

No. 26-8

In the Supreme Court of the United States

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KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF *AMICI CURIAE*
STATE OF WEST VIRGINIA
AND 11 OTHER STATES
IN SUPPORT OF PETITIONER**

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE**

Montgomery County Public Schools told a teacher she could keep her job on one condition: she had to become a mouthpiece for the district's gender-ideology-related views. MCPS's Guidelines for Student Gender Identity require staff to address elementary school children using pronouns that contradict their biological sex; staff must also keep parents in the dark if the child is secretly "transitioning" at school. Ms. Polk's Christian faith forbade both, so MCPS pushed her out of the classroom.

The Guidelines raise every First Amendment red flag. They compel speech, silence speech, pick a favored viewpoint in the gender identity debate, and pressure Ms. Polk to abandon her religious views. Ms. Polk wanted to teach without MCPS forcing her to violate her faith by proclaiming MCPS's preferred orthodoxy. And her request would have left the Guidelines intact, as she only asked to teach in elementary classrooms with no transitioning students.

But the Fourth Circuit denied her relief—finding a way around the First Amendment not once, but twice. First, it waved away Ms. Polk's free exercise claim, holding that the Constitution has nothing to say about MCPS punishing Ms. Polk for her faith. Then it swept aside her free speech claim, treating every word she spoke as though it belonged to MCPS merely because Ms. Polk was on the clock.

The Fourth Circuit was wrong. On the free exercise claim, the government transgresses constitutional bounds

* Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

when it compels a person to speak a message that violates their faith. MCPS's Guidelines impose that type of burden. Thus, the Guidelines must face strict scrutiny—regardless of whether they're neutral or generally applicable. But as it turns out, the Guidelines aren't neutral or generally applicable, either. And they can't survive strict scrutiny. Likewise, on the speech claim, a government can't entirely strip a teacher of her own voice the moment she enters a classroom. While the government can regulate internal workplace speech, it cannot hand a teacher a script for non-curricular things she must say and a gag for others she must not. So read correctly, free exercise and free speech doctrines point the same direction: MCPS has violated the First Amendment.

This double-barreled problem is a big one. For one, these issues are not unique to Maryland, as over 1,200 similar pronoun policies exist nationwide. *List of School District Transgender-Gender Nonconforming Student Policies*, DEFENDING EDUC., perma.cc/RC2L-TDBN (last updated May 4, 2026). For another, they don't present merely partisan concerns. The same reasoning that gives districts a free pass to compel a teacher to use preferred pronouns also gives them a pass to prevent a teacher from using preferred pronouns. That's already happening, as the circuit split on this question reveals. And the fallout won't stop with gender ideology. Neutered constitutional protections will turn schools into instruments of ideological conformity for any orthodoxy that might become a government's new favorite.

As to both religion and speech, the First Amendment offers more than the milquetoast protections the Fourth Circuit conceived. The Court should grant the petition and reverse.

SUMMARY OF ARGUMENT

I. Montgomery County Public Schools’s Guidelines violate the Free Exercise Clause. Multiple, independent tracks may confirm that a law improperly burdens religious exercise—escalating review to strict scrutiny. Under *Mahmoud*, a plaintiff can show the type of burden imposed is one this Court has already condemned. Alternatively, under *Smith*, a plaintiff can show the policy is not neutral or generally applicable.

Here, the Guidelines must face strict scrutiny. The Guidelines impose the same type of burden *Barnette* forbids—and that parallel alone is damning under *Mahmoud*. But if that weren’t enough, the Guidelines fail even *Smith*’s flawed test. These Guidelines aren’t neutral or generally applicable, as they uniquely burden religious practitioners and contemplate exceptions. And under the stringent review embodied in strict scrutiny, the Guidelines buckle.

II. The Guidelines also violate the Free Speech Clause—three times over. The Clause bars the government from silencing speech, compelling speech, or discriminating based on viewpoint. Those constraints limit the State as an employer, too. What are those limits? It depends. The Court’s compelled speech cases have splintered into competing tests—*Pickering*, exacting scrutiny, strict scrutiny, per se unconstitutionality—and it’s often hard to know which really applies. That fracture has further deepened as courts have divided over how broadly to define a teacher’s official duties under *Garcetti*, and whether a teacher’s pronoun usage is part of their official duties.

