

No. 26-8

IN THE
Supreme Court of the United States

KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS;
MONTGOMERY COUNTY BOARD OF EDUCATION;
SHEBRA L. EVANS, MONIQUE FELDER, LYNNE HARRIS,
GRACE RIVERA-OVEN, KARLA SILVESTRE,
REBECCA SMONDROWSKI, BRENDA WOLFF, AND
JULIE YANG, INDIVIDUALLY & IN THEIR OFFICIAL
CAPACITIES AS MEMBERS OF THE MONTGOMERY
COUNTY BOARD OF EDUCATION,

Respondents.

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

BRIEF IN OPPOSITION

BRUCE M. BERMAN
JEREMY W. BRINSTER
MEGAN O. GARDNER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, DC 20037

ALAN SCHOENFELD
Counsel of Record
EMILY BARNET
CASSANDRA A. MITCHELL
TOM SCHNOOR
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

QUESTIONS PRESENTED

During the 2022-2023 school year, Montgomery County Public Schools (“MCPS”) required all staff to agree to comply with MCPS policies relating to communication with parents about students’ gender identity and use of pronouns in the classroom. Kimberly Ann Polk, a part-time elementary school substitute teacher, would not agree to follow those policies. Polk challenged MCPS’s enforcement of the policies against her. The court of appeals held that *Employment Division v. Smith*, 494 U.S. 872 (1990), governed Polk’s free-exercise claim, and that *Garcetti v. Ceballos*, 547 U.S. 410 (2006), governed her free-speech claim. This Court subsequently held in *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam), that another school’s parent-communication policy likely violated parents’ free-exercise rights. MCPS promptly changed its parent-communication policy. It also granted Polk’s request to use students’ names instead of pronouns and restored her eligibility to teach. The questions presented are:

1. Whether the court of appeals correctly held that *Smith* applies to Polk’s free-exercise claim, or instead should *sua sponte* have reached an argument that Polk never raised and that no court has addressed: that *Smith* does not apply when a teacher alleges a free-exercise burden of the same character as that in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).
2. Whether the court of appeals correctly held that *Garcetti* applies to Polk’s free-speech claim, or should have been the first federal appeals court to hold that an elementary school teacher’s classroom speech to students falls outside of the teacher’s official duties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT	5
A. Polk’s Service As A Substitute Teacher At MCPS And Objections To MCPS Policies	5
B. Proceedings Below	6
C. MCPS’s Revision Of The Guidelines And Reinstatement And Accommodation Of Polk	9
REASONS FOR DENYING THE PETITION	10
I. THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW—BUT EVEN IF THEY DID, THIS CASE IS AN INAPPROPRIATE VEHICLE	10
A. Polk’s Free-Exercise Challenge, Which Focuses On A Policy Similar To One This Court Already Reviewed In <i>Mirabelli</i> , Is Not Worthy Of Review	11

TABLE OF CONTENTS—Continued

	Page
1. This Court only recently decided that certain legal challenges to parent-communication policies are likely to succeed, prompting MCPS and other schools to replace their policies.	11
2. None of Polk’s efforts to justify this Court’s review has merit.....	14
B. Polk’s Free-Speech Challenge To The Pronoun Policy Is Factbound And Splitless, And Respondents Have Now Afforded Her The Accommodation She Requested	19
1. The Fourth Circuit’s factbound application of <i>Garcetti</i> to the pronoun policy did not create a circuit split.	19
2. This case is a poor vehicle to evaluate the pronoun policy.	23
II. THE FOURTH CIRCUIT’S DECISION IS CONSISTENT WITH THIS COURT’S PRECEDENTS.....	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Adams v. Trustees of University of North Carolina-Wilmington</i> , 640 F.3d 550 (4th Cir. 2011).....	21
<i>Ashaheed v. Currington</i> , 7 F.4th 1236 (10th Cir. 2021).....	19
<i>Bates v. Pakseresht</i> , 146 F.4th 772 (9th Cir. 2025)	17, 18
<i>Boston Parent Coalition for Academic Excellence Corporation v. School Committee for City of Boston</i> , 145 S. Ct. 15 (2024)	13
<i>Bowen v. Roy</i> , 476 U.S. 693 (1986)	8
<i>Church of Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993)	17
<i>City & County of San Francisco v. Sheehan</i> , 575 U.S. 600 (2015)	13
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	15
<i>Dolce v. Connetquot Central School District</i> , 2026 WL 2560338 (2d Cir. Aug. 31, 2026),.....	20
<i>Employment Division, Department of Human Resources of Oregon v. Smith</i> , 494 U.S. 872 (1990)	25
<i>Evans-Marshall v. Board of Education Tipp City Exempted Village School District</i> , 624 F.3d 332 (6th Cir. 2010)	21
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006)	9, 19, 20, 24, 26

TABLE OF AUTHORITIES—Continued

	Page
<i>Geraghty v. Jackson Local School District Board of Education</i> , 2024 WL 3758499 (N.D. Ohio Aug. 12, 2024)	22
<i>Isaac v. North Carolina Department of Transportation</i> , 192 F. App'x 197 (4th Cir. 2006)	22
<i>Janus v. AFSCME</i> , 585 U.S. 878 (2018)	24
<i>Johnson v. Poway Unified School District</i> , 658 F.3d 954 (9th Cir. 2011)	21
<i>Kennedy v. Bremerton School District</i> , 597 U.S. 507 (2022)	4, 8, 20, 26, 27
<i>Kondilis v. City of Chicago</i> , 160 F.4th 866 (7th Cir. 2025).....	16
<i>Lee v. Poudre School District R-1</i> , 146 S. Ct. 26 (2025)	17
<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025).....	3, 4, 8, 25, 26
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission</i> , 584 U.S. 617 (2018)	19
<i>Mayer v. Monroe County Community School Corporation</i> , 474 F.3d 477 (7th Cir. 2007)	20
<i>Meriwether v. Hartop</i> , 992 F.3d 492 (6th Cir. 2021)	21, 22
<i>Miller v. McDonald</i> , 180 F.4th 420 (2d Cir. 2026)	15
<i>Mirabelli v. Bonta</i> , 607 U.S. 492 (2026)	2, 9, 10, 11, 16, 17, 27

