan, J., dissenting) ("[T]he student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school").

Because no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech in these ways, the Court may have felt no need to specify the source of this authority or to explain how the special rules applicable to in-school student speech fit into our broader framework of free-speech case law. But when a public school regulates what students say or write when they are not on school grounds and are not participating in a school program, the school has the obligation to answer the question with which I began: Why should ***2051** enrollment in a public school result in the diminution of a student's free-speech rights?

The only plausible answer that comes readily to mind is consent, either express or implied. The theory must be that by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights.

This understanding is consistent with the conditions to which an adult would implicitly consent by enrolling in an adult education class run by a unit of state or local government. If an adult signs up for, say, a French class, the adult may be required to speak French, to answer the teacher's questions, and to comply with other rules that are imposed for the sake of orderly instruction.

When it comes to children, courts in this country have analyzed the issue of consent by adapting the common-law doctrine of *in loco parentis*. See *Morse*, 551 U.S., at 413–416, 127 S.Ct. 2618 (THOMAS, J., concurring). Under the common law, as Blackstone explained, "[a father could] delegate part of his parental authority ... to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has *such a portion of the power of the parent* committed to his charge, [namely,] that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*." 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) (some emphasis added).

Blackstone's explanation of the doctrine seems to treat it primarily as an implied term in a private employment agreement between a father and those with whom he contracted for the provision of educational services for his child,[9] and therefore the scope of the delegation that could be inferred depended on "the purposes for which [the tutor or schoolmaster was] employed." *Ibid.* If a child was sent to a boarding school, the parents would not have been in a position to monitor or control the child's behavior or to attend to the child's welfare on a daily basis, and the schoolmaster would be regarded as having implicitly received the authority to perform those functions around the clock while the child was in residence. On the other hand, if parents hired a tutor to instruct a child in the home on certain subjects during certain hours, the scope of the delegation would be different. The tutor would be in charge during lessons, but the parents would retain most of their authority. In short, the scope of the delegation depended on the scope of the agreed-upon undertaking.

Today, of course, the educational picture is quite different. The education of children within a specified age range is compulsory,[10] and States specify the minimum number of hours per day and the minimum number of days per year that a student must attend classes, as well as many aspects of the school curriculum.[11] Parents ***2052** are not required to enroll their children in a public school. They can select a private school if a suitable one is available and they can afford the tuition, and they may also be able to educate their children at home if they have the time and ability and can meet the standards that their State imposes.[12] But by choice or necessity, nearly 90% of the students in this country attend public schools,[13] and parents and public schools do not enter into a contractual relationship.

If *in loco parentis* is transplanted from Blackstone's England to the 21st century United States, what it amounts to is simply a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform. Because public school students attend school for only part of the day and continue to live at home, the degree of authority conferred is obviously less than that delegated to the head of a late-18th century boarding school, but because public school students are taught outside the home, the authority conferred may be greater in at least some respects than that enjoyed by a tutor of Blackstone's time.

So how much authority to regulate speech do parents implicitly delegate when they enroll a child at a public school? The answer must be that parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission, as well as the authority to perform any other functions to which parents expressly or implicitly agree —for example, by giving permission for a child to participate in an extracurricular activity or to go on a school trip.

III

I have already explained what this delegated authority means with respect to student speech during standard classroom instruction. And it is reasonable to infer that this authority extends to periods when students are in school but are not in class, for example, when they are walking in a hall, eating lunch, congregating outside before the school day starts, or waiting for a bus after school. During the entire school day, a school must have the authority to protect everyone on its premises, and therefore schools must be able to prohibit threatening and harassing speech. An effective instructional atmosphere could not be maintained in a school, and good teachers would be hard to recruit and retain, if ***2053** students were free to abuse or disrespect them. And the school has a duty to protect students while in school because their parents are unable to do that during those hours. See *Morse*, 551 U.S., at 424, 127 S.Ct. 2618 (ALITO, J., concurring). But even when students are on school premises during regular school hours, they are not stripped of their free-speech rights. *Tinker* teaches that expression that does not interfere with a class (such as by straying from the topic, interrupting the teacher or other students, etc.) cannot be suppressed unless it "involves substantial disorder or invasion of the rights of others." 393 U.S., at 513, 89 S.Ct. 733.