But even in this doctrinal maze, every path leads to the same destination: The Guidelines are unconstitutional.

They transgress all three limits of the Free Speech Clause. The Guidelines compel teachers to address students using their preferred pronouns and silence teachers from sharing a student’s transition with their parents—all in service of MCPS’s preferred gender ideology message. And none of the possible tests rescue the Guidelines from constitutional defect.

ARGUMENT

I. MCPS has violated the Free Exercise Clause.

The Guidelines run afoul of the Free Exercise Clause. Both *Mahmoud* and *Smith* call for strict scrutiny—and under that demanding standard, the Guidelines collapse.

A. States cannot compel a person to speak a message that violates his or her conscience.

1. Free exercise protections, alongside other constitutional protections, bar the government from penalizing disfavored religious beliefs.

The Free Exercise Clause prohibits the government from discriminating against disfavored religious views. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Even a “narrow” view of free exercise principles “protect[s] against ... coercion to renounce or abandon one’s religion.” *Mahmoud v. Taylor*, 606 U.S. 522, 558 (2025). So a State violates the Constitution when it pressures someone to make a “belief or benefit” choice, like refraining from Sabbath work or obtaining unemployment benefits. See *Sherbert*, 374 U.S. at 404, 410. A government policy also cannot be “saved from constitutional infirmity” because a plaintiff may seek similar benefits elsewhere. *Id.*

Other constitutional freedoms often reinforce these strong free exercise protections.

Yoder provides one example. The law—“neutral on its face” and “appl[ying] uniformly to all citizens of the State”—mandated schooling through age sixteen. *Wisconsin v. Yoder*, 406 U.S. 205, 211, 220 (1972). But Amish families argued that keeping their children in school past eighth grade would “expos[e] ... their children to a ‘worldly’ influence in conflict with their [religious] beliefs.” *Id.* at 211. The Court sided with the families: Both free exercise rights and the parental right to “direct the upbringing” of one’s children barred the State’s action. *Id.* at 233.

Similarly, the across-the-board policies in *Barnette* and *Wooley* were enjoined on free speech grounds—but the speech claims sprang from religious objections. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626, 640 (1943); *Wooley v. Maynard*, 430 U.S. 705, 707 (1977). In *Wooley*, the state law mandated all license plates carry the slogan, “Live Free or Die.” 430 U.S. at 707. In *Barnette*, the policy compelled students to salute and pledge allegiance to the flag. 319 U.S. at 626-29. That latter policy represented an “especially egregious kind of direct coercion: a requirement that students make an affirmation contrary to their ... religious beliefs.” *Mahmoud*, 606 U.S. at 548. But in both cases, Jehovah’s Witnesses would not comply because doing so would violate their religion. *Wooley*, 430 U.S. at 707; *Barnette*, 319 U.S. at 629. And the Court vindicated their free speech (and free exercise) rights, as the government cannot make a person “foster ... an idea they find morally objectionable.” *Wooley*, 430 U.S. at 715.

Society’s “hydraulic insistence on conformity to majoritarian standards” may increasingly conflict with

individuals’ religious precepts. *Yoder*, 406 U.S. at 217. But the guarantee of the Free Exercise Clause remains firm.

2. This Court’s precedents offer several routes to strict scrutiny for laws that burden religious practices.

Mahmoud clarified that *Smith* isn’t the only path to strict scrutiny. Often, the free exercise inquiry begins by asking the *Smith* questions: whether the law is neutral and generally applicable. *Mahmoud*, 606 U.S. at 564. A law that fails on either gets strict scrutiny. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 882 (1990). But sometimes, neutrality and general applicability don’t matter. *Mahmoud*, 606 U.S. at 564. *Smith* aside, strict scrutiny applies whenever a policy imposes the same kind of burden on religion that an earlier precedent already denounced. *Id.* at 565 n.14. Pre-*Smith* cases remain binding “like any other precedent.” *Id.* at 558. So courts apply the case that “directly controls”—even if there’s some internal “tension” between different strands of precedent. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (cleaned up).