TABLE OF AUTHORITIES—Continued

	Page
<i>Perry v. Marteney</i> , 172 F.4th 315 (4th Cir. 2026)	16
<i>Pickering v. Board of Education of Township High School District 205, Will County</i> , 391 U.S. 563 (1968)	9
<i>St. Dominic Academy v. Makin</i> , 181 F.4th 11 (1st Cir. 2026)	19
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	3, 25
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	3
<i>Wood v. Florida Department of Education.</i> , 142 F.4th 1286 (11th Cir. 2025)	23
<i>Vlaming v. West Point School Board</i> , 895 S.E.2d 705 (Va. 2023)	22, 27
<i>Zivotofsky ex rel. Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012)	15

STATUTES PROVISIONS

28 U.S.C. § 1292	7
------------------------	---

OTHER AUTHORITIES

Ann Arbor (MI) Public Schools, <i>Board of Education Policy: Transgender and Gender Nonconforming Students</i> (rev. Aug. 26, 2026), https://tinyurl.com/26yumu9f	12
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TABLE OF AUTHORITIES—Continued

	Page
Anne Arundel County (Md.) Public Schools, <i>Safe and Inclusive Environments for LGBTQ+ Students</i> (rev. Aug. 18, 2026), https://perma.cc/YCW9-Q87A	12
California Teachers Advisory, <i>Internal Advisory: Protecting Inclusive Education While Accommodating Religious Beliefs After Mahmoud v. Taylor</i> (Sept. 2025), https://www.cta.org/document/mahmoud-v- taylor-sept-2025	13
Campbell, Ashlyn, <i>MCPS Directs Staff To Release Students’ Gender Identity Upon Families’ Request</i> , Bethesda Today (May 4, 2026), https://bethesda magazine.com/2026/05/04/mcps-gender- identity-guidelines	12
Maryland State Department of Education, <i>Non-Discrimination Guidelines for Student Gender Transitions</i> (rev. Apr. 2026), https://perma.cc/UY8R-MDAH	12
MCPS, <i>Gender Identity in Montgomery County Public Schools</i> (amended 2025- 2026), https://perma.cc/QL3R-6ML2	10, 12
MCPS, <i>MCPS Updates Gender Identity Guidelines</i> , https://perma.cc/C955-SL29 (Apr. 30, 2026)	10, 12
Westwood (NJ) Regional Board of Education, <i>District Policy: Transgender Students</i> (rev. June 11, 2026), https://perma.cc/LJ4N- E8N8	12

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BRIEF IN OPPOSITION

INTRODUCTION

Kimberly Ann Polk served as a part-time substitute teacher with Montgomery County Public Schools (“MCPS”) over the course of ten days during the 2021-2022 school year. At the start of the 2022-2023 school year, Polk declined to certify that she would comply with

MCPS's guidelines on student gender identity. She objected, in particular, to two requirements. First, that teachers not disclose information about a student's gender identity, including to parents, without the student's consent (the "parent-communication policy"). Second, that staff address students by their preferred pronouns (the "pronoun policy"). Because she did not agree to comply with the guidelines, Polk was not eligible to serve as a substitute teacher at MCPS during the 2022-2023 school year.

MCPS has since revised its guidelines. Under the current guidelines, teachers are not required to obtain student consent before sharing information about a student's gender identity with parents. MCPS also has since granted Polk the accommodation she originally requested, allowing her to use students' names instead of preferred pronouns.

The Court should deny her petition.

First, the questions presented do not warrant review because they are splitless and center around a policy similar to the one this Court recently addressed in *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam). And even if the questions were worthy of review, this case is not the right vehicle to address them.

The petition's primary focus is not the pronoun policy, but the parent-communication policy, about which all the judges below agreed. A decision on that policy would have virtually no practical effect. Barely one month after the Fourth Circuit issued the decision below, this Court held that another public school's similar policy likely violated parents' free-exercise and due-process rights. *Mirabelli*, 607 U.S. at 493-497. Because *Mirabelli* recognized that parents challenging such policies would likely succeed, MCPS revised its gender

identity guidelines. These revisions make clear that teachers must share information about a student’s gender identity with any requesting parents. This means that neither Polk nor any other MCPS staff member is subject to the parent-communication policy that Polk challenges. Other school districts across the country are likewise changing their policies, further minimizing the prospective importance of Polk’s challenge to MCPS’s former policy.

Polk offers no compelling reason for this Court to review her free-exercise challenge anyway. Polk’s lead free-exercise argument—that strict scrutiny applies automatically because she alleges a free-exercise burden analogous to that in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943)—appeared nowhere in her briefing below and has not been addressed by any court. And there is no need for this Court to “confirm” its recent holding in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), that *Smith* does not apply to burdens on parents of the same character as that in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Polk’s alternative free-exercise argument—that the Fourth Circuit improperly applied this Court’s cases requiring a showing of religious targeting to establish that a policy is not neutral—also implicates no circuit conflict. The Fourth Circuit and Ninth Circuit both recognized that plaintiffs can demonstrate non-neutrality through facts that show a policy was adopted *because* it affects religious exercise.

What remains is Polk’s free-speech challenge to the pronoun policy, which also does not merit this Court’s review. The Fourth Circuit’s context-specific application of *Garcetti* does not implicate any circuit split. While Polk tries to paint the Fourth Circuit’s free-speech ruling as an expansive statement on the speech rights of public-school employees, its decision rests

narrowly on the facts of this case. The Fourth Circuit did not break from other federal appeals courts, which consistently recognize that *Garcetti*'s official-duties test applies to the classroom speech of K-12 teachers to their students and provides schools significant leeway to regulate the speech that is part of a teacher's job. This case is also a poor vehicle to address Polk's free-speech arguments. The Fourth Circuit did not address one of the core questions discussed in Polk's petition: the application of *Pickering* to compelled speech. MCPS has, moreover, granted the accommodation Polk requested from the pronoun policy. This case would therefore require the Court to pass upon the lawfulness of a policy to which Polk is no longer subject by reaching out and deciding an issue not resolved by the Fourth Circuit.

Second, the Fourth Circuit's decision is correct. Consistent with *Mahmoud*, the Fourth Circuit determined that *Smith*—which applies “in most circumstances,” *Mahmoud*, 606 U.S. at 564—applied here because Polk did not allege a burden of the same character as the burden on parental rights in *Yoder*. In line with this Court's decisions in *Garcetti* and *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), the Fourth Circuit also properly concluded that Polk's free-speech claim implicated speech within the scope of her duties as a substitute teacher. And while the Fourth Circuit did not have the benefit of this Court's decision in *Mirabelli*, it echoed the line *Mirabelli* drew between teachers and parents when it declined to hold that Polk could invoke the rights of parents to invalidate the guidelines.

