

PRONOUN POLICIES IN PUBLIC SCHOOLS:
THE CASE AGAINST FIRST AMENDMENT EXCEPTIONS FOR K-12
TEACHERS

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INTRODUCTION

School is not always a safe place for transgender and gender non-conforming students.¹ Recent research shows that many transgender students feel unsafe at school.² These students are likely to have lower GPAs and miss more school days because of concerns for their safety.³

In certain parts of the country, schools have enacted policies designed to respect students' gender identities by requiring teachers and staff to use gender nonconforming students' chosen names, pronouns, and honorifics.⁴ However, some teachers have resisted these mandates, even though the U.S. Departments of Education and Justice have said that under Title IX, transgender and other gender non-conforming students have the right to be treated according to their gender identity.⁵ Chosen name use is also linked to reduced depressive symptoms, suicidal ideation, and suicidal behavior among transgender youth.⁶

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¹ *Youth & Student Issues*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/youth-students> (last visited Oct. 19, 2021).

² Joseph G. Kosciw et al., *The 2019 National School Climate Survey*, GLESEN 1, 16-17 (2019), https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf.

³ *Youth & Student Issues*, *supra* note 1.

⁴ *Policy Map*, GLESEN, <https://www.glsen.org/policy-maps> (last visited Sept. 12, 2021).

⁵ *Fact Sheet on U.S. Department of Education Policy Letter on Transgender Students*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/sites/default/files/ED-DCL-Fact-Sheet.pdf> (last visited Dec. 15, 2021).

⁶ Amanda M. Pollitt, Salvatore Loverno & Stephen T. Russell, *Predictors and Mental Health Benefits of Chosen Name Use Among Transgender Youth*, 53 *YOUTH & SOC'Y* 320, 330-36 (2019).

Teachers who refused to adhere to these new pronoun policies claim that they violate their First Amendment rights to free expression and free exercise of religion.⁷ School administrators have responded to these refusals by disciplining and, in some instances, terminating the contracts of teachers who ignore the stated policy.⁸

A handful of the teachers fired for refusing to use students' preferred names and pronouns have taken legal action against school administrators, asserting that the policies violate their constitutional and statutory rights.⁹ To date, courts have heard three cases brought by teachers who refused to address students by their preferred names, pronouns, or honorifics even though the students' parents and medical professionals have signed off on changes to official school records.¹⁰ These teachers have argued that pronoun policies, which are supported by groups ranging from the National Education Association to the National Center for Transgender Rights, violate their First Amendment rights and their rights under Title VII of the Civil Rights Act.¹¹

These initial cases are evidence of a potentially grim trend among teachers who harbor hostile views toward transgender and nonbinary individuals. Their refusals to use preferred names, honorifics, and pronouns are harmful to students and disruptive to the learning environment for all.¹² This paper argues that the right to freedom of expression does not extend to the task of addressing students in a classroom. This paper also suggests that courts should not grant an

⁷ *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 837 (S.D. Ind. 2020); *Vlaming v. W. Point Sch. Bd.*, 480 F. Supp. 3d 711, 716, 720 (E.D. Va. 2020); *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, at 3 (Va. Aug. 30, 2021) (order affirming preliminary injunction), <https://adfmlegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

⁸ *Kluge*, 432 F. Supp. 3d at 837 (S.D. Ind. 2020); *Vlaming*, 480 F. Supp. 3d at 716; *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, at 2 (Va. Aug. 30, 2021), <https://adfmlegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

⁹ *Kluge*, 432 F. Supp. 3d at 837; *Vlaming*, 480 F. Supp. 3d at 716, 720; *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, at 3 (Va. Aug. 30, 2021), <https://adfmlegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

¹⁰ *Kluge*, 432 F. Supp. 3d at 837; *Vlaming*, 480 F. Supp. 3d at 716, 720; *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, at 3 (Va. Aug. 30, 2021), <https://adfmlegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

¹¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

¹² See Sari Reisner et al., *Global Health Burden and Needs of Transgender Populations: A Review*, 388 THE LANCET 412, 428 (2016); see also Lydia Sausa, *Translating Research Into Practice: Trans Youth Recommendations for Improving School Systems*, 3 J. OF GAY & LESBIAN ISSUES IN EDUC. 29, 38-39 (2005).

exception to this policy based on a teacher's religious beliefs because it violates the third-party harm principle.¹³

The following Sections will explain why the First Amendment is an invalid exemption from these neutral policies. This paper will also demonstrate that enforcing these rules does not discriminate against teachers because of their religion, but in fact, does quite the opposite. Failure to adhere to these directives violates Title IX by discriminating against students on the basis of sex, which the Supreme Court has ruled includes both sexual orientation and gender identity.¹⁴

Part I of the paper discusses the status of openly transgender and nonbinary students in K-12 schools and the laws and policies which prohibit discrimination against them. Part II will explore K-12 teachers' rights to freedom of expression. In Part III, the constitutionality of religious exemptions to neutral laws is examined, focusing on the third-party harm principle. Part IV will present an overview of current cases involving teachers in Indiana and Virginia who claim they were wrongfully terminated for failing to adhere to their school's pronoun policy. In Part V, the cases and background regarding teachers' free expression and religious exemptions are used to establish that these claims, and future claims based on these arguments, are invalid. Part VI summarizes the arguments presented and concludes the paper.

I. BACKGROUND

Recent research suggests that between two and three percent of U.S. adolescents aged thirteen to seventeen identify as outside the traditional gender binary.¹⁵ The term "nonbinary" refers to anyone whose gender identity does not fit within the traditional construction of gender as being male or female.¹⁶ The term "transgender" is a

¹³ Douglas NeJaime & Reva B. Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, RELIGIOUS FREEDOM, LGBTQ RTS., AND THE PROSPECTS FOR COMMON GROUND 69, 74-75 (2019).

¹⁴ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020).

¹⁵ Jody Herman et al., *Age of Individuals Who Identify as Transgender in the United States*, WILLIAMS INST. 1, 2 (January 2017), <https://williamsinstitute.law.ucla.edu/publications/age-trans-individuals-us/> (citing Bianca D.M. Wilson & Angeliki A. Kastanis, *Sexual and gender minority disproportionality and disparities in child welfare: A population-based study*, WILLIAMS INST. 11, 12 (Aug. 29, 2015)).

¹⁶ *Nonbinary*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/resources/?s=nonbinary> (last visited Sept. 4, 2021). Other terms used to refer to people whose gender

broad term used to describe people whose gender identity is different from the sex they were assigned at birth.¹⁷ A 2020 survey of LGBTQ youth conducted by The Trevor Project found that although the term “nonbinary” has often been associated with a transgender or transitioning person, only half of the respondents who identified as nonbinary also identified as transgender.¹⁸

Unfortunately, both nonbinary and transgender adolescents are discriminated against and even threatened with violence because of their gender identity.¹⁹ According to a 2020 report from the Centers for Disease Control, 27 percent of transgender students surveyed felt unsafe at school.²⁰ Approximately 35 percent of transgender students were bullied, and 35 percent had attempted suicide.²¹ Research shows that transgender youth across the world face elevated rates of bullying compared to their cisgender peers.²²

To address this issue, many school districts are developing policies to protect students who are gender nonconforming from discrimination.²³ These policies address students’ use of bathrooms and locker rooms that correspond with their gender identity, participation in

identity falls outside of the traditional binary of male female include: queer, gender non-conforming, genderfluid, genderqueer, androgynous, agender, demigirl, demiboy, genderflux, and bigender. *Diversity of Nonbinary Youth*, THE TREVOR PROJECT (July 13, 2021), <https://www.thetrevorproject.org/research-briefs/diversity-of-nonbinary-youth/>.

