

No. 26-8

IN THE
Supreme Court of the United States

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 THE LIBERTY JUSTICE CENTER'S
PARENTS INITIATIVE AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

Timothy R. Snowball
Counsel of Record
Kathryn Cosgrove
PARENTS INITIATIVE OF THE
LIBERTY JUSTICE CENTER
1629 K Street N.W., Suite 300
Washington, D.C. 20006
(512) 481-4400
tsnowball@libertyjusticecenter.org

July 31, 2026

Questions Presented

1. Under *Employment Division v. Smith*, are public school policies that force teachers to use pronouns inconsistent with a student's biological sex subject to strict scrutiny under the First Amendment's Free Exercise Clause?

2. Do public schools violate the First Amendment's Free Speech Clause when they force teachers to use pronouns inconsistent with a student's biological sex?

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Interest of Amicus Curiae¹

The PARENTS Initiative is a project of the Liberty Justice Center (LJC), a nonprofit, nonpartisan public-interest litigation firm that defends and advances individual liberties and limited, accountable government. This work includes pursuing strategic, precedent-setting litigation aimed at protecting parental and student rights and ensuring educational freedom. LJC has previously filed amicus briefs on educational issues before this Court, *e.g.*, *Carson v. Makin*, 596 U.S. 767 (2022), and has a specific interest in the Court accepting this case for review. The free exercise and free speech issues the Petition raises, and which are discussed below, are germane to LJC’s efforts to further educational freedom.

Summary of the Argument

The Petition should be granted because the court below misinterpreted the First Amendment’s protections for free exercise and free speech. In doing so, it rendered a decision that conflicts with this Court’s precedents, creates a circuit split, and raises important federal questions that this Court must settle.

The Montgomery County Board of Education imposed guidelines upon Petitioner Kimberly Polk that compelled her to refer to students by “preferred” pronouns inconsistent with their biological sex—and to do so without notifying their parents.

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus’s intent to file this brief.

Applying *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Fourth Circuit held that the guidelines were a “neutral” policy and thus did not violate Ms. Polk’s right to free exercise of her religion. This holding conflicts with both *Smith*’s own neutrality standard and a recent Ninth Circuit case. This Court should settle this conflict of authority.

Next, applying *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Fourth Circuit held that the Board compelling Ms. Polk to use students preferred pronouns did not violate her free speech rights because the speech occurred within the scope of her “official duties.” Even if that were true, which it is not, the speech at issue is not subject to the *Garcetti* framework because it was unlawful and undermines the rights of parents to direct the education of their children. The Fourth Circuit’s holding is thus in direct conflict with other decisions of this Court, and should be settled.

Finally, the Fourth Circuit’s decision raises important federal questions it is the unique purview of this Court to resolve. The Fourth Circuit’s interpretation of *Smith* is unworkable and underinclusive, and its interpretation of *Garcetti* would allow public schools to require teachers to undermine parental rights. This Court should also accept the Petition to address these important federal questions.

For these and the reasons below, the Petition for a Writ of Certiorari should be granted.

Argument

I.

The Fourth Circuit’s decision below creates conflicts of authority concerning the free exercise of religion.

A. The decision below conflicts with this Court’s free exercise precedents.

Under *Smith*, laws that incidentally burden the free exercise of religion but are otherwise “neutral” and “generally applicable” do not require application of strict scrutiny. 494 U.S. at 872. But *Smith*’s neutrality standard is demanding.

Even facially neutral laws tinged with hostility toward a particular religion or set of religious beliefs are not considered “neutral,” and must satisfy strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”).

The Free Exercise Clause thus protects against governmental hostility “which is masked, as well as overt.” *Id.* Otherwise, government could “impose regulations hostile to the religious beliefs of affected citizens and act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop v. Colorado C.R. Comm’n*, 584 U.S. 617, 638 (2018). As this Court made clear in *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021), the government “fails to act neutrally when

it proceeds in a manner intolerant of religious beliefs *or* restricts practices because of their religious nature” (emphasis added).

Therefore, plaintiffs need not show evidence of causation under *Smith* in order maintain a free exercise claim. When religious exercise is treated comparatively unfavorably or with hostility, strict scrutiny is triggered. *See Tandon v. Newsom*, 593 U.S. 61, 62, (2021) (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.”).

Here, the Fourth Circuit treats the *Smith* neutrality prong as requiring a *causal* element not present in *Smith* or subsequent cases. Under this approach, unless a law burdening religion is enacted because of religious animus, it is considered neutral. Pet’r’s App. at 21a (“In other words, as we have explained, ‘when presented with a law that affects religious practice, even if indirectly, a court must look behind the law’s text to determine if it was enacted ‘because of’ and not ‘in spite of’ its effect on religion.’”) (citations omitted). This means that a law could be hostile to a particular religion and avoid strict scrutiny so long as this hostility was not the “but-for” cause of the law being enacted.