STATEMENT**A. Polk's Service As A Substitute Teacher At MCPS And Objections To MCPS Policies**

Polk served part time as an MCPS substitute teacher during the 2021-2022 school year. C.A.J.A.23. She taught for ten days, covering preschool special education, kindergarten, and second- and fourth-grade classes. *Id.*; C.A.J.A.54. By her own account, Polk “never encountered” students who wished to use a name other than their legal name or a pronoun that did not match their biological sex. C.A.J.A.40.

To receive teaching assignments for a given school year, substitutes must annually complete the same district-wide compliance training required of all MCPS staff. C.A.J.A.104. Beginning in the 2017-2018 school year, MCPS asked its staff as part of this process to review materials on since-revised versions of the MCPS Guidelines for Student Gender Identity. *Id.* MCPS adopted the guidelines years ago to set forth practices relating to transgender and gender non-conforming students. C.A.J.A.102. The guidelines were developed in consultation with MCPS students, parents, and staff, and in line with contemporaneous guidance issued by the Maryland Department of Education. C.A.J.A.102-103. Polk raised no objection to the guidelines during the 2021-2022 school year. As part of the compliance process for the 2022-2023 school year, all staff were required to agree that they understood their obligation to comply with the guidelines. C.A.J.A.104. Citing her religious beliefs, Polk declined, and requested a religious accommodation. C.A.J.A.24.

Polk objected to two aspects of the guidelines relevant here. First, at the time, the guidelines provided that students have “the right to keep private one’s

transgender status or gender nonconforming presentation at school,” and that staff were not authorized to disclose a student’s transgender status to parents or guardians, absent the student’s authorization or a legal requirement to do so. C.A.J.A.66-67. Second, the guidelines provided then, as they do now, that “[a]ll students have the right to be referred to by their identified name and/or pronoun[,]” and that “[s]chool staff members should address students by the name and pronoun corresponding to the gender identity that is consistently asserted at school.” C.A.J.A.67.

Polk asked that she not be required to withhold information about students’ gender identities from their parents in instances where students did not consent to sharing that information. C.A.J.A.85. She also proposed that she be allowed to use a student’s preferred name only, instead of using pronouns inconsistent with a student’s biological sex. C.A.J.A.83-86. The request for an accommodation was purely hypothetical, as Polk had never encountered a transgender or gender nonconforming student in her very limited hours as a substitute teacher in lower-grade classrooms. After MCPS declined her request in December 2022, Polk did not return to work at MCPS as a substitute teacher. *See* C.A.J.A.25.

B. Proceedings Below

Polk sued MCPS, its governing body the Montgomery County Board of Education, the Board’s members, and the MCPS Superintendent. C.A.J.A.15-18. She asserted claims under Title VII of the Civil Rights Act of 1964 and the Free Exercise and Free Speech Clauses of the First Amendment. C.A.J.A.28-31. Her free-exercise claim alleged that the guidelines burdened her religious beliefs by requiring her to withhold information about a

student’s gender identity and refer to students using pronouns inconsistent with their biological sex. C.A.J.A.29-31. Her free-speech claim alleged that those same requirements unlawfully compelled her speech. *Id.*

Polk moved for a preliminary injunction that would allow her to substitute teach only in classrooms with no “transitioning students.” C.A.J.A.34-35. The district court denied the preliminary injunction and dismissed the First Amendment claims, while allowing the Title VII claim to proceed against the Board. Pet.App.53a-54a, 102a-105a. The court held that Polk’s free-exercise claim failed because the guidelines were neutral and generally applicable under *Smith* and survived rational basis review. Pet.App.66a-78a. It held that her free-speech claim failed under *Garcetti* because the allegedly compelled speech in the classroom was “part of Polk’s official duties as a teacher.” Pet.App.81a-94a.

Polk appealed the dismissal of her free-exercise and free-speech claims.¹ After briefing concluded, this Court decided *Mahmoud*. Polk submitted a notice of supplemental authority arguing that, under *Mahmoud*, *Smith* did not govern her free-exercise claim because her asserted burden was of “the same character as that imposed in *Yoder*.” C.A. Notice of Suppl. Auth. ¶2 (July 24, 2025), Dkt.53. The Fourth Circuit heard argument in

¹ The district court denied preliminary injunctive relief on Polk’s free-exercise and free-speech claims because it concluded those claims should be dismissed under Rule 12(b)(6). Pet.App.13a. Polk appealed pursuant to 28 U.S.C. § 1292(a)(1). *Id.* The Fourth Circuit held that it had pendent appellate jurisdiction to review the Rule 12(b)(6) dismissal of the free-exercise and free-speech claims because they were inextricably intertwined with the immediately appealable denial of preliminary injunctive relief. Pet.App.16a.

October 2025, and in January 2026, it affirmed the district court. Pet.App.1a-38a.

The Fourth Circuit panel unanimously held that Polk’s free-exercise claim failed. Pet.App.18a-29a, 39a-40a. The majority explained that it was “duty-bound to faithfully apply” *Smith*, which “remains in full force ‘in most circumstances.’” Pet.App.18a-19a & n.8 (quoting *Mahmoud*, 606 U.S. at 564). While *Smith* does not apply to *Yoder*-like burdens on parental rights under *Mahmoud*, the panel reasoned that *Smith* applied to Polk’s alleged free-exercise burden because “Polk is not a parent—she is a substitute teacher.” Pet.App.19a n.8. Applying *Smith*, the majority held that the former guidelines were neutral and generally applicable, and survived rational-basis review. Pet.App.20a-29a. On neutrality, the majority held that the former guidelines were neutral on their face. Pet.App.21a. Because “[i]mportantly, such neutrality does not end [the] analysis,” the majority also considered whether the former guidelines nonetheless “act[ed] as ‘covert suppression of particular religious beliefs.’” *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (plurality)). It held that they did not, and concluded that Polk failed to plausibly allege “a ‘beneath-the-surface’ hostility toward those with particular religious views.” Pet.App.22a.

Judge Wilkinson agreed with the majority that *Smith* applies to Polk’s free-exercise claim and that, applying *Smith*, the claim was unlikely to succeed on the merits. Pet.App.39a-40a.