IV

A

A public school's regulation of off-premises student speech is a different matter. While the decision to enroll a student in a public school may be regarded as conferring the authority to regulate *some* off-premises speech (a subject I address below), enrollment cannot be treated as a complete transfer of parental authority over a student's speech. In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children. See *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (discussing "the liberty of parents and guardians to direct the upbringing and education of children under their control"). Parents do not implicitly relinquish all that authority when they send their children to a public school. As the Court notes, it would be far-fetched to suggest that enrollment implicitly confers the right to regulate what a child says or writes at all times of day and throughout the calendar year. See *ante,* at 2062.[14] Any such argument would run headlong into the fundamental principle that a State "may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." ***2054** [15]*Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013) (internal quotation marks omitted). While the in-school restrictions discussed above are essential to the operation of a public school system, any argument in favor of expansive regulation of off-premises speech must contend with this fundamental free-speech principle.

B

The degree to which enrollment in a public school can be regarded as a delegation of authority over off-campus speech

depends on the nature of the speech and the circumstances under which it occurs. I will not attempt to provide a complete taxonomy of off-premises speech, but relevant lower court cases tend to fall into a few basic groups. And with respect to speech in each of these groups, the question that courts must ask is whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question.

One category of off-premises student speech falls easily within the scope of the authority that parents implicitly or explicitly provide. This category includes speech that takes place during or as part of what amounts to a temporal or spatial extension of the regular school program, *e.g.,* online instruction at home, assigned essays or other homework, and transportation to and from school. Also included are statements made during other school activities in which students participate with their parents' consent, such as school trips, school sports and other extracurricular activities that may take place after regular school hours or off school premises, and after-school programs for students who would otherwise be without adult supervision during that time. Abusive speech that occurs while students are walking to and from school may also fall into this category on the theory that it is school attendance that puts students on that route and in the company of the fellow students who engage in the abuse. The imperatives that justify the regulation of student speech while in school—the need for orderly and effective instruction and student protection—apply more or less equally to these off-premises activities.

Most of the specific examples of off-premises speech that the Court mentions fall into this category. See *ante,* at 2045 (speech taking place during "remote learning," "participation in other online school activities," "activities taken for school credit," "travel en route to and from the school," "[the time during which] the school is responsible for the student," and "extracurricular activities," as well as speech taking place on "the school's immediate surroundings" or in the context of "writing ... papers").[16] The Court's broad ***2055** statements about off-premises speech must be understood with this in mind.

At the other end of the spectrum, there is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection, see *Lane v. Franks*, 573 U.S. 228, 235, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment"); *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) ("[A] free-speech clause without religion would be Hamlet without the prince"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) ("[A]dvocacy of a politically controversial viewpoint ... is the essence of First Amendment expression"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"); *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" (internal quotation marks omitted)), and the connection between student speech in this category and the ability of a public school to carry out its instructional program is tenuous.

If a school tried to regulate such speech, the most that it could claim is that offensive off-premises speech on important matters may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises. But it is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas that are "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); see also *Matal* v. *Tam*, 582 U.S. ——, —— – ——, 137 S.Ct. 1744, 1751, 198 L.Ed.2d 366 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (opinion of Stevens, J.) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63–64, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion) ("Nor may speech be curtailed because it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger"); ***2056** *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("It is firmly settled that under our Constitution

the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"). It is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away such a critical right.

To her credit, petitioner's attorney acknowledged this during oral argument. As she explained, even if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto." Tr. of Oral Arg. 15–16.[17] The school may suppress the disruption, but it may not punish the off-campus speech that prompted other students to engage in misconduct. See *id.,* at 5–6 ("[I]f listeners riot because they find speech offensive, schools should punish the rioters, not the speaker. In other words, the hecklers don't get the veto"); see also *id.,* at 27–28.

This is true even if the student's off-premises speech on a matter of public concern is intemperate and crude. When a student engages in oral or written communication of this nature, the student is subject to whatever restraints the student's parents impose, but the student enjoys the same First Amendment protection against government regulation as all other members of the public. And the Court has held that these rights extend to speech that is couched in vulgar and offensive terms. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U.S. ——, 139 S.Ct. 2294, 204 L.Ed.2d 714 (2019); *Matal*, 582 U.S. ——, 137 S.Ct. 1744; *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

Between these two extremes (*i.e.*, off-premises speech that is tantamount to on-campus speech and general statements made off premises on matters of public concern) lie the categories of off-premises student speech that appear to have given rise to the most litigation. A survey of lower court cases reveals several prominent categories. I will mention some of those categories, but like the Court, I do not attempt to set out the test to be used in judging the constitutionality of a public school's efforts to regulate such speech.