Mahmoud, for example, fell outside *Smith*’s residual rule. There, the “character of the burden” imposed—mandating “‘LGBTQ+-inclusive’ storybooks” be read in classrooms—mirrored the burden created by the compulsory attendance law in *Yoder*. *Mahmoud*, 606 U.S. at 550, 553, 564. Both policies “impose[d] upon children a set of values and beliefs that [were] ‘hostile’ to their parents’ religious beliefs.” *Id.* at 554. Whatever the factual differences between *Yoder* and *Mahmoud*, the government action in each posed “the same kind of objective danger to the free exercise of religion.” *Id.* at 554 (cleaned up).

Whenever a policy burdens religion in a way a prior precedent already found problematic, it must face strict scrutiny—regardless of how it fares under *Smith*. *Mahmoud*, 606 U.S. at 565 n.14.

3. Of course, *Smith* also lays a path to strict scrutiny. Its neutrality and general applicability prongs suss out overt and covert suppression of religious beliefs.

A policy is not generally applicable if the government makes individualized assessments in granting exemptions. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021). Whenever the government evaluates “the particular justification” for a religious request, its actions fail to be generally applicable, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)—even if the State has never granted an exemption, *Fulton*, 593 U.S. at 537.

Likewise, state action fails to be neutral when it burdens religious people and “almost no others.” *Lukumi*, 508 U.S. at 536. Looking beyond the face of the policy to examine its “effect” or “net result” may reveal impermissible “covert suppression of particular religious beliefs.” *Id.* at 534-536 (cleaned up).

B. The Guidelines fall under both *Mahmoud* and *Smith*.

Applying the standards above, *Mahmoud* dictates that the Guidelines be subjected to strict scrutiny. The same is true under *Smith*—even though *Smith* is flawed, such that the Court should really just lay it to rest. Applying strict scrutiny, the Guidelines prove unconstitutional.

1. First, the easier path: the Guidelines improperly coerce Ms. Polk “to renounce or abandon [her] religion.”

Mahmoud, 606 U.S. at 558. That fundamental imposition should be enough to trigger strict scrutiny.

Ms. Polk believes that “God created individuals as either male or female” and that parents have the God-given right to direct their child’s upbringing. App.6 (cleaned up). So encouraging “children to present [differently] than their God-given sex” or “hid[ing] from parents [that] their child is transitioning genders at school” would violate her religious beliefs. App.6 (cleaned up).

But the Guidelines compel Ms. Polk to abandon or violate those views. The Guidelines forbid a staff member from disclosing the child’s “transgender status” or “gender nonconforming presentation” to other staff or parents. App.5a. They also “mandate that school staff ... address students by the name and pronoun corresponding to the gender identity that is consistently asserted at school.” App.4a (cleaned up). But when talking to parents, the Guidelines direct staff to use the student’s biologically correct name and pronouns. App.57a.

So Ms. Polk must either acquiesce to the school system’s flexible conception of gender and sex or lose her job—a “belief or benefit” choice that infringes on Ms. Polk’s free exercise of religion. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). The possibility that Ms. Polk could seek employment somewhere more tolerant of her religious beliefs also does not make the Guidelines constitutional. *Id.*

The Guidelines are much like—and indeed, even worse than—the policies in *Barnette* and *Wooley*. As in *Barnette*, the Guidelines impose the most “egregious kind of direct coercion” by compelling Ms. Polk to face punishment or affirm a message that violates her religious

beliefs. *Mahmoud*, 606 U.S. at 548; App.4a-5a, App.7a. And as with the mandatory license plate slogan in *Wooley*, the Guidelines require Ms. Polk to speak an “ideological message” that she finds “morally objectionable.” 430 U.S. at 715. But the Guidelines go further: Instead of compelling symbolic speech on an unobjectionable message like “patriotism,” *Barnette*, 319 U.S. at 631 (cleaned up), the Guidelines compel literal speech on a controversial message, *Mahmoud*, 606 U.S. at 553.

Because the Guidelines inflict “a burden of the same character” as *Barnette* and *Wooley*, those cases govern. *Mahmoud*, 606 U.S. at 565 & n.14. The Guidelines must face strict scrutiny.

2. What’s more, the Guidelines trigger strict scrutiny even under the unduly forgiving *Smith* framework.

First, the Guidelines are not generally applicable. Ms. Polk “submitted a request for a religious accommodation,” but MCPS denied it. App.7a. That fact defeats general applicability, as it shows the district was willing to entertain the notion of an exception—just not grant one for this particular practitioner. *Fulton*, 593 U.S. at 533, 537.