The court also affirmed the dismissal of Polk’s free-speech claim. The majority acknowledged that “teachers do not ‘shed their constitutional rights to freedom or expression at the schoolhouse gate.’” Pet.App.30a (quoting *Kennedy*, 597 U.S. at 527). But under *Garcetti*, a

public school teacher “by necessity must accept certain limitations on his or her freedom.” Pet.App.29a (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). And Polk’s free-speech claim failed under *Garcetti*’s official-duties test. Pet.App.31a. In the majority’s view, “how a teacher addresses a particular student in a particular classroom ... is merely part of that teacher’s job description.” Pet.App.31a-32a. Judge Wilkinson disagreed. Recognizing that *Garcetti* plays an important role in primary and secondary schools, he argued that *Garcetti* nevertheless did not apply to Polk’s “noncurricular” speech involving “classroom administration.” Pet.App.49a-50a. He would have instead applied the balancing test adopted in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and held that Polk’s interests outweighed MCPS’s.

C. MCPS’s Revision Of The Guidelines And Rein-statement And Accommodation Of Polk

In March 2026, just over a month after the Fourth Circuit ruled, this Court decided *Mirabelli*. In that case, parents and teachers had sued to enjoin a school district’s policies concerning student gender identity. 607 U.S. at 492. A district court certified a class with separate subclasses for parents and teachers and enjoined application of the policies to them; the Ninth Circuit stayed the injunction pending appeal. *Id.* at 494-495. The parents and teachers asked this Court to vacate the stay, and this Court granted the application “with respect to the parents” only. *Id.* at 496. The Court held that the challenged policies triggered, and likely failed, strict scrutiny under the Free Exercise Clause because “they substantially interfere with the ‘right of parents to guide the religious development of their children’” under *Mahmoud* and *Yoder*. *Id.* at 496-497. The Court also

held that the challenged policies “shut [parents] out of participation in decisions regarding their children’s mental health.” *Id.* at 497. Accordingly, the policies “likely violate parents’ rights to direct the upbringing and education of their children” under the Due Process Clause. *Id.*

After *Mirabelli*, MCPS quickly amended its guidelines on student gender identity, effective April 27, 2026. MCPS, *MCPS Updates Gender Identity Guidelines* (Apr. 30, 2026), <https://perma.cc/C955-SL29>; MCPS, *Gender Identity in Montgomery County Public Schools* (amended 2025-2026), <https://perma.cc/QL3R-6ML2>. Under the revised guidelines, if a parent or guardian requests information about a student’s gender-identity status, school staff are obligated to provide it.

Also after *Mirabelli*, MCPS reinstated Polk’s substitute-teaching eligibility. MCPS also granted Polk her requested accommodation from the pronoun policy—addressing the single issue on which Judge Wilkinson disagreed with the Fourth Circuit majority. Specifically, MCPS informed Polk that she would not have to use students’ preferred pronouns in the classroom. Polk responded by declining to engage substantively with the offer.

REASONS FOR DENYING THE PETITION

I. THE QUESTIONS PRESENTED DO NOT WARRANT REVIEW—BUT EVEN IF THEY DID, THIS CASE IS AN INAPPROPRIATE VEHICLE

As her questions presented indicate, Polk believes the Fourth Circuit misapplied this Court’s precedents by evaluating her claims under *Smith* and *Garcetti*. There is no circuit split on these questions. Her petition is also plagued with vehicle problems, including her

invention of new arguments on appeal, the limited nature of the Fourth Circuit’s holdings, and the fact that Polk is no longer subject to the policies she challenges. The Court should deny review.

A. Polk’s Free-Exercise Challenge, Which Focuses On A Policy Similar To One This Court Already Reviewed In *Mirabelli*, Is Not Worthy Of Review

- 1. This Court only recently decided that certain legal challenges to parent-communication policies are likely to succeed, prompting MCPS and other schools to replace their policies.**

Polk principally argues that this Court should grant certiorari to review the Fourth Circuit’s dismissal of her free-exercise challenge to the parent-communication policy. Pet.3, 12-17. But *Mirabelli*, decided just weeks after the Fourth Circuit’s decision, renders review unnecessary. There, the Court held that those most directly affected by a similar parent-communication policy—the parents—were likely to succeed on the merits of their claims that the policy violated their free-exercise and due-process rights. *Mirabelli v. Bonta*, 607 U.S. 492, 496-497 (2026). *Mirabelli* therefore resolved the central question of whether a school district can lawfully condition sharing information about a student’s gender identity with parents on the student’s consent.

MCPS promptly responded to *Mirabelli* by making significant policy changes. MCPS’s new guidelines, revised in the weeks following the decision in *Mirabelli*, now explicitly state that all staff “must inform” parents or guardians upon request “that their student has expressed that they identify as transgender or gender non-conforming,” and that staff “are not required to conceal

this information from parents/guardians.” MCPS, *Gender Identity in Montgomery County Public Schools* 3. This change in policy applies across-the-board, meaning staff do not need to seek an accommodation in order to respond to parents’ requests for information about student gender identity. MCPS publicly acknowledged that the guidelines had been updated in response to new legal developments, including this Court’s decision in *Mirabelli*. See MCPS, *MCPS Updates Gender Identity Guidelines* (Apr. 30, 2026), <https://perma.cc/C955-SL29>; Campbell, *MCPS Directs Staff To Release Students’ Gender Identity Upon Families’ Request*, Bethesda Today (May 4, 2026), <https://bethesdamagazine.com/2026/05/04/mcps-gender-identity-guidelines>. These developments defeat Polk’s claim that she has “not benefitted” from this Court’s *Mirabelli* decision because she is not a parent. Pet.33.

MCPS was not alone in revising its policies following *Mirabelli*. The Maryland Department of Education—whose contemporaneous guidance the guidelines had tracked—likewise revised its guidance concerning transgender and gender-nonconforming students in the wake of *Mirabelli*. See Maryland State Dep’t of Educ., *Non-Discrimination Guidelines for Student Gender Transitions* (rev. Apr. 2026) (citing *Mirabelli*), <https://perma.cc/UY8R-MDAH>.