One group of cases involves perceived threats to school administrators, teachers, other staff members, or students. Laws that apply to everyone prohibit defined categories of threats,[18] see, *e.g.*, 18 Pa. Cons. Stat. § 2706(a);[19] ***2057** Tex. Penal Code Ann. § 22.07(a) (West 2020),[20] but schools have claimed that their duties demand broader authority.[21]

Another common category involves speech that criticizes or derides school administrators, teachers, or other staff members.[22] Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence. See Brief for College Athlete Advocates as *Amicus Curiae* 12–21; Brief for Student Press Law Center et al. as *Amici Curiae* 10–11, 17–20, 30.

Perhaps the most difficult category involves criticism or hurtful remarks about other students.[23] Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech. See, *e.g.*, *Saxe v. State College Area School Dist.*, 240 F.3d 200, 206–207 (C.A.3 2001).

V

The present case does not fall into any of these categories. Instead, it simply involves criticism (albeit in a crude manner) of the school and an extracurricular activity. Unflattering speech about a school or ***2058** one of its programs is different from speech that criticizes or derides particular individuals, and for the reasons detailed by the Court and by Judge Ambro in his separate opinion below, the school's justifications for punishing B. L.'s speech were weak. She sent the messages and image in question on her own time while at a local convenience store. They were transmitted via a medium that preserved the communication for only 24 hours, and she sent them to a select group of "friends." She did not send the messages to the school or to any administrator, teacher, or coach, and no member of the school staff would have even known about the messages if some of B. L.'s "friends" had not taken it upon themselves to spread the word.

The school did not claim that the messages caused any significant disruption of classes. The most it asserted along these lines was that they "upset" some students (including members of the cheerleading squad),[24] caused students to ask some questions about the matter during an algebra class taught by a cheerleading coach,[25] and put out "negativity ...

that could impact students in the school."[26] The freedom of students to speak off-campus would not be worth much if it gave way in the face of such relatively minor complaints. Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting, and the algebra teacher had the authority to quell in-class discussion of B. L.'s messages and demand that the students concentrate on the work of the class.

As for the messages' effect on the morale of the cheerleading squad, the coach of a team sport may wish to take group cohesion and harmony into account in selecting members of the team, in assigning roles, and in allocating playing time, but it is self-evident that this authority has limits. (To take an obvious example, a coach could not discriminate against a student for blowing the whistle on serious misconduct.) And here, the school did not simply take B. L.'s messages into account in deciding whether her attitude would make her effective in doing what cheerleaders are primarily expected to do: encouraging vocal fan support at the events where they appear. Instead, the school imposed punishment: suspension for a year from the cheerleading squad despite B. L.'s apologies.

There is, finally, the matter of B. L.'s language. There are parents who would not have been pleased with B. L.'s language and gesture, but whatever B. L.'s parents thought about what she did, it is not reasonable to infer that they gave the school the authority to regulate her choice of language when she was off school premises and not engaged in any school activity. And B. L.'s school does not claim that it possesses or makes any effort to exercise the authority to regulate the vocabulary and gestures of all its students 24 hours a day and 365 days a year.

There are more than 90,000 public school principals in this country[27] and more than 13,000 separate school districts.[28] The overwhelming majority of ***2059** school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand. If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory.

Justice THOMAS, dissenting.

B. L., a high school student, sent a profanity-laced message to hundreds of people, including classmates and teammates. The message included a picture of B. L. raising her middle finger and captioned "F*** school" and "f*** cheer." This message was juxtaposed with another, which explained that B. L. was frustrated that she failed to make the varsity cheerleading squad. The cheerleading coach responded by disciplining B. L.

The Court overrides that decision—without even mentioning the 150 years of history supporting the coach. Using broad brushstrokes, the majority outlines the scope of school authority. When students are on campus, the majority says, schools have authority *in loco parentis*—that is, as substitutes of parents—to discipline speech and conduct. Off campus, the authority of schools is somewhat less. At that level of generality, I agree. But the majority omits important detail. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?

Disregarding these important issues, the majority simply posits three vague considerations and reaches an outcome. A more searching review reveals that schools historically could discipline students in circumstances like those presented here. Because the majority does not attempt to explain why we should not apply this historical rule and does not attempt to tether its approach to anything stable, I respectfully dissent.

I

A

While the majority entirely ignores the relevant history, I would begin the assessment of the scope of free-speech rights incorporated against the States by looking to "what 'ordinary citizens' at the time of [the Fourteenth Amendment's] ratification would have understood" the right to encompass. *McDonald v. Chicago*, 561 U.S. 742, 813, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). Cases and treatises from that era reveal that public schools retained substantial authority to discipline students. As I have previously explained, that authority was near plenary while students were at school.