This is not what the Free Exercise Clause demands, under either *Smith* or cases like *Fulton*. As such, the decision below is in direct conflict with this Court’s precedents, and the Petition should be granted to settle the conflict.

B. The decision below creates a circuit split between the Fourth and Ninth Circuits.

Unlike the Fourth Circuit, the Ninth Circuit correctly applies *Smith*'s neutrality prong, holding that hostility toward religion is sufficient to show a policy was not neutral.

In *Bates v. Pakseresht*, the Ninth Circuit considered an Oregon Department of Human Services policy requiring prospective parents applying to adopt a child from foster care to affirm—such as through the use of preferred pronouns—the professed gender identity of the adopted child. 146 F.4th 772, 776 (9th Cir. 2025). Pursuant to the policy, Oregon denied the application of Jessica Bates who, citing her religious beliefs, refused to follow this requirement. *Id.* at 780.

This denial, the Ninth Circuit held, violated the Free Exercise Clause. In reaching its holding, it concluded that a law could fail the *Smith* neutrality requirement even if hostile intent toward religion was not the cause of a law. *Id.* at 795. In fact, in *Bates* the Ninth Circuit accepted that the intent of the policy was to protect Oregon's children. *Id.* Nevertheless, the fact that the policy would burden religious persons demonstrated that Oregon was not complying with *Smith*'s neutrality prong. *Id.* at 794–95.

In accord with long-standing precedents in which this Court did not interpret *Smith* as requiring evidence of causation, *see, e.g., Lukumi*, 508 U.S. at 534; *Masterpiece Cakeshop*, 584 U.S. at 638, the Ninth Circuit rejects the requirement that religious animus motivate a law for it to be unconstitutional, *Bates*, 146 F.4th at 795 (“[W]hile hostility toward religion is sufficient to show that a law is not neutral in operation,

the Supreme Court has never suggested that overt hostility is required.”).

In reaching the opposite conclusion—requiring religious animus to motivate or cause the burden on religious exercise for a policy to be subject to strict scrutiny—the Fourth Circuit created a circuit split. The Petition should be granted to settle the conflict.

II.

The Fourth Circuit’s decision below creates a conflict of authority concerning the freedom of speech.

Compelling a teacher to speak on a noncurricular matter of profound moral and theological significance falls outside the scope of her official duties. However, even assuming the “official duties” test originating in *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006), was applicable (it was not), the Fourth Circuit misapplied *Garcetti* in another critical aspect. This Court’s precedents make clear that the authority to compel speech extends only to lawful and appropriate messages. The guidelines at issue here do not qualify.

Garcetti contemplated speech that is not “unlawful or otherwise inappropriate.” 547 U.S. at 426. The Fourth Circuit’s “official duties” characterization does not justify the Board requiring an employee like Ms. Polk knowingly burden another person’s constitutional rights, like the parents whose children might be attempting to “socially transition” genders without their knowledge. Employers have no heightened interest in compelling speech that burdens the fundamental rights of other people. *Id.* at 422–23 (stating that

“employers have heightened interests in controlling speech made by an employee in his or her professional capacity” because they “must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission”).

Indeed, the Fourth Circuit turned *Garcetti*’s rationale on its head. A doctrine designed to preserve the integrity of governmental functions has been co-opted to instead punish an employee for refusing to engage in unlawful conduct—namely, violating parents’ constitutional right to decisions for the well-being of their own children. *Id.* at 419; *see also Jackler v. Byrne*, 658 F.3d 225, 229 (2d. Cir. 2011) (holding that *Garcetti* does “not preclude First Amendment protection for . . . refusals to make false statements” when a police officer refused to file a false report that was a part of his official duties”).

As this Court also explained in *Janus v. AFSCME*, “if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any *lawful* message.” 585 U.S. at 908 (emphasis added). When a message is not lawful, “it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.” *Id.* In fact, this Court recently reaffirmed this logic when cautioning that a similar nondisclosure policy was likely unlawful. *Mirabelli v. Bonta*, 607 U.S. 492, 497 (2026) (“Gender dysphoria is a condition that has an important bearing on a child’s mental health, but when a child exhibits symptoms of gender dysphoria at school, California’s policies conceal that information from parents and facilitate a degree of gender transitioning during

school hours. These policies likely violate parents’ rights to direct the upbringing and education of their children.”).