The Guidelines also are not neutral. The Guidelines make MCPS classrooms inhospitable to those who “hold traditional views on marriage, sex, and gender.” *Mahmoud*, 606 U.S. at 567. This burden “falls on [religious objectors and] almost no others.” *Lukumi*, 508 U.S. at 536. And unfortunately, the district’s hostility comes as no surprise. MCPS has a recent history of refusing “impassioned pleas” to accommodate these religious views. *Mahmoud*, 606 U.S. at 532. That circumstantial evidence provides yet more evidence of non-neutrality. See *Lukumi*, 508 U.S. at 540.

Whether examined through *Smith*'s neutral-and-generally-applicable lens or using *Mahmoud*'s character-of-the-burden framework, the Guidelines must face strict scrutiny.

3. The Guidelines fail strict scrutiny, which requires both a compelling governmental interest and narrow tailoring.

Start with the deficient interests. MCPS contends the Guidelines advance three interests: (1) “supporting and protecting the safety of the students whose parents may object to their decision to transition”; (2) ensuring all “staff ... will treat and nurture every student equally”; and (3) meeting “its obligations under Title IX.” App.27a-28a.

But MCPS's first two aims are “not ideologically neutral,” so they're not compelling. *Wooley*, 430 U.S. at 717. MCPS's viewpoint discriminatory rationale cannot save its viewpoint discriminatory policy. *Id.* And MCPS likewise cannot claim a compelling interest in “cut[ting] out the primary protectors of children's best interests: their parents.” *Mirabelli v. Bonta*, 607 U.S. 492, 496-97 (2026). As for Title IX, no court has held that Title IX compels teachers to use biologically inaccurate pronouns to address students. In fact, the existing authority says otherwise. See, e.g., *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 759 (6th Cir. 2025) (“[T]he School District lacks evidence that the use of biological pronouns would deny any students an equal access to education in [violation of Title IX.]”); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 150 F.4th 792, 811 (7th Cir. 2025) (holding that use of last names rather than preferred pronouns for students did not place school on “the razor's edge” of Title IX liability (cleaned up)).

And MCPS’s interests flounder on tailoring, too. For instance, even if MCPS needed the Guidelines to meet its Title IX obligations (it doesn’t), Title IX would “sweep too broadly [if] deployed to compel speech,” *303 Creative LLC v. Elenis*, 600 U.S. 570, 592 (2023)—especially because “content-neutral alternatives” exist, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); see, e.g., *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 544 (E.D. Ky. 2024) (holding that a rule construing Title IX to require use of preferred pronouns in the classroom unconstitutionally compelled speech). As one obvious alternative, MCPS could have respected Ms. Polk’s free speech rights and maintained its Guidelines by allowing her to substitute exclusively in “elementary school classrooms with no transitioning students attending them.” App.60a (cleaned up). That MCPS chose not to is fatal for tailoring.

* * *

In short, MCPS violated Ms. Polk’s free exercise rights. The Court should grant this petition and say so.

II. MCPS has also violated the Free Speech Clause.

The Guidelines silence speech, compel speech, and do both in a way that discriminates based on viewpoint. Roll the dice on any of the standards of review that might apply under the Free Speech Clause and the Guidelines crumble.

What standard applies shouldn’t be a gamble, though. Consider the host of important and unanswered questions this case raises: Does *Pickering* apply at all to compelled speech? Does it apply to blanket requirements in the same way it applies to single supervisory decisions? If *Pickering* does apply in either situation, what adjustment would it need? How broadly does *Garcetti*’s official duties

inquiry reach within the classroom? Do both *Pickering* and some form of heightened scrutiny apply to compelled speech employment policies? What type of heightened scrutiny governs—exacting or strict scrutiny?

This Court should take this case to provide much needed clarity on these questions.

A. First Amendment doctrines have grown irreparably fragmented.

1. The First Amendment bars the government from forcing individuals to proclaim the State’s preferred orthodoxy. Lurking beneath compelled speech policies often lies another, independent constitutional problem: viewpoint discrimination.

The freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley*, 430 U.S. at 714. So the government may not force someone to “betray[] their convictions,” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 892, 893 (2018), by “compel[ling] [him] to utter what is not in his mind,” *Barnette*, 319 U.S. at 634. The government also cannot require a speaker to accommodate another person’s speech unless doing so would not “alter” the person’s “own message[.]” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994).

The Free Speech Clause also “protects the right of individuals to hold a point of view different from the majority.” *Wooley*, 430 U.S. at 715. That protection extends to “misinformed or offensive” speech, *303 Creative*, 600 U.S. at 595, as well as speech that may “cause incalculable grief,” *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (cleaned up). The “government may not regulate ... based on hostility—or favoritism—towards

the underlying message expressed.” *R.A.V.*, 505 U.S. at 386.

Policies suffering from the first constitutional defect (compelling speech) often suffer from this second defect (viewpoint discrimination), too. Take *Barnette*, where a policy (1) compelled “students to [symbolically] declare a belief” with the aim of (2) “coerc[ing] uniformity of [a nationalistic] sentiment.” 319 U.S. at 632, 634, 640-41. Or consider the law in *Wooley*, which forced citizens to (1) “foster[] public adherence to an [(2)] ideological point of view.” 430 U.S. at 715. These laws used unconstitutional means to achieve unconstitutional ends.

2. The constitutional prohibitions against compelled speech and viewpoint discrimination apply with equal force inside the classroom. But *how* these prohibitions apply has turned hazy lately.

To start, teachers don’t “shed their constitutional rights to freedom of speech ... at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). And the government cannot rescue an impermissible speech policy by framing it as merely a “condition [of] employment.” *Lane v. Franks*, 573 U.S. 228, 236 (2014). That proscription constrains school districts, too. *Pickering v. Bd. of Educ. of Township High School Dist. 205, Will Cnty.*, 391 U.S. 563, 568 (1968).

But in limited circumstances, a State may constitutionally regulate its employees’ speech. *Pickering*, 391 U.S. at 568. A government employer can regulate speech if: (1) it is made “pursuant to [an employee’s] official duties,” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), (2) concerns a “matter[] only of personal interest,” *Connick v. Myers*, 461 U.S. 138, 147 (1983), and (3) the State’s interest in regulation outweighs the

employee's interest in expression, *Pickering*, 391 U.S. at 568. *Pickering*'s heartland thus involves an employer preventing an employee from publicly sharing internal workplace information. See *Connick*, 461 U.S. at 147-48 (questionnaire answers about "discipline and morale in the workplace"); *Garcetti*, 547 U.S. at 420-21 (an "opinion and recommendation" about "how best to proceed with a pending case").

But the contours of *Pickering* remain fuzzy. Questions persist about categories of cases where *Pickering* may be inappropriate. It's doubtful, for example, that the test applies to policies that compel speech because an employer cannot casually "command[] that its employees ... recite words with which they disagree." *Janus*, 585 U.S. at 908. It's also unlikely *Pickering* applies the same way to "blanket [employment] requirement[s]." *Id.* at 907. Sweeping policies inherently "give[] rise to far more serious concerns" than the "single supervisory decision[s]" *Pickering* was designed for. *Id.* (cleaned up). And even when the test does apply, the step one "official duties" inquiry may require different considerations when it comes to teachers. *Garcetti*, 547 U.S. at 425.

Sure enough, circuits are split on that last question: How broadly does *Garcetti*'s "official duties" test sweep?

The Fourth, Seventh, Ninth, and Eleventh Circuits take a near limitless view of *Garcetti* in the classroom. The Seventh Circuit held that, because "[e]xpression is a teacher's stock in trade," all in-classroom speech is part of a teacher's "official duties"—and therefore is unprotected. *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007). The Eleventh Circuit's approach is similarly sweeping. In its view, any time a "public-school teacher addresses her students within the four walls of a classroom—whether orally or in writing—she is

unquestionably acting pursuant to her official duties.” *Wood v. Fla. Dep’t of Educ.*, 142 F.4th 1286, 1290 (11th Cir. 2025) (cleaned up). The Fourth and Ninth Circuits likewise treat *Garcetti* as having no bounds. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011); App.31a-35a.