See *Morse v. Frederick*, 551 U.S. 393, 419, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (concurring opinion). Authority also extended to when students were traveling to or from school. See, *e.g., Lander v. Seaver*, 32 Vt. 114, 120 (1859). And, although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment.

Perhaps the most familiar example applying this rule is a case where a student, after returning home from school, used ***2060** "disrespectful language" against a teacher—he called the teacher "old"—"in presence of the [teacher] and of some of his fellow pupils." *Id.*, at 115 (emphasis deleted). The Vermont Supreme Court held that the teacher could discipline a student for this speech because the speech had "a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination." *Id.*, at 120; see also *ibid.* ("direct and immediate tendency to ... bring the master's authority into contempt"). The court distinguished the speech at issue from speech "in no ways connected with or affecting the school" and speech that has "merely a remote and indirect tendency to injure." *Id.*, at 120–121. In requiring a "direct and immediate tendency" to harm, *id.*, at 120, the court used the language of proximate causation, see Black's Law Dictionary 274 (11th ed. 2019) (defining "proximate cause" as a "cause that directly produces an event"); *id.*, at 1481 (defining "proximate" as "[i]mmediately before or after"); see also *Atchison, T. & S. F. R. Co. v. Calhoun*, 213 U.S. 1, 7, 29 S.Ct. 321, 53 L.Ed. 671 (1909) (using "proximate" cause and "immediate" cause interchangeably).

This rule was widespread. It was consistent with "the universal custom" in New England. *Lander*, 32 Vt. at 121. Various cases, treatises, and school manuals endorsed it.[*] And a justice of the Rhode Island Supreme Court, presiding over a trial, declared the rule "well settled." T. Stockwell, The School Manual, Containing the School Laws of Rhode Island 236–238 (1882) (Stockwell).

So widespread was this rule that it served not only as the basis for schools to discipline disrespectful speech but also to regulate truancy. Although modern doctrine draws a clear line between speech and conduct, cases in the 19th century did not. *E.g., Lander*, 32 Vt. at 120 (describing speech as "acts of misbehavior"); Stockwell 236–238 (applying the *Lander* rule to "[t]he conduct of pupils"); *Morse*, 551 U.S., at 419, 127 S.Ct. 2618 (THOMAS, J., concurring) ("speech rules and other school rules were treated identically"). Citing *Lander*, schools justified regulating truancy because of its proximate tendency to harm schools. As the Missouri Supreme Court put it, although "[t]ruancy is an act committed out of the school," schools could regulate it because of its "subversive" effects on the "good order and discipline of the school." *Deskins v. Gose*, 85 Mo. 485, 488–489 (1885); see also *Burdick v. Babcock*, 31 Iowa 562, 565, 567 (1871) ("If the effects of acts done out of school-hours reach within the schoolroom during school hours and are detrimental to good order and the best interest of the pupils, it is evident that such acts may be forbidden").

Some courts made statements that, if read in isolation, could suggest that schools had no authority at all to regulate off-campus speech. *E.g., Dritt v. Snodgrass*, 66 Mo. 286, 297 (1877) (Norton, J., joined by a majority of the court, concurring) ("neither the teacher nor directors have the authority to follow [a student home], and govern his conduct while under the parental eye" because that would "supersede entirely parental authority"). But, these courts made it clear that the rule against regulating off-campus speech applied only when that speech was "nowise ***2061** connected with the management or successful operation of the school." *King v. Jefferson City School Bd.*, 71 Mo. 628, 630 (1880) (distinguishing *Dritt*); accord, *Lander*, 32 Vt. at 120–121 (similar). In other words, they followed *Lander*: A school can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs.

B

If there is a good constitutional reason to depart from this historical rule, the majority and the parties fail to identify it. I would thus apply the rule. Assuming that B. L.'s speech occurred off campus, the purpose and effect of B. L.'s speech was "to degrade the [program and cheerleading staff]" in front of "other pupils," thus having "a direct and immediate tendency to ... subvert the [cheerleading coach's] authority." *Id.*, at 115, 120. As a result, the coach had authority to discipline B. L.

Our modern doctrine is not to the contrary. "[T]he penalties imposed in this case were unrelated to any political viewpoint" or religious viewpoint. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). And although the majority sugar coats this speech as "criticism," *ante*, at 2052 - 2053, it is well settled that

schools can punish "vulgar" speech—at least when it occurs on campus, *e.g., Fraser*, 478 U.S., at 683–684, 106 S.Ct. 3159; *ante*, at 2050 - 2051.