¹⁷ *Transgender*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/search/?s=transgender> (last visited Sept. 4, 2021).

¹⁸ *Diversity of Nonbinary Youth*, THE TREVOR PROJECT (July 13, 2021), <https://www.thetrevorproject.org/research-briefs/diversity-of-nonbinary-youth/>.

¹⁹ Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts*, MORBIDITY AND MORTALITY WEEKLY REP. 67, 69-70 (Jan. 25, 2019).

²⁰ *Id.*

²¹ *Id.*

²² Elias Heino, Noora Ellonen & Riittakerttu Kaltiala, *Transgender Identity Is Associated With Bullying Involvement Among Finnish Adolescents*, FRONTIERS IN PSYCHOL. 1, 5-6 (Jan. 8, 2021).

²³ *Names & Pronouns – State Policies*, GENDER INCLUSIVE SCHOOLS, <https://www.genderinclusiveschools.org/names-and-pronouns> (last visited Oct. 19, 2021); see also Natalie Pate, *Advocates, Families and Transgender Students Push for Progress in Oregon Schools*, SALEM STATESMAN J., (Feb. 19, 2020), <https://www.statesmanjournal.com/in-depth/news/education/2020/02/19/lgbtq-transgender-students-oregon-education-salem-keizer-public-schools/3848012002/>; Hannah Natanson, *Virginia Legislators Want to Ease the Suffering Transgender Students*, WASH. POST (Jan. 10, 2020), https://www.washingtonpost.com/local/education/virginia-legislators-want-schools-to-ease-the-suffering-of-transgender-students/2020/01/10/32711920-30b6-11ea-91fd-82d4e04a3fac_story.html.

school sports, and teachers' use of their proper pronouns.²⁴ In addition to drafting school policies, some states have adopted laws that expressly prohibit discrimination against students based on their gender identity.²⁵ Federal laws, such as Title IX and Title XII of the Civil Rights Act, also prohibit discrimination against gender nonconforming students.²⁶

Despite the extensive legal framework in place to protect students, some educators in K-12 public schools have refused to comply with policies that require them to refer to students by their chosen names and pronouns.

A. *Relevant Anti-Discrimination Laws*

Title IX of the Education Amendments of 1972 states that no person shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” receiving federal assistance “on the basis of sex.”²⁷ According to the Supreme Court’s recent ruling in *Bostock v. Clayton County*, the term “sex” includes sexual orientation and gender identity.²⁸

In 2016, the U.S. Departments of Justice and Education, the two agencies tasked with enforcing Title IX, released guidelines that outlined how Title IX applies to transgender students.²⁹ Summarizing its interpretation of the statute, as well as decades of case law, the Department of Education said that under Title IX, transgender students have a right to be treated according to their gender identity,³⁰

²⁴ *Names & Pronouns – State Policies*, *supra* note 23.

²⁵ *Policy Map*, *supra* note 4.

²⁶ Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1972); Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

²⁷ 20 U.S.C. § 1681(a).

²⁸ *Bostock*, 140 S. Ct. at 1741; *see also* *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021). Writing for the majority, Justice Gorsuch said that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,” bringing these categories of identity under the protective umbrella of Title VII of the Civil Rights Act. *Bostock*, 140 S. Ct. at 1741.

²⁹ Press Release, *U.S. Departments of Justice and Education Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students*, DEP’T OF JUST. (Mar. 13, 2016), <https://www.justice.gov/opa/pr/us-departments-justice-and-education-release-joint-guidance-help-schools-ensure-civil-rights>.

³⁰ Dear Colleague Letter on Transgender Students, DEP’T OF JUST. & DEP’T OF EDUC. (May 13, 2016) (on file with author).

including when it comes to names, pronouns, dress codes,³¹ and restroom access.³² The Supreme Court affirmed the latter when it let the U.S. Court of Appeals for the Fourth Circuit's ruling stand in *Grimm v. Gloucester*, which held that a transgender bathroom ban was unconstitutional under the Fourteenth Amendment and Title IX.³³

Although former President Trump's administration rolled back this federal guidance on the application of Title IX, it was reinstated when President Biden took office. In March of 2021, President Biden issued an Executive Order stating it is the policy of his administration for all students to be guaranteed "an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity."³⁴ The Executive Order instructed the Secretary of Education to issue new guidance regarding implementation and enforcement of the federal regulation entitled, "Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Financial Assistance."³⁵

Under that directive, the Department of Education's Office of Civil Rights issued a notice of interpretation in June 2021, saying that the agency would once again enforce Title IX's prohibition on discrimination based on sex, which included discrimination based on sexual orientation and gender identity.³⁶ The Department of Education cited the Supreme Court's landmark ruling in *Bostock v. Clayton County* to justify its approach. In *Bostock*, Justice Gorsuch, writing for the majority, stated that it was impossible to discriminate against a person based on their gender identity or sexual orientation without discriminating against that person based on sex.³⁷

³¹ *Id.*

³² *Grimm*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021).

³³ *Id.* at 620.

³⁴ Exec. Order No. 14021, 86 C.F.R. 13803 (2021).

³⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020); see also *Supporting Transgender Youth in School*, DEP'T. OF EDUC. (June 2021), <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>.

³⁶ *Supporting Transgender Youth in School*, U.S. DEPT. OF EDUC. (June 2021), <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>.

³⁷ *Bostock*, 140 S. Ct. at 1741.

Although Title IX applies to institutions receiving federal funds, the Supreme Court has repeatedly interpreted it as not authorizing suits against school officials or teachers.³⁸ However, the Equal Protection Clause of the Fourteenth Amendment to the Constitution also protects students and allows plaintiffs to allege unconstitutional gender discrimination in schools.³⁹

In addition to federal-level protections, some states are also moving to protect gender nonconforming students from discrimination. Today, seventeen states and the District of Columbia have laws that prohibit discrimination against students based on their gender identity or sexual orientation.⁴⁰ Comprehensive state guidance regarding the treatment of transgender, nonbinary, and gender nonconforming students has been issued in eighteen states and the District of Columbia, Puerto Rico, and the Virgin Islands.⁴¹ The laws themselves instruct school districts to adopt or amend policies related to the elimination of discrimination as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and textbooks and instructional materials used by students.⁴² These policies can vary from state to state. In Washington state, for example, the Gender Inclusive School Policy states:

The board believes in fostering an educational environment that is safe and free of discrimination for all students, regardless of gender expression, gender identity, or sex. To that end, the board recognizes the importance of an inclusive approach toward transgender and gender-expansive students with regard to key terms, communication and the use of names and pronouns, student records, confidential health and education information, communication, restroom and locker room use, and accessibility, sports, and physical education, dress codes, and other school activities, in order to provide these students with an equal opportunity for learning and achievement.⁴³

³⁸ *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257-58 (2009).

³⁹ *Id.* at 257.

⁴⁰ *Policy Map*, *supra* note 4.