Thus, the Fourth Circuit allowed the Board to compel speech that is unlawful because it facilitates the violation of parents’ constitutional rights—a conclusion that conflicts with the limitations this Court recognized in *Garcetti*. Under the Fourth Circuit’s logic, governmental employers could compel any speech occurring within official duties, even when the speech is otherwise illegal or violates constitutional rights. As such, the decision below is in direct conflict with this Court’s precedents, and the Petition should be granted to settle the conflict.

III.

The Fourth Circuit’s decision below raises important federal questions this Court should resolve.

A. The Fourth Circuit’s interpretation of *Smith* involves an important federal question.

This Petition presents an ideal vehicle to address whether policymakers have the ability to suppress religious expressions and practices under the guise of facially neutral policies, provided they are diligent in concealing their true motivations. This undermines turns the *Smith* test into a treasure hunt for smoking-gun evidence. This Court has rejected such an approach. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (noting that mere facial neutrality doesn’t save a law for which discriminatory intent “can readily be presumed.”).

Additionally, when determining the “cause” of a law, it is often impossible to disentangle hostility to religion from independent rationales. It is unlikely that pure religious bigotry *alone* ever motivates a law, ordinance, or policy. Instead, there are often compelling rationales for burdening religious expression that are unrelated to religious animus. For example, in *Kennedy v. Bremerton School District*, 597 U.S. 507, 521 (2022), administrators were concerned that a high school football coach’s post-game prayers would expose the District to constitutional liability under the Establishment Clause. Decisions like the Ninth Circuit’s in *Bates* avoid this problem and forego the causal question in the neutrality analysis. *Bates*, 146 F.4th at 795. Neither *Smith* nor its progeny require the causal relationship the Fourth Circuit’s demands.

This Court has repeatedly recognized that mere facial neutrality won’t save a law from strict scrutiny if the law demonstrates hostility to affected citizens’ religious beliefs. *E.g.*, *Lukumi*, 508 U.S. at 534; *Masterpiece Cakeshop*, 584 U.S. at 638. And the instant case is a perfect example of how distorting *Smith* can erode the protections of the Free Exercise Clause.

First, the *object* of the guidelines is to advance a normative position hostile to religious beliefs. Per the Board’s own characterization, the guidelines advance the government’s interest in “supporting and protecting the safety of the students whose parents may object to their decision to transition.” Brief of Defendants-Appellees at 27–28, *Polk v. Montgomery County Public Schools*, 166 F.4th 400 (2026) (No. 25-1136). But this “interest” is just the affirmation of a particular ideology—one that is “support[ive]” of children who identify as the opposite sex. By labeling those who do

not comply as “unsupportive,” the Guidelines betray a clear hostility toward those whose convictions regarding sex and gender diverge from the Board’s preferred viewpoint.

Second, any conceivable government interest the guidelines advance relies on the contested normative position that children should be encouraged to identify with the opposite sex. Ms. Polk, in accordance with her religious beliefs, disagrees with that position. The Board’s treatment of Ms. Polk is therefore fundamentally based on a normative disagreement with her religious beliefs. This is the exact kind of hostility to religious beliefs that should trigger strict scrutiny under *Smith*: a “negative normative” judgment of Ms. Polk’s religious justification for an accommodation. *Masterpiece Cakeshop*, 584 U.S. at 639.

Third, the guidelines favor a predominantly secular normative position over a predominantly religious one. The guidelines disproportionately affect religious persons, who are more likely to hold views contrary to the Board’s view on sex and gender.² Whether the Board denied Ms. Polk’s request *because of* hostility toward her religious beliefs is immaterial. The guidelines were crafted and enforced with such blatant disrespect for the religious beliefs of affected individuals that they meet the threshold of hostility. *See Bray*, 606 U.S. at 270; *Bates*, 146 F.4th at 795 (the uneven impact on

² See Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious “Nones,”* U.S., Pew Rsch. Ctr. <https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/> (last visited July 25, 2026).

religion “implicate[s] uniquely religious matters” regardless of any overt targeting of religion).

To address the Fourth Circuit’s erroneous interpretation of *Smith* and ensure that Americans can be secure in their religious rights, the Petition should be granted to settle this important federal question.

B. The Fourth Circuit’s interpretation of *Garcetti* involves an important federal question.

This Petition presents an ideal vehicle to address whether the Fourth Circuit’s interpretation of *Garcetti* can be squared with longstanding parental-rights precedents. The question is important to more than Ms. Polk. Instead, the stakes are substantial. If the Fourth Circuit’s reasoning stands, no limiting principles prevent public schools from compelling employees to participate in any number of policies that subvert the constitutional rights of the families they serve—whose children are their responsibility—not the state.