The discipline here—a 1-year suspension from the team—may strike some as disproportionate. Tr. of Oral Arg. 31, 57. But that does not matter for our purposes. State courts have policed school disciplinary decisions for "reasonable[ness]." *E.g., Burdick*, 31 Iowa at 565. And disproportionate discipline "can be challenged by parents in the political process." *Morse*, 551 U.S., at 420, 127 S.Ct. 2618 (THOMAS, J., concurring). But the majority and the parties provide no textual or historical evidence to suggest that federal courts generally can police the proportionality of school disciplinary decisions in the name of the First Amendment.

II

The majority declines to consider any of this history, instead favoring a few pragmatic guideposts. This is not the first time the Court has chosen intuition over history when it comes to student speech. The larger problem facing us today is that our student-speech cases are untethered from any textual or historical foundation. That failure leads the majority to miss much of the analysis relevant to these kinds of cases.

A

Consider the Court's longtime failure to grapple with the historical doctrine of *in loco parentis*. As I have previously explained, the Fourteenth Amendment was ratified against the background legal principle that publicly funded schools operated not as ordinary state actors, but as delegated substitutes of parents. *Id.,* at 411–413, 127 S.Ct. 2618. This principle freed schools from the constraints the Fourteenth Amendment placed on other government actors. "[N]o one doubted the government's ability to educate and discipline children as private schools did," including "through strict discipline ... for behavior the school considered disrespectful or wrong." *Id*., at 411–412, 127 S.Ct. 2618. "The doctrine of *in loco parentis* limited the ability of schools to set rules and control their classrooms in almost no way." *Id*., at 416, 127 S.Ct. 2618.

Plausible arguments can be raised in favor of departing from that historical doctrine. When the Fourteenth Amendment was ratified, just three jurisdictions had ***2062** compulsory-education laws. M. Katz, A History of Compulsory Education Laws 17 (1976). One might argue that the delegation logic of *in loco parentis* applies only when delegation is voluntary. But cf. *id.,* at 11–13 (identifying analogs to compulsory-education laws as early as the 1640s); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (requiring States to permit parents to send their children to nonpublic schools). The Court, however, did not make that (or any other) argument against this historical doctrine.

Instead, the Court simply abandoned the foundational rule without mentioning it. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Rather than wrestle with this history, the Court declared that it "ha[d] been the unmistakable holding of this Court for almost 50 years" that students have free-speech rights inside schools. *Id.,* at 506, 89 S.Ct. 733. "But the cases the Court cited in favor of that bold proposition do not support it." *Morse*, 551 U.S., at 420, n. 8, 127 S.Ct. 2618 (THOMAS, J., concurring). The cases on which *Tinker* chiefly relied concerned the rights of parents and private schools, not students. 551 U.S., at 420, n. 8, 127 S.Ct. 2618. Of the 11 cases the Court cited, only one—*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)—was on point. But, like *Tinker*, *Barnette* failed to mention the historical doctrine undergirding school authority. Not until decades later did the Court even hint at this doctrine, and, then, only as an aside. See *Fraser*, 478 U.S., at 684, 106 S.Ct. 3159.

The majority does no better today. At least it acknowledges that schools act *in loco parentis* when students speak on campus. See, *e.g., ante,* at 2050 - 2051. But the majority fails to address the historical contours of that doctrine, whether the doctrine applies to off-campus speech, or why the Court has abandoned it.

B

The Court's failure to explain itself in *Tinker* needlessly makes this case more difficult. Unlike *Tinker*, which involved a school's authority under a straightforward fact pattern, this case involves speech made in one location but capable of being received in countless others—an issue that has been aggravated exponentially by recent technological advances. The Court's decision not to create a solid foundation in *Tinker*, and now here not to consult the relevant history, predictably causes the majority to ignore relevant analysis.

First, the majority gives little apparent significance to B. L.'s decision to participate in an extracurricular activity. But the historical test suggests that authority of schools over off-campus speech may be greater when students participate in extracurricular programs. The *Lander* test focuses on the *effect* of speech, not its location. So students like B. L. who are active in extracurricular programs have a greater potential, by virtue of their participation, to harm those programs. For example, a profanity-laced screed delivered on social media or at the mall has a much different effect on a football program when done by a regular student than when done by the captain of the football team. So, too, here.