⁴¹ *Id.*

⁴² Wash. Rev. Code § 28A.642.020.

⁴³ *Gender Inclusive Schools*, WASHINGTON OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, <https://www.k12.wa.us/policy-funding/equity-and-civil-rights/information-families-civil-rights-washington-schools/gender-inclusive-schools> (last visited Oct. 19, 2021).

Each school district in Washington State is also required to train staff and volunteers regarding these policies and to designate a primary contact to ensure compliance and handle complaints.⁴⁴

New York's "Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students" is similar, but not identical, to Washington's policy.⁴⁵ The New York State Education Department's guidance also addresses the use of names and pronouns, the confidentiality of student records and health information, and participation in extracurricular activities.⁴⁶ Although New York does not specifically address inclusion on sports teams or dress codes, it does provide general guidelines for gender-based activities, rules, policies, and practices.⁴⁷

B. *Overview of Pronoun Policies*

In addition to state guidance, relevant unions and non-governmental organizations, such as the National Education Association (NEA) and the National Center for Transgender Equality, have provided best practices for developing these policies, which incorporate relevant laws alongside consideration for student learning.⁴⁸ These organizations suggest that school districts address many issues designated by state law, such as restroom and locker room access, participation in school sports and other activities, bullying and anti-harassment, and dress codes.⁴⁹

Most relevant to this discussion are school districts' policies regarding names, pronouns, and student records. Students should be addressed by their preferred names and pronouns without requiring a court-ordered name or gender change to alter their official records.⁵⁰

⁴⁴ *Id.*

⁴⁵ *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, N.Y. STATE EDUC. DEP'T, https://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf (last visited Jan. 20, 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Legal Guidance on Transgender Student Rights*, NAT'L EDUC. ASS'N, <https://www.nea.org/resource-library/legal-guidance-transgender-students-rights> (last visited Oct. 19, 2021).

⁴⁹ *Id.*

⁵⁰ *A Transgender Advocate's Guide to Updating and Amending School Records*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/youth-ferpa-faq> (last visited Oct. 19, 2021).

Under the Family Educational Rights and Privacy Act (FERPA), students and their parents should be able to request a formal hearing to amend their school records when they are “inaccurate, misleading or in violation of a student’s right to privacy.”⁵¹ People who have changed their gender identity have a privacy interest in records that reveal that change to future schools or employers. The U.S. Court of Appeals for the Second Circuit affirmed that a person’s transgender status is “excruciatingly private and intimate,” particularly for those who want to keep that information private.⁵²

Some school districts have responded proactively to these requirements. For example, the Seattle Public School District indicates on its website that students, parents, or guardians may request a change of student name or gender by contacting their school secretary or registrar.⁵³ Schools have also developed policies regarding how school administrators, teachers, and staff should address students. In 2019, the Howard County Public School System in Maryland updated its Policy on Sexual Discrimination, Sexual Harassment, and Sexual Misconduct to redefine prohibited gender discrimination as:

Any act or omission due to an individual’s actual or perceived sex, sexual orientation, gender, gender identity, or gender expression (including transgender or gender nonconforming) that creates an intimidating, hostile, or offensive working or educational environment; or substantially interferes with an individual’s ability to work, learn, or otherwise is sufficiently serious to limit an individual’s employment opportunities, or to limit a student’s ability to participate in or benefit from the educational program.⁵⁴

A memo to Howard County Public School System administrators outlining further details about the policy states that:

A student has the right to be addressed by a name and pronoun that corresponds to the student’s gender identity. An official name or gender change is not required, and the student need not change his or her

⁵¹ 320 U.S.C. § 1232g; 34 C.F.R. §§ 99.00.

⁵² *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

⁵³ *Students Have Option to Change Their Name and Gender Designation*, SEATTLE PUB. SCHOOLS, <https://www.seattleschools.org/about/official-notices/student-names-and-gender-designations/> (last visited Oct. 19, 2021).

⁵⁴ *Policy 1020 – Sexual Discrimination, Sexual Harassment, and Sexual Misconduct*, HOWARD CNTY. PUB. SCHOOLS, <https://policy.hcpss.org/1000/1020/> (last visited Sept. 4, 2021).

official records. If a teacher has been informed of a student who is transitioning or has transitioned, the teacher should ask the student how that student should be addressed. If teachers gather student preference and interest information at the start of the year, they should be encouraged to add preference regarding name and pronoun use.⁵⁵

A policy such as this one should be considered content neutral and reasonable, as it applies to all without bias. Policies that fit these standards govern how a teacher interacts with administrators, other teachers, and students in their school.⁵⁶ The Texas Administrative Code, for example, states that a teacher is not allowed to “intentionally, knowingly, or recklessly treat a student or minor in a manner that adversely affects or endangers the learning, physical health, mental health, or safety of the student or minor.”⁵⁷

Across the country, school districts are issuing directives like the Howard County Public School System memo to school administrators, teachers, and staff. Some teachers have refused to adhere to these policies, and the schools have taken disciplinary action.⁵⁸ To assess the constitutionality of their claims, Part II will establish the parameters that govern K-12 teachers’ freedom of expression.

II. K-12 TEACHERS’ FREEDOM OF EXPRESSION

A. *Freedom of Expression Inside and Outside the Classroom*

Although teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”⁵⁹ as public employees, teachers must endure greater restrictions on their First Amendment rights than private citizens. Generally, a teacher’s expression inside of the classroom is subject to discipline because the teacher is acting in her role as a public employee, rather than as a private citizen. As the Supreme Court noted in *Garcetti v. Ceballos*, “when public employees make statements pursuant to their official

⁵⁵ Memorandum from Kevin Gilbert, Director of Diversity, Equity, & Inclusion Re: Guidelines for Supporting Transgender and Gender Nonconforming Students 1 (Oct. 8, 2018) (on file with author).

⁵⁶ *Gender Inclusive Schools*, *supra* note 43.

⁵⁷ TEX. ADMIN. CODE § 247.2.

⁵⁸ *Kluge*, 432 F. Supp. 3d at 839; *Vlaming*, 480 F. Supp. 3d at 715; Complaint, *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21003254-00 (Va. Cir. Ct. filed June 1, 2021).

⁵⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁶⁰ Addressing students in the classroom is part of a public-school teacher’s professional responsibilities—to educate and provide an inclusive learning environment for students.⁶¹

Pickering v. Board of Education provides the precedent used to determine whether a teacher’s speech can be constitutionally curtailed.⁶² This case centered on the firing of public school teacher Marvin Pickering for sending a letter to a local newspaper criticizing the school board’s handling of a bond issue and revenue allotment.⁶³ Writing for the majority, Justice Marshall said that the Court’s goal was to arrive at a balance in its consideration of the interests of the teacher as a citizen commenting upon a matter of public concern and the interest of the State as an employer, promoting the efficiency of the public services it performs through its employees.⁶⁴

When applying *Pickering* as precedent, a court must determine whether a teacher is speaking as a private citizen on a matter of public concern, which is evaluated based on the content, form, and context of the speech.⁶⁵ When a teacher is speaking inside of a classroom about matters of a private concern, her speech may be constitutionally regulated.⁶⁶ If a teacher is speaking about a matter of public concern or exercising her rights as a citizen, then the teacher’s interest would outweigh the school’s interest, and the expression would be protected by the First Amendment.⁶⁷

Together these cases create the standards by which restrictions on teachers’ expression are commonly evaluated.⁶⁸ These decisions stress the importance of students’ learning in evaluating limits on teachers’ expression. Together, they offer clear guidance indicating that teachers’ speech may be constitutionally curtailed if it happens inside the

⁶⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁶¹ *Cf. id.* at 421-22.