Other school districts across the country have updated similar policies. See, e.g., Anne Arundel Cnty. (Md.) Pub. Schs., *Safe and Inclusive Environments for LGBTQ+ Students* (rev. Aug. 18, 2026), <https://perma.cc/YCW9-Q87A>; Ann Arbor (MI) Pub. Schs., *Board of Education Policy: Transgender and Gender Nonconforming Students* (rev. Aug. 26, 2026), <https://tinyurl.com/26yumu9f>; Westwood (NJ) Reg. Bd. of Educ., *District Policy: Transgender Students* (rev. June 11,

2026) (citing *Mirabelli*), <https://perma.cc/LJ4N-E8N8>; see also California Teachers Association, *Internal Advisory: Protecting Inclusive Education While Accommodating Religious Beliefs After Mahmoud v. Taylor* (Sept. 2025), <https://www.cta.org/document/mahmoud-v-taylor-sept-2025>.

These legal and factual developments make this case a poor vehicle to address any free-exercise questions that the abandoned parent-communication policy previously raised. Granting review would require the Court to immediately reevaluate the same kind of policy it so recently addressed in *Mirabelli*. It should not do so. “[C]ertiorari jurisdiction exists to clarify the law,” *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015), and there is nothing to clarify here now that *Mirabelli* has effectively resolved any question about whether parent-communication policies like MCPS’s can lawfully be enforced.

And because school districts are already adapting their policies and practices to this Court’s recent decisions, any ruling by this Court on the defunct parent-communication policy would offer little prospective guidance for MCPS or other schools trying to comply with the law. While “[s]trictly speaking, those developments may not moot this case[,]” “they greatly diminish the need for [this Court’s] review.” *Boston Parent Coal. for Acad. Excellence Corp. v. School Comm. for City of Bos.*, 145 S. Ct. 15, 15 (2024) (Mem.) (Gorsuch, J., respecting the denial of certiorari).²

² To the extent the Court believes that Polk’s free-exercise challenge should be reevaluated in light of *Mirabelli*, a remand would be appropriate to allow the Fourth Circuit to do so in the first instance.

2. None of Polk’s efforts to justify this Court’s review has merit.

Polk argues that this Court should review her free-exercise challenge anyway in order to (a) address an argument she never raised below; (b) “confirm” the holding of a recent decision that the lower courts are faithfully applying; and (c) weigh in on a nonexistent circuit split. This Court should decline to do so.

a. Polk’s principal free-exercise argument—that *Smith* does not apply to her claims because she alleges a *Barnette*-like free-exercise burden—does not warrant this Court’s review because she never raised it below and no lower court has addressed it.

Polk presents this argument for the first time in her petition. Before the Fourth Circuit, she argued that this Court’s recent decisions have “effectively abrogated” *Smith*, C.A. Polk Opening Br. 8, and that MCPS’s policies were not neutral or generally applicable, *id.* at 9-12. After briefing in the Fourth Circuit closed, this Court decided *Mahmoud*. As Polk recognizes, *Mahmoud* held that “*Smith* does not control when the burden the government has imposed on religious exercise has the ‘same character’ as the burden imposed in *Yoder*.” Pet.12. And in a notice of supplemental authority filed in the Fourth Circuit, Polk cited *Mahmoud* and argued that *Smith* should not apply to her claim because “the burden imposed on [her] is of the same character as that imposed in *Yoder*.” C.A. Notice of Suppl. Auth. ¶2 (Dkt.53).

In her petition, however, Polk asks this Court to decide a different issue: whether *Smith* also “does not apply when the burden imposed is of the same character as in *Barnette*.” Pet.13. Regardless of the answer to that question, Polk cannot raise it in her petition because she did not raise it below—not in the district court, not in the

Fourth Circuit, and not in any of the six notices of supplemental authority she filed after briefing closed in the Fourth Circuit. Indeed, in the entirety of Polk’s briefing, she cited *Barnette* only once: in support of her argument that *Garcetti* does not apply to her *free-speech* claim. See C.A. Polk Opening Br. 22. Polk never argued that *Barnette* controlled her free-exercise claim—let alone that *Smith* does not apply to her claim because she alleges a burden of the sort the students and parents alleged in *Barnette*—and the Fourth Circuit accordingly never addressed it.

Nor has Polk identified a *single* court that has ever considered whether, under *Mahmoud*, *Barnette* establishes an exception to *Smith*. Respondents are aware of no such case. This Court should not review Polk’s *Barnette* argument as an issue of first impression. See *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (The Supreme Court is “a court of review, not of first view.”); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (The Court should “not decide in the first instance issues not decided below.”).

b. Polk also suggests that this Court should grant the petition to “confirm” *Mahmoud*’s holding that strict scrutiny is appropriate when a case involves the same general burden as *Yoder*. Pet.17. But that clear statement of law does not need confirmation. And the Fourth Circuit correctly applied it here—as Judge Wilkinson agreed. See Pet.App.18a-20a, 39a-40a.

Polk identifies no split over this question and there is none. Indeed, since *Mahmoud*, lower courts are in complete agreement that *Smith* does not apply when a plaintiff *parent* alleges a *Yoder*-like burden. See, e.g., *Miller v. McDonald*, 180 F.4th 420, 432-434 (2d Cir. 2026) (per curiam) (Under *Mahmoud*, “when a law imposes a

burden ‘of the same character as that’ in *Yoder*, ‘strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable.’”); *Perry v. Marteney*, 172 F.4th 315, 326-327 (4th Cir. 2026) (“Under *Yoder* and *Mahmoud*, a law that ‘substantially interfere[es] with the religious development’ of a child is subject to strict scrutiny ‘regardless of whether the law is neutral or generally applicable.’”), *petition for cert. filed*, No. 26-319 (U.S. Sept. 5, 2026). Courts are actively determining which fact patterns satisfy the legal test articulated in *Mahmoud*. See, e.g., *Kondilis v. City of Chi.*, 160 F.4th 866, 871 n.4 (7th Cir. 2025) (“We have considered whether the ‘character of the burden’ at issue in this case warrants a departure from the ‘neutral and generally applicable’ test as in *Mahmoud* [but] [t]he character of the burden alleged here is not like *Yoder* or *Mahmoud*, both of which involved compulsory school programs that infringed on parents’ fundamental right to direct the education of their children”), *cert. denied*, 146 S. Ct. 1838 (2026). The Court’s intervention therefore is not warranted.