Second, the majority fails to consider whether schools often will have *more* authority, not less, to discipline students who transmit speech through social media. Because off-campus speech made through social media can be received on campus (and can spread rapidly to countless people), it often will have a greater proximate tendency to harm the school environment than will an off-campus in-person conversation.

***2063** Third, and relatedly, the majority uncritically adopts the assumption that B. L.'s speech, in fact, was off campus. But, the location of her speech is a much trickier question than the majority acknowledges. Because speech travels, schools sometimes may be able to treat speech as on campus even though it originates off campus. Nobody doubts, for example, that a school has *in loco parentis* authority over a student (and can discipline him) when he passes out vulgar flyers on campus—even if he creates those flyers off campus. The same may be true in many contexts when social media speech is generated off campus but received on campus. To be sure, this logic might not apply where the on-campus presence of speech is not proximately connected to its off-campus origin —as when a student "wholly accidental[ly]" brings a sibling's sketch to school years after it is created. *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 615, 617–618 (C.A.5 2004). This break in proximate causation might occur more often when a school prohibits the use of personal devices or social media on campus. See Tr. of Oral Arg. 68–69. But where it is foreseeable and likely that speech will travel onto campus, a school has a stronger claim to treating the speech as on-campus speech.

Here, it makes sense to treat B. L.'s speech as off-campus speech. There is little evidence that B. L.'s speech was received on campus. The cheerleading coach, in fact, did not view B. L.'s speech. She viewed a *copy* of that speech (a screenshot) created by another student. *Ante*, at 2043. But, the majority mentions none of this. It simply, and uncritically, assumes that B. L.'s speech was off campus. Because it creates a test untethered from history, it bypasses this relevant inquiry.

* * *

The Court transparently takes a common-law approach to today's decision. In effect, it states just one rule: Schools can regulate speech less often when that speech occurs off campus. It then identifies this case as an "example" and "leav[es] for future cases" the job of developing this new common-law doctrine. *Ante*, at 2046 - 2047. But the Court's foundation is untethered from anything stable, and courts (and schools) will almost certainly be at a loss as to what exactly the Court's opinion today means.

Perhaps there are good constitutional reasons to depart from the historical rule, and perhaps this Court and lower courts will identify and explain these reasons in the future. But because the Court does not do so today, and because it reaches the wrong result under the appropriate historical test, I respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), not only did the speech occur on school grounds during the regular school day, but our opinion was specifically directed at on-premises speech. See *id.*, at 506, 89 S.Ct. 733 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression *at the schoolhouse gate*" (emphasis added)); *ibid.* ("First

Amendment rights, applied in light of the special characteristics of the *school environment*, are available to teachers and students" (emphasis added)); *id.,* at 507, 89 S.Ct. 733 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, *to prescribe and control conduct in the schools*" (emphasis added)); *id.,* at 512–513, 89 S.Ct. 733 (referring to speech that occurs "in the classroom," "in the cafeteria, or on the playing field, or on the campus during the authorized hours"). *Tinker* makes no reference whatsoever to speech that takes place off premises and outside "authorized hours."

All our other cases involving the free-speech rights of public school students concerned speech in school or in a school-sponsored event or publication. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–678, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (school assembly); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 262, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (school newspaper); *Morse v. Frederick*, 551 U.S. 393, 397, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (display of banner on street near school at school-sponsored event).

2 This case does not involve speech by a student at a public college or university. For several reasons, including the age, independence, and living arrangements of such students, regulation of their speech may raise very different questions from those presented here. I do not understand the decision in this case to apply to such students.

3 See *ante*, at 2044 - 2045 (stating that a public school's authority to regulate student speech does not "*always* disappear" when the speech "takes place off campus" (emphasis added)); *ibid.* ("The school's regulatory interests remain significant in *some* off-campus circumstances" (emphasis added)).

4 See *ante*, at 2046 (stating that schools have "diminished" authority to regulate off-premises speech).

5 See *ante*, at 2046 ("[C]ourts must be more skeptical of a school's efforts to regulate off-campus speech").

6 See *ibid.* ("[A] school, in relation to off-campus speech, will rarely stand *in loco parentis*").

7 *Ante*, at 2046, 2046 – 2047.

8 *Ante*, at 2046 – 2047.

9 In a sensational and highly publicized mid-19th century case, there was an express delegation, *Regina* v. *Hopley*, 2 F. & F. 202, 175 Eng. Rep. 1024 (N. P. 1860), but in other 19th century cases, the delegation was inferred. See *Fitzgerald* v. *Northcote*, 4 F. & F. 656, 176 Eng. Rep. 734 (N. P. 1865); *State v. Osborne*, 24 Mo. App. 309 (1887).