⁶² *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 569-72 (1968).

⁶³ *Id.* at 566.

⁶⁴ *Id.* at 568.

⁶⁵ *Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009).

⁶⁶ *See Pickering*, 391 U.S. at 569-72.

⁶⁷ *Id.* at 574.

⁶⁸ *Id.*; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-73 (1988).

classroom and is about a matter of private concern, or if it would significantly disrupt the learning environment.⁶⁹

In terms of assessing disruption to the learning environment, the *Pickering* balancing test requires that a school show that the teacher's expression has substantially impaired the efficient operation of the school.⁷⁰ This interpretation is based primarily on the Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District*.⁷¹ Speaking within the context of student speech, the Court said that speculative harm is inadequate to prove a disruption to the school environment and that real harm must be demonstrated.⁷² The harmful nature of racist speech disrupts the learning environment substantially enough to limit or punish teacher expression. In *Anderson v. Evans*, the U.S. Court of Appeals for the Sixth Circuit held that the teacher's racist comments disrupted the learning environment and warranted the teacher's dismissal.⁷³ The principal argued that the teacher's anti-Black comments had strained her relationship with students and degraded the efficient and orderly operation of the school, and the Sixth Circuit agreed.⁷⁴

Although this example involves extreme speech, a teacher's expression does not need to rise to the level of violence or potential harm before a public school has the right to place restrictions on it.⁷⁵ However, when analyzing First Amendment challenges to pronoun policies, it is essential to establish that real harm is created for students, which disrupts the learning environment for gender nonconforming students and others.

B. Curriculum and Academic Freedom

Hazelwood School District v. Kuhlmeier expands on *Pickering* by establishing that restrictions on students' and teachers' speech may be constitutional when it is "reasonably related to a legitimate pedagogical concern."⁷⁶ Although *Hazelwood* is generally considered a stu-

⁶⁹ See *Pickering*, 391 U.S. at 574; *Hazelwood*, 484 U.S. at 275-76.

⁷⁰ *Connick v. Myers*, 461 U.S. 138, 150 (1983).

⁷¹ *Tinker*, 393 U.S. at 503.

⁷² *Id.* at 513-14.

⁷³ *Anderson v. Evans*, 660 F.2d 153, 159 (6th Cir. 1981).

⁷⁴ *Id.* at 156, 159.

⁷⁵ See Donna Prokop, *Controversial Teacher Speech: Striking a Balance between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533, 2557 (1993).

⁷⁶ *Hazelwood*, 484 U.S. at 273.

dent speech case, courts have also applied it to teacher speech inside the classroom.⁷⁷ One way courts have determined whether speech involves a matter of public concern is to assess whether and to what extent it is curricular and designed to impart knowledge to the students.⁷⁸

Teachers are required to meet certain academic standards set by the nation, state, or district, to ensure that they cover specific material and that students acquire certain skills as they work through different subjects at various grade levels.⁷⁹ For example, the Washington State Office of the Superintendent requires that public instruction of civics in high school must help the student understand “the purposes, organization, and function of governments, laws, and political systems,” guiding teachers on what skills the student needs to acquire by the end of the twelfth grade.⁸⁰ However, the standards themselves must be constitutional.

Within these parameters, teachers are given the flexibility to choose how they will reach the school administrators’ learning objectives. That is why variation exists in the way different teachers plan their lessons and engage with students. In the United States, K-12 public schools must strike a balance between meeting the requirements for instruction and ensuring teachers’ academic freedom.⁸¹

Broadly defined, academic freedom refers to teachers’ right to speak freely about their subjects, experiment with new ideas, and select what they feel are appropriate teaching materials and methods.⁸² Over time, courts have occasionally considered this balance and evaluated the boundaries of teachers’ academic freedom in the classroom. In 1969, Massachusetts public school teacher Robert Keefe was fired for assigning an article for homework that discussed the origins of the word “motherf*cker.”⁸³ The U.S. Court of Appeals for the First Circuit decided that Mr. Keefe had a right to teach the origins of the

⁷⁷ E.g., *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993).

⁷⁸ *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 697-98 (4th Cir. 2007).

⁷⁹ *K-12 College and Career Ready Standards*, DEP’T OF EDUC., <https://www.ed.gov/k-12reforms/standards> (last visited Oct. 17, 2021).

⁸⁰ *Social Studies Learning Standards*, WASH. OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, <https://www.k12.wa.us/student-success/resources-subject-area/social-studies/learning-standards> (last visited Oct. 17, 2021).

⁸¹ *Id.*

⁸² Cary Nelson, *Defining Academic Freedom*, INSIDE HIGHER ED (Dec. 21, 2010), <https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom>.

⁸³ *Keefe v. Geanakos*, 418 F.2d 359, 360-61 (1st Cir. 1969).

word so long as he successfully achieved the state's learning outcomes.⁸⁴

Policies that require teachers to use students' preferred names and pronouns implicate First Amendment protections for teachers' free expression and the Free Exercise Clause. Some teachers have claimed that adhering to these requirements violates their freedom of religion. Part III unpacks when and how such religious exceptions are constitutional.

III. FREEDOM OF RELIGION AND THE THIRD-PARTY HARM PRINCIPLE

The First Amendment protects the free exercise of religion and supports special accommodations for religious practice. These exemptions occur when generally applicable laws violate a person's right to free exercise of his religion.⁸⁵ However, the government limits claims for accommodations when those exemptions cause harm to other individuals.⁸⁶ When accommodations inflict harm on others, they may not be permitted.⁸⁷ This is known as the "third-party harm principle."⁸⁸

In addition to First Amendment protections for the free exercise of religion, Title VII of the Civil Rights Act prohibits discrimination based on religion.⁸⁹ According to the U.S. Equal Employment Opportunity Commission, religious discrimination occurs when someone is treated unfavorably because of his beliefs.⁹⁰ Title VII requires employers to accommodate employees' sincerely held religious beliefs when they conflict with the rules of employment, provided that such an accommodation would not result in undue hardship.⁹¹

To assess the existence and impact of third-party harm in the context of employees' religious beliefs, courts generally look at four fac-

⁸⁴ *Id.* at 361-62.

⁸⁵ Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1964).

⁸⁶ See *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

⁸⁷ See *id.*

⁸⁸ See Douglas NeJaime & Reva B. Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, RELIGIOUS FREEDOM, LGBTQ RTS., AND THE PROSPECTS FOR COMMON GROUND 69, 74 (2019), https://law.yale.edu/sites/default/files/documents/faculty/papers/nejaime_siegel_religious_accommodation_and_its_limits_in_a_pluralist_society.pdf.

⁸⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1964).

⁹⁰ *Religious Discrimination*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/religious-discrimination> (last visited Oct. 20, 2021).