This case is a particularly poor vehicle to “confirm” that *Smith* does not apply to *Yoder*-like burdens because Polk is not a parent like those whose rights were at issue in *Yoder* and *Mahmoud*. In *Mirabelli*, this Court denied relief to teachers while granting relief to parents, making clear that school policies regarding communication with parents touch most directly on *parents’* fundamental rights. 607 U.S. at 498 (“The application to vacate the Ninth Circuit’s stay presented to Justice Kagan and by her referred to the Court is granted as to the parents *but is otherwise denied*.”(emphasis added)). And while Polk claims her petition raises important questions, she cites (Pet.33) a statement respecting denial of certiorari in a case where *parents* raised only a *due-process* claim.

Lee v. Poudre Sch. Dist. R-1, 146 S. Ct. 26 (2025) (Mem.) (Statement of Alito, J., respecting denial of certiorari). *Mirabelli* later resolved the question raised in *Lee*. 607 U.S. at 498.

c. Alternatively, Polk claims that the decision below created a circuit split with the Ninth Circuit about what constitutes a “neutral” policy under *Smith*. She asserts that the Fourth Circuit held “as a matter of law” that “allegations of a law’s primary impact on the religious cannot suffice to put at issue the law’s neutrality.” Pet.18. But the Fourth Circuit’s decision simply applied this Court’s foundational decision on religious targeting—*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)—and held that Polk did not allege religious targeting in this case. It concluded that “Polk offers no facts from which the court could plausibly infer that the Board created the Guidelines to target teachers who adhere to traditional religious teachings on gender identity or that the Board was hostile towards religion when it enacted the Guidelines.” Pet.App.23a-24a.

The Ninth Circuit did not depart from that straightforward application of existing precedent in *Bates v. Pakseresht*, 146 F.4th 772 (9th Cir. 2025), the only case Polk identifies on the other side of the alleged split. The Fourth Circuit’s application of *Lukumi* in this case did not create a split with the Ninth Circuit’s decision in *Bates*. Polk mischaracterizes both cases in an effort to manufacture one. First, Polk claims that the Fourth Circuit rejected the holding in *Bates* that “[a] facially neutral law need not *exclusively burden* religious persons to be regarded as non-neutral in operation.” *Id.* at 795 (emphasis added); Pet.19. That is wrong. The Fourth Circuit recognized that a facially neutral law would not be neutral under *Lukumi* if it “was implemented with the

object of targeting a religious practice.” Pet.App.22a. But Polk could not make this showing merely by alleging that “religious individuals will be impacted” by the guidelines. Pet.App.24a. Unlike the plaintiff in *Bates*, Polk did not allege “facts from which the court could plausibly infer that the Board created the Guidelines to target teachers who adhere to traditional religious teachings on gender identity.” *Id.*; see *Bates*, 146 F.4th at 792-795.

Second, and relatedly, Polk claims the Ninth Circuit held in *Bates* that “common-sense knowledge that the provisions will ‘overwhelmingly block’ people with traditional religious beliefs can defeat *Smith*’s neutrality prong.” Pet.20. That characterization ignores the many record facts that went into the Ninth Circuit’s holding that “all the circumstances in the record as a whole” established non-neutrality. *Bates*, 146 F.4th at 795. The evidence there included policymaking “materials that call[ed] out more traditional religious settings as tending to contravene Oregon’s perspective on sexuality and gender identity.” *Id.* For example, Oregon cautioned aspiring adoptive parents to find other, “more affirming churches and religious groups that are providing affirming spaces to LGBTQ+ youth and their families.” *Id.* at 793. This evidence helped show that the policy “overwhelmingly” affected certain religious communities that were “specifically identifi[ed]” by policymakers. *Id.* at 794. In light of this evidence and other signifiers of religious targeting under *Lukumi*, no further showing of “overt” hostility was required to establish non-neutrality. *Id.* at 795.

Both the Fourth Circuit and the Ninth Circuit thus rested their decisions on the recognition that there must be some evidence that the government has “impose[d] regulations that are hostile to the religious beliefs of

affected citizens” or “act[ed] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm’n*, 584 U.S. 617, 638 (2018). Other courts have agreed, noting that overt hostility is not required when there is evidence that the government action is “motivated by [the plaintiff’s] religious commitments,” *Ashaheed v. Currington*, 7 F.4th 1236, 1244 (10th Cir. 2021), or when the action “singl[es] out religious expression as opposed to other forms of expression,” *St. Dominic Academy v. Makin*, 181 F.4th 11, 35 (1st Cir. 2026).

Regardless, Polk at most describes a 1-to-1 split where both decisions came down only in the past year. The Fourth Circuit did not even cite the Ninth Circuit’s opinion in *Bates*, let alone expressly depart from it. To the extent the Fourth and Ninth Circuit split over a legal question—they did not—that question has not had sufficient time to percolate among the lower courts.

B. Polk’s Free-Speech Challenge To The Pronoun Policy Is Factbound And Splitless, And Respondents Have Now Afforded Her The Accommodation She Requested

1. The Fourth Circuit’s factbound application of *Garcetti* to the pronoun policy did not create a circuit split.

The Court has long recognized that “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Public employees retain their First Amendment right “in certain circumstances, to speak as a citizen addressing matters of public concern.” *Id.* at 417. But this does not “mean[] the speech rights of public school employees are so

boundless that they may deliver any message to anyone anytime they wish.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). Accordingly, the Court has made clear that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes.” *Garcetti*, 547 U.S. at 421. The Fourth Circuit hewed to that rule in considering Polk’s as-applied challenge, concluding that “[w]hen Polk uses pronouns to refer to students in the classroom setting” she is speaking pursuant to her official duties as the students’ teacher and therefore application of the guidelines to that speech does not offend the First Amendment. Pet.App.31a-32a, 36a n.13. In reaching that conclusion, the Fourth Circuit did not create or deepen any circuit split.³

Because interacting with students in class is a standard part of a K-12 teacher’s duties, the courts of appeals afford school districts wide latitude in regulating teachers’ on-the-job speech under *Garcetti*. Just recently, in *Dolce v. Connetquot Central School District*, 2026 WL 2560338 (2d Cir. Aug. 31, 2026), the Second Circuit held that a school district did not run afoul of the Free Speech Clause when it ordered high school teachers to remove LGBTQ pride flags from their classroom walls and doors. *Id.* at *4-6. In *Mayer v. Monroe County*

³ Polk does not appear to argue that the Court should review the parent-communication policy under the Free Speech Clause. To the extent that Polk does, it does not warrant review. As explained in Part I.A, MCPS eliminated the parent-communication policy and Polk offers no reason for the Court to review her challenge to it anyway. In any event, the Fourth Circuit also concluded that Polk is speaking pursuant to her official duties “[w]hen [she] speaks to parents about their child’s behavior in school.” Pet.App.31a-32a. That conclusion did not create a circuit conflict, and it was consistent with this Court’s precedents.