10 See *Ingraham v. Wright*, 430 U.S. 651, 660, n. 14, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (noting that "compulsory school attendance laws were in force in all the States" by 1918).

11 See National Center for Education Statistics (NCES), State Education Practices, Table 5.14: Number of Instructional Days and Hours in the School Year, by State, 2018, https://nces.ed.gov/programs/statereform/tab5_14.asp.

12 Pennsylvania, for example, requires a minimum of 180 days of instruction per year. See Pa. Stat. Ann., Tit. 24, § 13–1327.1(c) (Purdon 2016). Students must be taught English, mathematics, science, geography, history, civics, safety education, health, physical education, music, and art. §§ 13–1327.1(c)(1)–(2). Parents are required to maintain current and detailed records of their child's learning materials and progress, § 13–1327.1(e)(1), and they must turn those records over to a teacher or psychologist for an annual evaluation to determine whether "an appropriate education is occurring," § 13–1327.1(e)(2). The evaluation also includes an interview of the child. *Ibid.* Once the evaluation is completed, it is submitted to the superintendent of the public school district of residence. §§ 13–1327.1(e)(2), (h)(1). If the superintendent and a hearing examiner find that the child is not being supplied an appropriate education, and the parents' appeal of that decision is unsuccessful, the child will be promptly enrolled in the public school district of residence or a private school. §§ 13–1327.1(k)–(*l*).

13 See NCES, School Choice in the United States, 2019, Table 206.20: Percentage Distribution of Students Ages 5 through 17 Attending Kindergarten through 12th Grade, By School Type or Participation in Homeschooling and Selected Child,

Parent, and Household Characteristics, Selected Years 1999 Through 2016, https://nces.ed.gov/programs/digest//d19/tables/dt19_206.20.asp.

14 There is no basis for concluding that the original public meaning of the free-speech right protected by the First and Fourteenth Amendments was understood by Congress or the legislatures that ratified those Amendments as permitting a public school to punish a wide swath of off-premises student speech. Compare *post,* at 2059 – 2061 (THOMAS, J., dissenting). At the time of the adoption of the First Amendment, public education was virtually unknown, and the Amendment did not apply to the States. And as for the Fourteenth Amendment, research has found only one pre-1868 case involving a public school's regulation of a student's off-premises speech. In *Lander v. Seaver*, 32 Vt. 114 (1859), an 11-year-old boy, while driving his father's cow by the home of his teacher, called the teacher "Old Jack Seaver" in the presence of other students. *Id.,* at 115 (emphasis deleted). The next day, the teacher "whipped him with a small rawhide." *Ibid.* In a tort suit against the teacher for assault and battery, the Supreme Court of Vermont reversed the lower court's judgment for the teacher but opined that the teacher had the authority to punish the student's speech because of its effect on the operation of the school. *Id.,* at 120–121, 125. This decision is of negligible value for present purposes. It does not appear that any claim was raised under the state constitutional provision protecting freedom of speech. And even if flinty Vermont parents at the time in question could be understood to have implicitly delegated to the teacher the authority to whip their son for his off-premises speech, the same inference is wholly unrealistic today.

15 Here, the Pennsylvania Constitution required that B. L. and all other students be offered "a thorough and efficient system of public education." Art. III, § 14.

16 Two other examples mentioned by the Court—"communications to school e-mail accounts or phones" and speech "on a school's website"—may fall into the same category if they concern school work. *Ante,* at 2045. The Court also mentions "breaches of school security devices," *ibid.*, but such breaches may be punishable regardless of whether the perpetrator is a student at the school. See, *e.g.,* 18 Pa. Const. Stat. § 7611 (2016) ("Unlawful use of computer and other computer crimes"). Another specific example provided by the Court is "all speech taking place over school laptops." *Ante,* at 2045. I do not take this statement to apply under all circumstances to all student speech on such laptops. In a well-publicized case, a public high school that provided laptops to high school students used those computers to surreptitiously monitor students' private messages and to photograph them in their homes. See *Robbins v. Lower Merion School Dist.*, 2010 WL 3421026, *1 (E.D. Pa., Aug. 30, 2010); see also Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification and in Support of Defendants' Cross-Motion for Entry of Permanent Equitable Relief in *Robbins v. Lower Merion School Dist.*, No. 2:10–cv–00665 (ED Pa.), pp. 4–5, 2010 WL 3421026. I do not understand the Court to approve such a practice. In assessing the degree to which a school can regulate speech on a laptop that a school provides for student use outside school, it would be important to know the terms of the agreement under which the laptop was provided.