⁹¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1964).

tors: (1) the magnitude of third-party harm, (2) the likelihood that harm will occur, (3) the religious interest at stake, and (4) any secular exemptions to the law or policy in question.⁹² To understand the magnitude of the harm, courts will analyze the severity of injury from the exemption and the burden it places on those affected.⁹³ When examining the likelihood, the Supreme Court has indicated that threatened harms are not significant enough to warrant exceptions.⁹⁴ In terms of religious interest, a strong religious interest in an exemption justifies a larger burden placed on third parties.⁹⁵ Courts will also consider whether secular exemptions have been granted.⁹⁶

Courts' application of the third-party harm principle and assessment of undue hardship has evolved over the past several decades, in large part due to the enactment of the federal Religious Freedom Restoration Act (RFRA), as well as similar state laws.⁹⁷ The RFRA was passed in 1993 to provide greater protections for religious freedom.⁹⁸ This law was a direct response to the Supreme Court's ruling in *Employment Division v. Smith* that religious exemptions to neutral, generally applicable laws that only incidentally burdened religion were not required under the Constitution.⁹⁹ This meant that religious plaintiffs would not be guaranteed exemptions from neutral, generally applicable laws.¹⁰⁰

In response to what was perceived as an attack on religious liberty, Congress passed the RFRA to overturn the *Smith* decision.¹⁰¹ The law said that government actions that substantially burden a person's exercise of religion, even when it comes from a rule of general applicability, must meet the threshold for strict scrutiny by furthering a compelling government interest and being narrowly drawn.¹⁰² The

⁹² See Christopher C. Lund, *Religious Exemptions, Third Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1377-81 (2016).

⁹³ *Id.* at 1377.

⁹⁴ See *Holt v. Hobbs*, 574 U.S. 352, 367-69 (2015).

⁹⁵ Lund, *supra* note 92, at 1379.

⁹⁶ *Id.* at 1381.

⁹⁷ 42 U.S.C. § 2000bb.

⁹⁸ *Id.*

⁹⁹ *Employment Div. v. Smith*, 494 U.S. at 879.

¹⁰⁰ *Id.* at 878.

¹⁰¹ 42 U.S.C. § 2000bb.

¹⁰² 42 U.S.C. § 2000bb prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

law originally included a provision that held that state laws burdening the free exercise of religion be held to the same standard, but the provision has since been struck down by the Supreme Court.¹⁰³ In *City of Boerne v. Flores*, the Supreme Court held that Congress exceeded its Fourteenth Amendment powers by enacting the RFRA, which subjected local ordinances to federal regulation.¹⁰⁴ Congress, the Court said, did not have the power to dictate how states would enforce the substance of its legislative restrictions.¹⁰⁵

Many states responded by creating state laws that provide similar protections. Today, twenty-one states have enacted state RFRA's.¹⁰⁶ States' RFRA's allow plaintiffs filing religious discrimination suits to allege a RFRA violation to obtain relief from a federal law or some federal action.¹⁰⁷ That might mean citing a state RFRA law as protection against Title IX enforcement of anti-discrimination policies. Defendants in a lawsuit can also claim a RFRA violation in their defense.¹⁰⁸ This might occur when a religious institution is accused of gender discrimination.

(1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. *Id.*

¹⁰³ *City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997).

¹⁰⁴ *Id.* at 527.

¹⁰⁵ *Id.* at 536.

¹⁰⁶ ALA. CONST. art. I, §3.01; ARIZ. REV. STAT. §41-1493.01; ARK. CODE ANN. § 16-123-401; CONN. GEN. STAT. §52-571b; FLA. STAT. §761.01; IDAHO CODE §73-402; 775 ILL. COMP. STAT. §35/1; IND. CODE § 34-13-9-1; IND. CODE § 34-13-9-0.7; KAN. STAT. ANN. §60-5301; KY. REV. STAT. ANN. §446.350; LA. STAT. ANN. §13:5231; MISS. CODE ANN. §11-61-1; MO. REV. STAT. §1.302; N.M. STAT. ANN. §28-22-1; OKLA. STAT. tit. 51, §251; 71 PA. CONS. STAT. §2403; R.I. GEN. LAWS §42-80.1-1; S.C. CODE ANN. §1-32-10; TENN. CODE ANN. §4-1-407; TEX. CIV. PRAC. & REM. CODE §110.001; VA. CODE ANN. §57-2.02.

¹⁰⁷ ALA. CONST. art. I, §3.01; ARIZ. REV. STAT. §41-1493.01; ARK. CODE ANN. § 16-123-401; CONN. GEN. STAT. §52-571b; FLA. STAT. §761.01; IDAHO CODE §73-402; 775 ILL. COMP. STAT. §35/1; IND. CODE § 34-13-9-1; IND. CODE § 34-13-9-0.7; KAN. STAT. ANN. §60-5301; KY. REV. STAT. ANN. §446.350; LA. STAT. ANN. §13:5231; MISS. CODE ANN. §11-61-1; MO. REV. STAT. §1.302; N.M. STAT. ANN. §28-22-1; OKLA. STAT. tit. 51, §251; 71 PA. CONS. STAT. §2403; R.I. GEN. LAWS §42-80.1-1; S.C. CODE ANN. §1-32-10; TENN. CODE ANN. §4-1-407; TEX. CIV. PRAC. & REM. CODE §110.001; VA. CODE ANN. §57-2.02.

¹⁰⁸ ALA. CONST. art. I, §3.01; ARIZ. REV. STAT. §41-1493.01; ARK. CODE ANN. § 16-123-401; CONN. GEN. STAT. §52-571b; FLA. STAT. §761.01; IDAHO CODE §73-402; 775 ILL. COMP. STAT. §35/1; IND. CODE § 34-13-9-1; IND. CODE § 34-13-9-0.7; KAN. STAT. ANN. §60-5301; KY. REV. STAT. ANN. §446.350; LA. STAT. ANN. §13:5231; MISS. CODE ANN. §11-61-1; MO. REV. STAT. §1.302; N.M. STAT. ANN. §28-22-1; OKLA. STAT. tit. 51, §251; 71 PA. CONS. STAT. §2403; R.I. GEN. LAWS §42-80.1-1; S.C. CODE ANN. §1-32-10; TENN. CODE ANN. §4-1-407; TEX. CIV. PRAC. & REM. CODE §110.001; VA. CODE ANN. §57-2.02.

In 2019, then Democratic Senator Kamala Harris introduced a bill that would prohibit the application of the RFRA to specific federal laws, including those that protect against discrimination or the promotion of equal opportunity, such as the Civil Rights Act.¹⁰⁹ Currently, no such exemptions exist and RFRA laws may be applied to religious exemptions to anti-discrimination laws. Before the enactment of RFRA laws, the Supreme Court referred to challenges to the Civil Rights Act based on religious grounds as “patently frivolous.”¹¹⁰

Since the RFRA has been passed, however, the Supreme Court’s treatment of objections has become more expansive, and scholars have raised concerns that the future application of the third-party harm principle may be limited given the current conservative makeup of the Supreme Court.¹¹¹ Murray points to the divergent opinions of Justices Alito and Kennedy in *Hobby Lobby* and *Masterpiece Cakeshop* as evidence of the Court’s split.¹¹² In *Hobby Lobby*, the Court said that the RFRA allowed religious employers an exemption to the contraceptive mandate in the Affordable Care Act.¹¹³ However, in assessing the harm this decision would cause, the Court assumed that the accommodation would have little to no effect on the women of *Hobby Lobby*.¹¹⁴