The Sixth Circuit and Virginia Supreme Court, on the other hand, take a properly circumscribed approach. The Sixth Circuit recognizes that a teacher’s “curricular and pedagogical choices [are made] in connection with her official duties as a teacher,” but the rest isn’t. *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010) (Sutton, J.). So a school district can regulate a teacher’s curricular speech but not non-curricular speech. *Id.* The Virginia Supreme Court has drawn the same line. *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 742-43 (Va. 2023).

This second approach is correct, as a sweeping view of teachers’ “official duties” poses serious problems. It would grant “official power ... to coerce acceptance of any ... creed,” *Barnette*, 319 U.S. at 634, and teachers would become “voiceless vehicle[s] to advance the [State’s preferred] ideology.” Lindsay McCarthy, *Wake Up: How Application of Garcetti to Public Educator Speech Harms Educators and Students Through the Lens of Florida’s Individual Freedom Act*, 98 ST. JOHN’S L. REV. 1365, 1382-83 (2025). Across the board, States could “mandate that teachers voice opinions contrary to their own without *any* First Amendment protection whatsoever.” App.48a (Wilkinson, J., dissenting) (emphasis added). So the government could “force an Israeli teacher to wear a pro-Palestine pin” or “an atheist teacher to recite the pledge of allegiance with the words ‘under God’.” App.48a

(Wilkinson, J., dissenting). The First Amendment requires more.

That split further deepens into disagreement on the precise question presented here: Is teachers' pronoun usage within their "official duties" under *Garcetti*?

The Fourth and Eleventh Circuits wrongly say yes. The Eleventh Circuit recently upheld a law directly opposed to the one here. The majority there blessed a statute that banned teachers from using pronouns that *don't align* with their biological sex. *Wood*, 142 F.4th at 1290. The Fourth Circuit below relied on a similarly sweeping view of *Garcetti* but to justify the contrary policy position pushed by the Guidelines here. See App.31a-35a.

Both decisions garnered strong dissents. Judge Jordan dissented from the Eleventh Circuit's decision, reasoning that the teacher's pronoun usage is not part of their "official duties": A teacher's "preferred personal title and pronouns ... do not depend on[] the school or the government for their existence." *Wood*, 142 F.4th at 1297 (Jordan, J., dissenting). Judge Wilkinson, below, dissented on similar grounds. He pointed out that, under the majority's rationale, teachers would "retain no speech protections whatsoever." App.47a.

On the other side, the Sixth Circuit and Virginia Supreme Court recognize that *Garcetti* cannot be so sweeping—particularly on a hot button issue like pronouns. The Sixth Circuit held that a public university professor "retain[ed] [his] First Amendment protections" while teaching, so the university could not force him to follow its compelled pronoun policy. *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021). The Virginia Supreme Court came out the same way, holding that a high school teacher retained First Amendment protection

for his use of pronouns. *Vlaming*, 895 S.E.2d at 742-43. Because *Garcetti*'s dividing line was whether speech was "curricular," the school could compel a teacher to teach "the specific subjects that the teacher is expected to teach," but not a "highly divisive, ideological issue that violated a teacher's religious faith." *Id.* at 742-43 (cleaned up).

Once again, it's the latter group of courts that has the better of the argument. An unduly expansive view of *Garcetti* poses real, non-partisan problems when it comes to pronoun policies. Policies mandating preferred pronouns and policies forbidding them are "indistinguishable under the Free Speech Clause." Zachary A. Kayal, *He/she/they "Say Gay": A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality*, 57 COLUM. J.L. & SOC. PROBS. 57, 65 (2023). So a sweeping application of *Garcetti* ensures States can pick a winner between the two sides—but which teachers get silenced will depend on the political majorities within each jurisdiction.

But the Court can save that ultimate answer for later. What matters at this stage is something undeniable: Lower courts are in discord when it comes to *Garcetti* and *Pickering*—and they need this Court's help.

3. The unsettled territory doesn't stop at *Pickering*, as it's far from the only test this Court has used to evaluate the constitutionality of speech policies. So the map for lower courts to follow is—troublingly—more of a choose-your-own-adventure framework.

In *Barnette*, the Court established a first route: Only the most "immediate and urgent grounds" could justify a compelled speech policy. 319 U.S. at 633.