17 Counsel was asked what a school could have done during the Vietnam War era if a student said, "[the] war is immoral, American soldiers are baby killers, I hope there are a lot of casualties so that people will rise up." Tr. of Oral Arg. 15. Counsel agreed that "[e]ven if that would cause a disruption in the school," "the school couldn't do anything about it." *Ibid.* In her words, "that would be a heckler's veto, no can do." *Id.,* at 15–16.

18 The First Amendment permits prohibitions of "true threats," which are "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

19 This law is commonly referred to as Pennsylvania's "terrorist threat statute." It prohibits "communicat[ing], either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another; (2) cause evacuation of a building, place of assembly or facility of public transportation; or (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience."

20 In Texas, it is a crime to "threate[n] to commit any offense involving violence to any person or property" with specified intent, such as the intent to "place another person in fear of imminent serious bodily injury" or to "interrupt the occupation or use of a ... public place."

21 See, *e.g., McNeil v. Sherwood School Dist. 88J*, 918 F.3d 700, 704 (C.A.9 2019) (*per curiam*) (student created a "hit list" of students and drew graphic images of violence); *Wynar v. Douglas County School Dist.*, 728 F.3d 1062, 1065–1066 (C.A.9 2013) (student spoke about committing a school shooting); *Wisniewski v. Board of Ed.*, 494 F.3d 34, 36 (C.A.2 2007) (student sent a message depicting a pistol firing a bullet at his English teacher's head); *Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 611 (C.A.5 2004) (student drew a picture showing his school under attack by a gasoline tanker, missile launcher, helicopter, and armed individuals); *Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 619 (C.A.8 2002) (en banc) (student drafted letters expressing a desire to molest, rape, and murder his ex-girlfriend); but see *Conroy v. Lacey Twp. School Dist.*, 2020 WL 528896, *1 (D NJ, Jan. 31, 2020) (two high school students posted photos on Snapchat showing them with legally purchased guns at a shooting range on a Saturday, which another student claimed made him " 'nervous to come to school' "); see also *Conroy* v. *Lacey Twp. School Dist.*, No. 3:19–cv–09452, 2020 WL 528896 (D. N.J., Aug. 25, 2020) (order dismissing case with prejudice after settlement). The cases cited in this footnote and footnotes 22–23 are listed to show types of claims addressed by the lower courts. I do not express any view about the correctness of the decisions.

22 See, *e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 45 (C.A.2 2008) (member of student council posted a message on her personal blog complaining about the administration and encouraging readers to call or e-mail the school to complain); *Evans v. Bayer*, 684 F.Supp.2d 1365, 1367 (S.D. Fla. 2010) (student created a Facebook group "for students to voice their dislike" of their teacher).

23 See, *e.g.*, *S. J. W. v. Lee's Summit R–7 School Dist.*, 696 F.3d 771, 773–774 (C.A.8 2012) (high school juniors posted a variety of offensive, racist, and sexually-explicit comments about particular female classmates); *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 567–568 (C.A.4 2011) (student created an online discussion group accusing another student of having a sexually-transmitted disease); *Dunkley v. Board of Ed. of Greater Egg Harbor Regional High School Dist.*, 216 F.Supp.3d 485, 487 (N.J. 2016) (student used an anonymous Twitter account to insult other students based on their appearances and athletic abilities).

24 App. 82.

25 *Id.*, at 82–84.

26 *Id.,* at 81.

27 See NCES, School Principals, Table 212.08: Number and Percentage Distribution in Public and Private Elementary and Secondary Schools, Selected Years 1993–1994 Through 2017–2018, https://nces.ed.gov/programs/digest/d19/tables/dt19_212.08.asp?current=yes.

28 See NCES, Overview of Schools and School Districts, Table 214.10: Number of Public School Districts and Public and Private Elementary and Secondary Schools, Selected Years 1869–1870 Through 2018–2019, https://nces.ed.gov/programs/digest/d20/tables/dt20_214.10.asp.

* *E.g., Deskins v. Gose*, 85 Mo. 485, 488–489 (1885) (citing *Lander*); F. Burke, Law of Public Schools 116, 129 (1880) ("[W]hatsoever has a direct and immediate tendency to injure the school in its important interests, or to subvert the authority of those in charge of it, is properly a subject for regulation and discipline, and this is so *wherever* the acts may be committed" (citing *Lander*)); C. Bardeen, The New York School Office's Handbook 158 (1910) (citing *Lander*).