Writing for the majority in *Hobby Lobby*, Justice Alito spoke to the concerns raised in the dissent that hiring discrimination based on

¹⁰⁹ Do No Harm Act, S. 593, 116th Cong. (2019). This bill prohibits the application of the Religious Freedom Restoration Act of 1993 (RFRA) to specified federal laws or the implementation of such laws. *Id.* Currently, the RFRA prohibits the government from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability, except in furtherance of a compelling governmental interest when using the least restrictive means. 42 U.S.C. § 2000bb. Under the bill, RFRA is inapplicable to laws or the implementation of laws that protect against discrimination or the promotion of equal opportunity (e.g., the Civil Rights Act of 1964); require employers to provide wages, other compensation, or benefits, including leave; protect collective activity in the workplace; protect against child labor, abuse, or exploitation; or provide for access to, information about, referrals for, provision of, or coverage for, any health care item or service. Do No Harm Act, S. 593, 116th Cong. (2019). The bill prevents RFRA from being used to deny (1) goods or services the government has contracted, granted, or made an agreement to provide to a beneficiary; or (2) a person’s full and equal enjoyment of a government-provided good, service, benefit, facility, privilege, advantage, or accommodation. *Id.*

¹¹⁰ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 n. 5 (1968) (per curiam).

¹¹¹ Note, *Reframing the Harm: Religious Exemptions and Third-Party Harm after Little Sisters*, 134 HARV. L. REV. 2186, 2194 (2021).

¹¹² *Id.*

¹¹³ *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 690-91 (2014).

¹¹⁴ *Id.* at 732.

race or other protected categories of identity may be disguised as religious practice to avoid legal sanctions.¹¹⁵ Justice Alito said that these concerns were unfounded.¹¹⁶ He also took issue with the government's argument that religious exemptions should not be granted when the exemption would deny other individuals access to government benefits.¹¹⁷ Justice Alito asked: If the right to buy alcohol was considered a government benefit, would a Muslim grocer be forced to sell alcohol against his wishes?¹¹⁸

This narrow interpretation of the validity of the third-party harm principle stands in stark contrast to Justice Kennedy's position in the *Masterpiece Cakeshop* decision, which addressed whether a baker's religious freedom allowed him to refuse to bake a wedding cake for a same-sex couple.¹¹⁹ The Court held that the baker's right to religious freedom was violated when the Colorado Civil Rights Commission failed to be neutral in its application of the law prohibiting discrimination against members of the LGBTQ community. Despite this ruling, which focused primarily on the animus of the Colorado Civil Rights Commission, the Court reaffirmed the notion that religious objections did not allow people to deny members of protected classes equal access to goods and services under neutral and generally applicable public accommodation laws.¹²⁰ The Court's analysis in that case seemed to support the third-party harm principle.

However, the Court did not consider the third-party principle in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, which upheld the Trump Administration's religious exemptions to the contraceptive mandate.¹²¹ This was so even though the religious exemptions in question would cause between 70,000 and 126,400 women to lose access to no-cost contraceptive services.¹²² In her dis-

¹¹⁵ *Id.* at 733.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 729 n.37.

¹¹⁸ *Id.*

¹¹⁹ *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n.*, 138 S. Ct. 1719, 1723 (2018).

¹²⁰ *Id.* at 1727. Writing for the majority, Justice Kennedy said that "while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations." *Id.*

¹²¹ *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373 (2020).

¹²² *Id.* at 2401 (Ginsburg, J., dissenting).

sent, Justice Ginsburg noted that neither the Constitution's Free Exercise Clause nor the RFRA condone harm to third parties occasioned by entire disregard for their needs.¹²³

Despite the Supreme Court's recent inconsistency on the application of the third-party harm principle to questions of contraception and Justice Alito's concern regarding denial of government benefits as a justification for exemptions, the Court's position seems fixed. Decisions like *Masterpiece Cakeshop* make clear that religious exemptions will not be granted for neutral, generally applicable laws prohibiting discrimination. The Supreme Court's firm stance on the frivolity of religious challenges to the Civil Rights Act indicates that religion cannot and will not be used as justification for overt discrimination.¹²⁴ The Court also recognizes that discrimination "causes grave harm to its victims," thus activating the third-party harm principle.¹²⁵

This guiding principle must be kept in mind when examining the current cases involving K-12 teachers who have been fired for failure to adhere to the pronoun policies enacted by their school districts. This principle is important because educators filing these claims argue that using a transgender or gender nonbinary student's preferred name or pronouns violates their right to freely exercise their religion.

IV. RELEVANT CASES: KLUGE, VLAMING, & CROSS

Currently, there are only three cases that address specific questions about whether exceptions to these policies should be granted to K-12 teachers on First Amendment grounds.¹²⁶ There are ancillary cases, such as those happening in higher education¹²⁷ or those challenging the policies themselves.¹²⁸ However, the focus here is on claims brought by teachers who were fired for refusing to adhere to school policies requiring them to address students by their proper names and pronouns.

¹²³ *Id.* at 2400-01.

¹²⁴ Newman, 390 U.S. at 402 n.5.

¹²⁵ *United States v. Burke*, 504 U.S. 229, 238 (1992).

¹²⁶ *Kluge*, 432 F. Supp. 3d at 839; *Vlaming*, 480 F. Supp. 3d at 715; Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, (Va. Aug. 30, 2021), <https://adfmmedialegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

¹²⁷ *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

¹²⁸ Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, (Va. Aug. 30, 2021), <https://adfmmedialegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

A. *Kluge v. Brownsburg Community School Corp.*

In 2017, the Brownsburg Community School Board in Brownsburg, Indiana enacted a policy that permitted gender nonconforming students to change their name in the school database with a letter from a parent and medical professional.¹²⁹ The School Board also instituted a policy that required teachers to address students using the name and pronouns that corresponded to the gender in the updated school records.¹³⁰ The policy was outlined in a handout called “Transgender Questions,” which provided answers to questions submitted by faculty.¹³¹

John Kluge, the music and orchestra teacher at Brownsburg High School, said that the policy conflicted with his religious beliefs against “affirming gender dysphoria.”¹³² As a workaround, Mr. Kluge began to refer to students only by their last name and relied on another employee to distribute the band’s gender-specific uniforms.¹³³ After several months, the school principal told Mr. Kluge that his use of last names only in the classroom was causing tension and suggested that he resign.¹³⁴ A member of the district’s human resources personnel team said that Mr. Kluge’s approach had offended students and caused them to become withdrawn in the classroom.¹³⁵ Mr. Kluge claimed that encouraging students to present themselves as the opposite sex and calling them an opposite sex name was sinful and potentially harmful to students.¹³⁶

Eventually, Mr. Kluge resigned but sued the Brownsburg Community School Board and several employees saying he was discriminated against and forced to resign because his religious beliefs prevented him from following the school policy.¹³⁷ In his suit, Mr. Kluge argued that the transgender and gender nonconforming policies were informal, unwritten, and overbroad.¹³⁸ He said that the policy attempted to regulate and compel the expression of faculty members

¹²⁹ *Kluge*, 432 F. Supp. 3d at 833.

¹³⁰ *Id.*

¹³¹ *Id.* at 835.

¹³² *Id.* at 833-34.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Kluge*, 432 F. Supp. 3d at 834.

¹³⁶ *Id.*

¹³⁷ *Id.* 832-33.