Recently, this Court forged a different path—holding a compelled speech policy to be point blank unconstitutional. *303 Creative*, 600 U.S. at 585-96 (striking down the law but not applying strict scrutiny). Because the First Amendment does not permit “government[s] to force ... [people] to speak what they do not believe on pain of penalty,” no state interest or degree of tailoring can cure a compelled speech law’s constitutional defect. *Id.* at 589-90.

Viewpoint discrimination sets forth yet another track. Discriminatory policies are “presumptively unconstitutional” and must face strict scrutiny. *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (cleaned up). Strict scrutiny requires the state action to be “narrowly tailored to serve compelling state interests.” *Id.* (cleaned up).

Janus adds another fork to the road. The Court canvassed three possible standards for a compelled-subsidy policy—*Pickering*, exacting scrutiny, and strict scrutiny. *Janus*, 585 U.S. at 894-901, 907-16. The Court applied *Pickering* just to be thorough, and chose exacting over strict scrutiny only because the law at issue failed even that more forgiving test. *Id.* Under exacting scrutiny, the Court asked whether “a compelled subsidy ... serve[d] a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.* at 894 (cleaned up).

A policy compelling speech may thus be: justifiable on only the most immediate and urgent grounds, per se unconstitutional, subject to strict scrutiny, subject to exacting scrutiny, and/or subject to *Pickering* balancing.

B. Under any of the competing standards, the Guidelines violate the Free Speech Clause.

1. The Guidelines commit three of the First Amendment’s cardinal sins: silencing speech, compelling speech, and discriminating based on viewpoint. Silencing is obvious; if a child is secretly transitioning at school, MCPS forbids staff, including Ms. Polk, from sharing that information with parents. App.5a. Equally obvious is the compelled speech; the Guidelines force staff to address students using their preferred pronouns but use biologically correct pronouns when speaking with parents whose child is secretly transitioning. App.4a, App.57a. Forcing Ms. Polk to use a student’s preferred pronouns would compel her to send a message with which she profoundly disagrees. *Turner Broad.*, 512 U.S. at 655. And the Guidelines have a viewpoint discrimination problem, too. In particular, they “establish[] a hierarchy of public opinion, valuing pro-transgender messages above more socially conservative positions.” App.43a (Wilkinson, J., dissenting).

That viewpoint discrimination is especially troubling, but proponents of compelled pronoun policies see it as a feature—not a bug. Pro-gender ideology groups make this fact plain, describing use of preferred pronouns as a “vital and an important way to affirm trans and gender diverse people’s identities.” *Transgender 101 Guide*, ACLU KANSAS (April 18, 2023), <https://tinyurl.com/3eszdf25>. Advocacy organizations insist people use preferred pronouns instead of biologically accurate ones because those pronouns send a message. In the same way, MCPS would not push these pronouns’ use if they lacked a communicative element. So both Ms. Polk and MCPS can agree then: The Guidelines propound a specific viewpoint.

The Guidelines effectuate a three-in-one infringement of the most egregious free speech violations: silencing disfavored speech and compelling preferred speech—all in service of a “hotly contested” ideological viewpoint. *Mahmoud*, 606 U.S. at 553.

2. That the Guidelines apply inside classroom walls makes the free speech violation no better. *Pickering*—if it even applied—would not give the State a green light to compel controversial, non-curricular speech.

To begin, the Guidelines “cast a [troubling] pall of orthodoxy over the classroom.” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). MCPS silences its employees from sharing traditional views of sex—and conscripts what they must say to preach its approved pro-gender ideology message. That government-mandated orthodoxy is just as troubling inside as outside the classroom. See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). MCPS may not feel much “responsibility to the Constitution,” *Barnette*, 319 U.S. at 637; see *Mahmoud*, 606 U.S. at 532-43, but the district is still bound to follow it. And it’s the judiciary’s role to ensure MCPS stays within constitutional bounds, *Barnette*, 319 U.S. at 639, even if the majority below misread this responsibility as an “invitation to run the public schools,” App.35a.

Oozing from the Fourth Circuit’s decision is rationale this Court has long rejected. Compare *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597-98 (1940), overruled by *Barnette*, 319 U.S. 624, with App.35a-37a. The decision below abdicates the judicial role—and improperly aggrandizes local school districts’ power—by only halfheartedly policing constitutional violations because they occur within classroom walls. *Barnette*, 319 U.S. at 639. The Fourth Circuit also incorrectly held that Ms.