Community School Corporation, 474 F.3d 477 (7th Cir. 2007), the Seventh Circuit held that a school district did not violate the free-speech rights of a probationary teacher when it declined to renew her contract after she voiced opposition to the Iraq War in front of students. *Id.* at 478-480. Other circuits have agreed that *Garcetti* gives school districts leeway to regulate the speech of elementary and secondary school teachers where the facts demonstrate that the teacher is speaking in the classroom as part of his or her official duties. See *Evans-Marshall v. Board of Educ. Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 & n.12 (9th Cir. 2011).

Polk asserts that “[t]he lower courts are divided over whether *Garcetti* categorically bars” challenges to pronoun policies by public-school teachers. Pet.21. But there is no circuit split on this issue in primary and secondary schools. The Fourth Circuit’s holding does not conflict with *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), the one federal circuit court decision Polk identifies as “reject[ing] the argument that a teacher’s pronoun usage falls outside the First Amendment[.]” Pet.23. *Meriwether* analyzed claims by a *university professor*, and expressly distinguished the case from circuit precedent involving primary- and secondary-school teachers like Polk. See 992 F.3d at 505 n.1 (citing *Evans-Marshall*). *Meriwether* held only that “the First Amendment protects the free-speech rights of professors when they are teaching[.]” *id.* at 505, and the Fourth Circuit agrees, see *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550, 562-564 (4th Cir. 2011). That proposition has no bearing on this case, which involves the free-speech rights of elementary school teachers. And, in any event, Polk has now been

granted the type of accommodation that the court in *Meriwether* held was sufficient to remedy any First Amendment problem. See 992 F.3d at 510-511.

The other cases that Polk discusses do not create a circuit split. Polk cites (Pet.24) a district court decision extending *Meriwether* to the K-12 context: *Geraghty v. Jackson Local School District Board of Education*, 2024 WL 3758499, at *12 (N.D. Ohio Aug. 12, 2024)—but one district court decision does not create a circuit split. Polk also points (Pet.24-25) to a state-court case, *Vlaming v. West Point School Board*, 895 S.E.2d 705 (Va. 2023). *Vlaming* held that a school board violated the free-speech rights of a high school teacher under the Virginia Constitution when it allegedly fired him for refusing to refer to a particular student by their preferred pronouns. 895 S.E.2d at 737. The Virginia Supreme Court made clear that state law provided an adequate and independent ground for its free-speech holding: “[E]ven if our understanding of existing federal precedent is incorrect, we would nonetheless hold fast to our reasoning in the present case as the proper interpretation of the right to free speech protected by” the Virginia Constitution. *Id.*⁴

An amicus supporting Polk more accurately assesses the state of play in the lower courts. The

⁴ Nor is the distinction between federal and state constitutional law in Virginia a reason to grant review here. Polk contends that, after *Vlaming*, “public schoolteachers in Virginia now have different free speech rights depending on whether they sue in federal or state court.” Pet.24. But that is not true. Nothing would stop a federal court in Virginia with jurisdiction from granting a plaintiff relief under the Virginia Constitution. See *Isaac v. North Carolina Dep’t of Transp.*, 192 F. App’x 197, 199-200 (4th Cir. 2006) (per curiam) (affirming exercise of supplemental jurisdiction over state constitutional claim).

Manhattan Institute asks this Court to “anticipate” a circuit split on whether referring to one’s students by their preferred pronouns is part of an elementary school teacher’s job duties under *Garcetti*. Manhattan Inst. Br. 6-12. But neither that amicus nor Polk explains why this Court should anticipate such a development rather than allow these issues to play out below. To the contrary, cases like this one show that these issues are only beginning to percolate in the lower courts, and that school districts are willing to accommodate teachers by permitting them to use names rather than pronouns. Nor have courts working through these issues uniformly favored one side of an ideological debate. *See Wood v. Florida Dep’t of Educ.*, 142 F.4th 1286, 1291-1293 (11th Cir. 2025) (applying *Garcetti* and *Kennedy* to hold that Florida could prohibit a transgender high school teacher from using preferred pronouns to refer to herself in the classroom). As other amici supporting Polk—teachers who have raised similar challenges elsewhere—themselves acknowledge, they “have been able to win significant victories on behalf of the First Amendment.” Christian Educators Ass’n Int’l Br. 6. This Court’s intervention is not needed.

2. This case is a poor vehicle to evaluate the pronoun policy.

This case is also a bad vehicle to wade into questions over pronoun policies and teacher free speech. Polk asks the Court to pass upon the lawfulness of a policy as to which MCPS has offered her requested accommodation by deciding an issue that the Fourth Circuit did not reach.

First, if Polk ever has a transgender student in her elementary school classroom in the future, she will not be required to use a pronoun that does not match the

student’s biological sex. In early April 2026, MCPS informed Polk that, as she had proposed, she could use a student’s preferred name without using any pronouns.

Second, Polk urges this Court to review her free-speech claim so it can decide an issue not passed upon below. Polk argues that this case “raises the question reserved” in *Janus v. AFSCME*, 585 U.S. 878, 908 (2018), of whether *Pickering* applies to compelled speech. Pet.32-33. She emphasizes the importance of this question to her free-speech claim in the first sentence of her petition. Pet.3. But the Fourth Circuit did not decide that question. It applied *Garcetti* because it concluded that Polk’s classroom speech *was* part of her official duties. And in *Janus*, this Court explained that “[o]f course, 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 (citing *Garcetti*, 547 U.S. at 421-422, 425-426). Even the dissent below declined to address this question. Pet.App.46a.

There is no reason for this Court to reach a question the Fourth Circuit did not address in order to pass upon the lawfulness of a policy to which Polk is no longer subject.