¹³⁸ *Id.* at 835.

beyond what was needed to educate the students.¹³⁹ Altogether, Mr. Kluge asserted thirteen claims for relief, including: religious discrimination, retaliation, and hostile work environment under Title VII; retaliation, content and viewpoint discrimination, compelled speech, and violation of free exercise of religion under the First Amendment; violation of the right to be free from unconstitutional conditions; violation of the right of due process and equal protection under the Fourteenth Amendment; violation of rights of conscience and free exercise of religion under the Indiana State Constitution; and finally intentional infliction of emotional distress and fraud under Indiana common law.¹⁴⁰ The defendants moved to dismiss all claims, and the district court agreed with the exceptions of the retaliation and religious discrimination claims under Title VII of the Civil Rights Act.¹⁴¹

In addressing the First Amendment speech claims, the district court said that the claims failed because Mr. Kluge's refusal to address students by their proper names and pronouns was not protected speech. Namely, Mr. Kluge was speaking as a public school teacher, not a private citizen, and addressing students in the classroom was not a matter of public concern.¹⁴² The district court cited *Pickering* as precedent.¹⁴³ As discussed in Part II, in *Pickering*, the Supreme Court developed a legal test to balance a teacher's interests as a private citizen commenting on matters of public concern and the interests of the State as an employer in promoting the efficiency of public services it performs through its employees.¹⁴⁴ In this situation, the court said that Mr. Kluge was disciplined not for criticizing the policy, which would have been protected expression, but for refusing to follow it.¹⁴⁵ The district court said that the speech was pursuant to official duties as a public employee and that it was difficult to imagine how a teacher could perform his duties as a teacher without addressing students.¹⁴⁶ The court said that "addressing students is necessary to communicate

¹³⁹ *Id.* at 835-36.

¹⁴⁰ *Id.* at 836.

¹⁴¹ *Kluge*, 432 F. Supp. 3d at 836-54, 859-60.

¹⁴² *Id.* at 838-39.

¹⁴³ *Id.* at 837-38.

¹⁴⁴ *Pickering*, 391 U.S. at 565-66.

¹⁴⁵ *See Kluge*, 432 F. Supp. 3d at 838-39.

¹⁴⁶ *Id.* at 839.

with them and teach them the material.”¹⁴⁷ Moreover, Mr. Kluge’s choice of how to address students is not a matter of public concern even though gender identity is a sensitive, political topic.¹⁴⁸ Mr. Kluge’s choices inside the classroom do not contribute to the broader public debate on transgender issues.¹⁴⁹ Instead, this communication represents a private interaction between Mr. Kluge and his students.¹⁵⁰

Mr. Kluge also asserted that the school’s name and pronoun policy conflicted with his religious beliefs against “affirming gender dysphoria.”¹⁵¹ However, the district court dismissed the claim that the policy violated his right to free exercise of religion under the First Amendment saying that the policy was neutral and did not demonstrate animus toward any religion.¹⁵²

The two counts the district court did allow to move forward were his claims under Title VII. Specifically, Mr. Kluge alleged that the school failed to offer him adequate religious accommodations and that school administrators retaliated against him when they said he could use last names, but then withdrew that decision without demonstrating the hardship that his approach caused the students.¹⁵³

As discussed in Part III, Title VII requires employers to accommodate employees’ sincerely held religious beliefs when they conflict with the rules of employment and when providing an accommodation would not result in undue hardship.¹⁵⁴ Part V argues that being called by your last name only or being misgendered with the wrong pronouns creates a hardship for students and impedes their ability to learn.

Another key question that needs to be addressed for Mr. Kluge to prove that the school discriminated against him because it failed to make accommodations for his religious beliefs is whether addressing students by their preferred name and pronouns is an administrative function. Mr. Kluge argued that it was not, and said that addressing “an adolescent suffering from gender dysphoria” by his preferred

¹⁴⁷ *Id.* (citing *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019) (explaining how teachers communicating with students is part of their jobs and running a classroom is a “core academic dut[y]”)).

¹⁴⁸ *Kluge*, 432 F. Supp. 3d at 839.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 834.

¹⁵² *Id.* at 841.

¹⁵³ *Id.* at 844-48, 859-60.

¹⁵⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

name and pronouns was instead an expression of approval, acceptance, and even celebration.¹⁵⁵ In their arguments, both Mr. Kluge and the Brownsburg Community School Corp. cited the Indiana District Court case, *Summers v. Whitis*, which held that a county clerk was required to process marriage licenses for LGBTQ couples despite her religious objections.¹⁵⁶ There, the district court said that the processing was a purely administrative function and that there was no objective conflict between her religious belief that gay marriage was a sin and the requirement that she process marriage licenses for same-sex couples.¹⁵⁷ In its objective inquiry of the conflict, the court said that because Ms. Summers was only required to process the license, which involved making sure information was correctly filled out and recorded for the public record, and not perform marriage ceremonies, the function was an administrative one.¹⁵⁸ Moreover, the court determined that Ms. Summers was acting on behalf of the state of Indiana, not on her own behalf.¹⁵⁹

The School District claims that in his role as an instructor, Mr. Kluge is acting on behalf of the State of Indiana and the Brownsburg School District and, therefore, is required to use the students' preferred names and pronouns in its school database.¹⁶⁰ The School District also asserts that this is a purely administrative task, but Mr. Kluge argues that addressing students by a name or pronoun that does not match the sex they were assigned is sinful and, therefore, against his religion. The district court has allowed this count to proceed to further litigation, which will examine Mr. Kluge's religious beliefs and analyze the policy itself to determine whether it covers a purely administrative function.¹⁶¹ The court also allowed the retaliation claim to move forward.¹⁶²

¹⁵⁵ *Kluge*, 432 F. Supp. 3d at 844.

¹⁵⁶ *Summers v. Whitis*, No. 4:15-cv-00093-RLY-DML, 2016 U.S. Dist. LEXIS 173222, at *19-20 (S.D. Ind. Dec. 15, 2016).

¹⁵⁷ *Id.* at *13-14.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See Kluge*, 432 F. Supp. 3d at 845-46.

¹⁶¹ *Id.*

¹⁶² *Id.* at 848. To bring a successful retaliation claim under Title VII, the plaintiff must allege facts showing that they "engaged in statutorily protected expression and was subjected to an adverse employment action as a result." *Id.* at 847. In the *Kluge* case, the Indiana District Court said that they could not conclude that the retaliation claim was a failure based on the standards of review for a motion to dismiss. *Id.* In other words, the allegation is substantial

B. *Vlaming v. West Point School Board*

In *Vlaming v. West Point School Board*, Peter Vlaming, a French teacher at West Point High School, was fired for violating policies against discrimination and harassment and not following repeated orders from the principal and superintendent.¹⁶³ Mr. Vlaming's student, Doe, was transitioning from female to male and wished to go by male pronouns and a traditionally male name.¹⁶⁴ Because students were required to choose French names for his course, Mr. Vlaming used the French name selected by Doe.¹⁶⁵ However, Mr. Vlaming avoided using pronouns when speaking to Doe.¹⁶⁶ Outside the classroom, Mr. Vlaming used she/her pronouns to refer to Doe, even though those pronouns did not align with the student's gender identity.¹⁶⁷ Doe's parents and the school's principal spoke to Mr. Vlaming, who said his conscience and religious beliefs prohibited him from using names and pronouns that did not match with a person's sex at birth.¹⁶⁸ Then, in a subsequent class period, Mr. Vlaming referred to Doe using she/her pronouns.¹⁶⁹ After that incident, Doe withdrew from the course, and Mr. Vlaming was placed on leave and afterward continued to disobey a direct order from the superintendent to comply.¹⁷⁰ He was fired for not following orders to adhere to the policies, which prohibited discrimination and harassment in the school.¹⁷¹

Mr. Vlaming sued the school board in federal district court.¹⁷² He claimed that his dismissal violated several rights guaranteed to him by the Virginia Constitution and Virginia Code, including freedom of speech, freedom of religion, due process, freedom from government discrimination, the Dillon rule, and breach of contract.¹⁷³ Mr. Vlaming did not raise his complaints under Title IX. Instead, he argued that the school's harassment and discrimination policies did not con-

enough to move forward, and like the accommodation claim, analysis will happen at a later stage.