Polk’s First Amendment rights spring to life only if she has no choice but to work for MCPS. App.32a. That rationale is flat wrong. See *Pickering*, 391 U.S. at 568.

Pickering also cannot save the Guidelines because it shouldn’t apply. Every hint this Court has given about when *Pickering* may be inappropriate or require modification is present here. The Guidelines compel speech. App.4a. They apply within classroom walls. See App.4a-6a. And unlike typical *Pickering* cases involving a “single supervisory decision,” *Janus*, 585 U.S. at 907 (cleaned up), the Guidelines dictate speech of all staff members and substitute teachers across “one of the largest school districts in the Nation,” *Mahmoud*, 606 U.S. at 532; App.6a. Just one of these defects would caution against applying *Pickering*. See *Janus*, 585 U.S. at 907-08. But the Guidelines suffer from all three. Even if *Pickering* applied, the balancing test would require very serious “modification” in a case like this. *Janus*, 585 U.S. at 907. What type of modification? This Court would need to say.

But even under an inappropriate test like *Pickering*, the Guidelines still collapse. First, Ms. Polk’s pronoun usage is not part of her “official duties.” How she addresses students takes place “within the [school] environment,” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530 (2022) (cleaned up), but her pronoun usage does not “owe[] its existence to” her responsibilities as a substitute teacher, *Garcetti*, 547 U.S. at 421. Second, pronoun usage sends a message about “controversial subjects such as ... sexual orientation and gender identity”—which “are undoubtedly matters of profound value and concern to the public.” *Janus*, 585 U.S. at 912 (cleaned up). Third, MCPS’s interest pales in comparison to hers: MCPS does not need to affirm students’ gender

identity or facilitate a secret gender transition to “function” as a school district. *Rankin v. McPherson*, 483 U.S. 378, 388, 390-91 (1987).

The Fourth Circuit embraced a troublingly broad view of *Pickering*. On the first prong, it held that compelling a teacher to affirm a child’s gender identity is just part of a substitute teacher’s job. App.31a. Then, the court said whether Ms. Polk affirms a child’s potentially secret gender transition is not a matter of public concern. App.37a. Finally, instead of asking whether MCPS needed the *Guidelines* to operate, the court asked whether “the *judiciary* [would] interfere with the effective operation of the schools” if it struck down the Guidelines. App.37a (emphasis added) (cleaned up). The Fourth Circuit thought holding MCPS to constitutional standards would interfere with the district’s operation. But courts shouldn’t shy away from implementing specific, tailored remedies because it would require a district to change. That’s just the nature of litigation.

Neither MCPS’s role as a school nor as an employer gives it a hall pass to violate the First Amendment. The Court should clarify that *Pickering* does not apply to sweeping, controversial, compelled speech policies like this one.

3. The Guidelines must face at least exacting scrutiny—and they fail.

- Under *Barnette*, MCPS lacks the “immediate and urgent grounds” necessary to justify a compelled speech policy. 319 U.S. at 633. Ideological interests fall short. *Id.* at 631; *Wooley*, 430 U.S. at 716.
- Applying *303 Creative*, the Guidelines are per se unconstitutional. The government may not compel

Ms. Polk to speak its message or face punishment.
303 Creative, 600 U.S. at 589-90.

- Because the Guidelines are the antithesis of viewpoint neutral, they could also be presumptively unconstitutional and subject to strict scrutiny. *Becerra*, 585 U.S. at 766.
- And if *Janus*’s apathetic embrace of exacting scrutiny applied, then MCPS still would need to provide a compelling interest and substantial tailoring. 585 U.S. at 894.

MCPS’s interests are not compelling. See *supra* I.B.3. And even if they were, those aims sweep “significantly broader than necessary” to achieve its goals, invalidating the policy under either strict or exacting scrutiny. *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 314 (2012); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800-01 (1988); see also *supra* I.B.3.

* * *

This splintered framework of free speech protections cannot stand. By granting the petition here—in this case that presents a clean vehicle—the Court can combine these scattered paths into a single, navigable one.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted.

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