The Due Process Clause of the Fourteenth Amendment protects those liberties that are “deeply rooted in the Nation’s history and tradition,” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Few rights satisfy that standard more easily than the right of parents to direct the upbringing and education of their children. In fact, parent’s interest “in the care, custody, and control of their [] children is perhaps the oldest of the fundamental liberty interests” this Court recognizes. *Troxel v. Granville*, 530 U.S. 57, 65 (2002). This element of Western legal history and tradition stretches back to

Blackstone³ and Locke,⁴ and even as far back as Aristotle⁵ and Cicero.⁶

At the time of ratification of the Fourteenth Amendment, “[t]he concept of total parental control over children’s lives extended into the schools.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 830 (2011) (Thomas, J., dissenting). As this Court has recognized repeatedly, parents may delegate certain responsibilities to schools—such as curriculum or instructor decisions—but they retain the right to direct a child’s education and care. Thus, while these parental rights can be delegated, they cannot be supplanted.⁷

Parham v. J.R. is clear on this point, recognizing that the right and responsibility of parental authority

³ 1 William Blackstone, *Commentaries on the Laws of England* 452 (1753).

⁴ John Locke, *Two Treatises on Government*, 252–53 (Hollis ed., 1764) (1689) (“The subjection of a minor places in the father a temporary government, which terminates with the minority of the child.”).

⁵ Aristotle, *Politics* at 3–4, 16 (Benjamin Jowett ed., 1885) (“[W]hen several families are united, and the association aims at something more than the supply of daily needs, the first society to be formed is the village... the first community, indeed... is the family.”).

⁶ M. Tullius Cicero, *De Officiis* at 54 (Walter Miller ed., 1913) (“For since the reproductive instinct is by Nature’s gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state.”)

⁷ Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature* at 183–84 (Ian Hunter & David Saunders eds., Liberty Fund 2003) (1673) (although parents may entrust their children’s education to others, it is a duty that “the Parent reserve to himself the Oversight of the Person deputed”).

“include[s] their need for medical care or treatment.” 442 U.S. 584, 603 (1979). This is true because while a “child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery,” a parent knows better and has the “authority to decide what is best for the child.” *Id.* at 604. Gender dysphoria, characterized as “distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender,” *Keohane v. Fla. Dep’t of Corr. Sec’y*, 952 F.3d 1257, 1262 (11th Cir. 2020), fits this description.

Treatments like “social transitioning” for children experiencing gender dysphoria “has an important bearing on a child’s mental health.” *Mirabelli*, 607 U.S. at 497. But children lack the “maturity, experience, and capacity for judgment required for making life’s difficult decisions,” which would include the decision to undergo a social transition. *Parham*, 442 U.S. at 602; *see also United States v. Skrmetti*, 605 U.S. 495, 524 (2025) (finding reasonable a state’s determination that minors lack the maturity to understand the consequences of medically transitioning). It is up to families—in consultation with their faiths, doctors, and consciences, to make decisions about their children’s mental health treatments—not school administrators or teachers. Therefore, a policy such as this “quite obviously excludes parents from important decisions about their child’s mental health.” *Mirabelli*, 607 U.S. at 499 (Barrett, J., concurring).

The Fourth Circuit nevertheless would require Ms. Polk to facilitate a policy at odds with this Court’s parental-rights jurisprudence. *Parham*, 442 U.S. at 603 (a child’s disagreement with his parents does not “automatically transfer the power to make that decision

from the parents to some agency or officer of the state.”). Under the guidelines, a student may adopt a different name or pronouns at school, requiring teachers like Ms. Polk to honor those identifiers even where parents disagree—or have been kept in the dark. That arrangement does not merely accommodate student preferences, it supplants parental authority.

Yet that is exactly what the Fourth Circuit would require Ms. Polk to engage in. The important federal question presented here is both recurring and deepening. At least one thousand two hundred districts governing over twenty thousand schools and twelve million students nationwide have policies that prevent teachers from disclosing to parents a student’s gender status without that student’s permission.⁸ The question of how *Garcetti* interacts with parental rights will not resolve itself, and teachers are forced to either use their speech to violate parents’ fundamental constitutional rights or be fired.

To address the Fourth Circuit’s erroneous interpretation of *Garcetti* and ensure that Americans can be secure in their free speech rights, the Petition should be granted to settle this important federal question.

⁸ Defending Education, *List of School District Transgender – Gender Nonconforming Student Policies*, <https://defendinged.org/investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/>. (last visited July 23, 2026).

Conclusion

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Timothy R. Snowball

Counsel of Record

Kathryn Cosgrove

PARENTS INITIATIVE OF THE

LIBERTY JUSTICE CENTER

1629 K Street N.W., Suite 300

Washington, D.C. 20006

(512) 481-4400

tsnowball@libertyjusticecenter.org

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