II. THE FOURTH CIRCUIT’S DECISION IS CONSISTENT WITH THIS COURT’S PRECEDENTS

As detailed above, Polk identifies no circuit splits and no other compelling reason for the Court to grant review. She thus seeks only error correction. But the Fourth Circuit’s decision is consistent with the Court’s precedents.

1. The Fourth Circuit’s decision is consistent with *Mahmoud*. Contrary to Polk’s assertion, the Fourth

Circuit did not “flout[] *Mahmoud*’s animating logic” (Pet.3), or “[m]inimiz[e] *Mahmoud*” (Pet.13), by holding that *Smith* applied to her free-exercise challenge. *Smith* applied to Polk’s claim because, unlike the plaintiffs in *Mahmoud*, she did not allege a *Yoder*-like burden. The burden in *Yoder* was a burden on *parents*’ right to direct the religious development of their children. *Mahmoud v. Taylor*, 606 U.S. 522, 565 (2025); Pet.App.19a n.8. Polk “is not a parent,” and had “no standing to assert parental rights” like those burdened in *Yoder* and *Mahmoud*. Pet.App.19a n.8.

The Fourth Circuit also did not defy *Mahmoud* by declining to hold that *Smith* “does not apply when the burden imposed is of the same character as in *Barnette*.” Pet.13. To adopt the *Barnette*-like burden argument, the Fourth Circuit would have had to extend “*Mahmoud*’s animating logic[,]” Pet.3, far beyond its holding. *Mahmoud*’s logic rested on the Court’s explanation in *Smith* that *Yoder* was “an exception to the general rule that governments may burden religious exercise pursuant to neutral and generally applicable laws.” *Mahmoud*, 606 U.S. at 564. That meant that *Smith* does not apply to *Yoder*-like free-exercise burdens, because in *Smith*, the Court identified *Yoder* as one of “[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action.” *Employment Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990). In contrast, *Smith* explicitly recognized *Barnette* as a case that, while “involv[ing] freedom of religion,” was “decided exclusively upon *free speech* grounds.” *Id.* at 882 (emphasis added); see *Barnette*, 319 U.S. at 634-636. Neither the letter nor the logic of *Mahmoud* required the Fourth Circuit to hold that *Smith* does not apply to *Barnette*-like burdens, in potential defiance of

Mahmoud's recognition that *Smith* applies "in most circumstances." 606 U.S. at 564.

2. The Fourth Circuit's decision is also consistent with this Court's free-speech precedents. Polk claims (Pet.23, 26-28) a conflict with *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). In *Kennedy*, the Court considered the application of *Garcetti* to a high school football coach who knelt to pray on the field after games. *Id.* at 519, 527-531. As in *Garcetti*, the Court cautioned against "excessively broad" job descriptions that treat "everything teachers and coaches say in the workplace as government speech subject to government control." *Id.* at 532. It then held that the coach was not engaged in his official duties when he prayed because his on-field, postgame prayers did not "owe their existence to [his] responsibilities as a public employee" and occurred "[d]uring the postgame period when ... coaches were free to attend briefly to personal matters." *Id.* at 530. Contrary to Polk's insinuation (Pet.25), the guidelines created no such excessively broad job description. The speech Polk challenges—using pronouns to address students in the classroom—would arise solely in the course of her duties as a substitute teacher. She has never challenged how the guidelines would apply to speech that did not "owe[] its existence" to her responsibilities as a public employee. *Garcetti*, 547 U.S. at 421-422. Speech outside her official duties would include, for example, speech she engages in when "discussing politics with a co-worker," "writing a letter to a local newspaper," *id.* at 423-424, or during a time when she is "free to attend briefly to personal matters," *Kennedy*, 597 U.S. at 530. Because of the scope of her challenge, Polk's assertion (Pet.22) that the Fourth Circuit held "everything a teacher says to students and parents becomes part of a teacher's prescribed duties when she enters

government employment” vastly overstates the court’s actual holding.

The Fourth Circuit’s decision also does not improperly extend *Garcetti* by recognizing that speech may be unprotected even if it is not “curricular.” Pet.26-30. The court explained that, while the speech in question was not “curricular,” it unquestionably related to “[c]lassroom administration,” which “is a teacher’s job.” Pet.App.35a-36a n.13. This holding echoed this Court’s recognition in *Kennedy* that a coach’s speech “instructing players, discussing strategy, [and] encouraging better on-field performance” would be part of his “official duties” as “speech the [school] paid him to produce as a coach.” 597 U.S. at 529-530. Contrary to Polk’s suggestion, the Fourth Circuit did not allow MCPS to “simply declar[e] it [her] ‘official duty’ to courier the School Board’s ideological view of gender identity.” Pet.25 (quoting *Vlaming*, 895 S.E.2d at 742). The Fourth Circuit instead found it “obvious” that “how Polk addresses her students in the classroom”—regardless of the message it conveys—falls at the core of her “job” as a teacher. Pet.App.36a n.13.

3. Finally, citing *Mirabelli*, Polk contends that the Fourth Circuit misapplied *Garcetti* because it did not hold that the guidelines compelled *unlawful* speech by requiring teachers to “frustrate ... parental rights and responsibilities” and “take over their functions when it comes to a child’s mental health and gender confusion.” Pet.30-31. But that argument conflates the rights of teachers with those of parents. Whatever burden the guidelines requirement might have imposed on *parents*, this Court’s *Mirabelli* decision makes clear that parents are differently situated than teachers. *See* 607 U.S. at 496. Polk, a substitute teacher, cannot invoke a right belonging to parents to invalidate the guidelines. The

Fourth Circuit thus correctly declined, on these alleged facts, to hold that the guidelines compelled Polk to speak for an illegitimate purpose. And as noted above, if the Court believes the Fourth Circuit should have evaluated Polk's claim differently in light of *Mirabelli*, a remand would be appropriate to allow the Fourth Circuit to do so.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

BRUCE M. BERMAN	ALAN SCHOENFELD
JEREMY W. BRINSTER	<i>Counsel of Record</i>
MEGAN O. GARDNER	EMILY BARNET
WILMER CUTLER PICKERING	CASSANDRA A. MITCHELL
HALE AND DORR LLP	TOM SCHNOOR
2100 Pennsylvania Ave. NW	WILMER CUTLER PICKERING
Washington, DC 20037	HALE AND DORR LLP
	7 World Trade Center
	250 Greenwich Street
	New York, NY 10007
	(212) 230-8800
	alan.schoenfeld@wilmerhale.com

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