¹⁶³ See *Vlaming*, 480 F. Supp. 3d at 715-16.

¹⁶⁴ *Id.* at 716.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Vlaming*, 480 F. Supp. 3d at 716.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 716-17.

¹⁷³ *Id.*

form with Virginia state law.¹⁷⁴ The court found it lacked jurisdiction to rule and remanded the case to state court.¹⁷⁵ The Fourth Circuit Court of Appeals affirmed the district court's remand order.¹⁷⁶

C. *Cross v. Loudoun*

Byron Tanner Cross, a gym teacher in Loudoun County, Virginia, spoke at a school board meeting against a policy adopted by the Loudoun County School Board to protect LGBTQ students from discrimination.¹⁷⁷ Like the policies in previous cases, this mandate requires Loudoun County Public School teachers to use students' preferred pronouns and names.¹⁷⁸ Mr. Cross, who rejected the policy based on his religious beliefs, refused to comply and spoke out publicly against it, arguing that it violated his right to free expression.¹⁷⁹ He was suspended, but the Virginia Circuit Court ordered his reinstatement, and the Supreme Court of Virginia upheld that decision.¹⁸⁰

In the case, Mr. Cross argued that his suspension was an act of retaliation by the School Board following his exercise of constitutionally protected expression.¹⁸¹ To determine whether Mr. Cross's speech at the School Board meeting was in fact protected, the court applied the balancing test laid out in *Pickering*.¹⁸² In its analysis, the Virginia court determined that when Mr. Cross spoke out against the policy at the School Board meeting, he was speaking as a citizen, not in his official capacity as a teacher.¹⁸³ The court noted that the speech took place during non-working hours and was not conducted at his usual place of employment.¹⁸⁴ Citing *Brooks v. Arthur*, the court

¹⁷⁴ *Id.* at 718-19.

¹⁷⁵ *Vlaming*, 480 F. Supp. 3d at 723.

¹⁷⁶ *Vlaming v. W. Point Sch. Bd.*, No. 20-1940, 2021 U.S. App. LEXIS 24958 (4th Cir. Aug. 20, 2021).

¹⁷⁷ Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, at 1-2 (Va. Aug. 30, 2021), <https://adfmedialegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>.

¹⁷⁸ *Id.* at 1.

¹⁷⁹ *Id.* at 1-3.

¹⁸⁰ *Id.* at 1-2, 8.

¹⁸¹ *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21003254-00, at 2 (Va. Cir. Ct. June 8, 2021) (order granting preliminary injunction), <https://adflegal.org/sites/default/files/2021-06/Cross-v-Loudoun-County-Public-Schools-TRO-PI-Decision-2021-06-08.pdf>.

¹⁸² *Id.* at 2-3.

¹⁸³ *Id.* at 2.

¹⁸⁴ *Id.*

found that the speech was not a “solely private dispute.”¹⁸⁵ Instead, the court also said that the enactment of a policy regarding transgender issues and the conduct of staff within the public school system was in fact a matter of public concern.¹⁸⁶ Laws enacted by legislatures invite political discourse, said the court, and are, on their face, matters of public, political, and social interest.¹⁸⁷ Stepping back, the court analyzed whether Mr. Cross’s right to free expression outweighed the School Board’s interest in restricting speech. Although the School Board cited the disruption caused by Mr. Cross’s statements (as evidenced by parents’ e-mails to the school), the court found little evidence of the impact of the alleged disruption.¹⁸⁸

After being reinstated, Mr. Cross, joined by two additional plaintiffs, Kimberly Wright and Monica Gill, returned to the Virginia Circuit Court to challenge the policy itself.¹⁸⁹ The ACLU of Virginia, along with several LGBTQ rights organizations, filed an *Amici Curiae* brief arguing that although teachers may disagree with the policy, they do not have the right to violate it in their capacity as K-12 teachers in the Loudoun County school system.¹⁹⁰ They argue that the policy is essential for the health and safety of transgender and gender nonconforming students.¹⁹¹ The ACLU cites evidence regarding the physical and emotional harms caused by misgendering students and argues that teachers must use gender affirmed names and pronouns to treat stu-

¹⁸⁵ *Id.* at 3; see also *Brooks v. Arthur*, 685 F.3d 367, 369 (4th Cir. 2012). Two employees claimed they were unlawfully fired for exercising their First Amendment rights to complain about their workplace. *Brooks*, 685 F.3d at 370. However, the Fourth Circuit Court of Appeals concluded that “complaints about . . . the employee’s own duties” that are “filed with an employer using an internal grievance procedure . . . do[] not relate to a matter of public concern and accordingly may give rise to discipline without imposing any special burden of justification on the government employer.” *Id.* at 369.

¹⁸⁶ *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21003254-00, at 2-3 (Va. Cir. Ct. June 8, 2021), <https://adflegal.org/sites/default/files/2021-06/Cross-v-Loudoun-County-Public-Schools-TRO-PI-Decision-2021-06-08.pdf>.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.* at 3-4.

¹⁸⁹ Complaint at 1, *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21003254-00 (Va. Cir. Ct. filed June 1, 2021), <https://adfmmedialegalfiles.blob.core.windows.net/files/CrossAmendedComplaint.pdf>.

¹⁹⁰ Brief for the American Civil Liberties Union of Virginia et al. as *Amici Curiae* Supporting Defendants’ Opposition to Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction, *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21003254-00, at 3, <https://acluva.org/en/cases/byron-tanner-cross-et-al-v-loudoun-county-school-board-et-al-amicus> [hereinafter *ACLU Amicus Brief*].

¹⁹¹ *Id.* at 5.

dents equally.¹⁹² Failure to do this discriminates against gender non-conforming students, stigmatizing them and harming their social and emotional development.¹⁹³

Taken together, these cases illuminate the kinds of arguments educators in future, similar cases are likely to make. Part V discusses why this reasoning should be rejected by courts.

ANALYSIS

Applicable laws and precedents indicate that K-12 teachers are legally required to follow pronoun policies and that exceptions to this requirement are unconstitutional. The failure to use a student's preferred name and pronoun is discriminatory and a violation of Title IX.¹⁹⁴ When addressing students, teachers are acting as employees of the school speaking on private matters.¹⁹⁵ In these instances, they are not and should not be considered private citizens speaking out on matters of public concern. Additionally, addressing students is an administrative function of the school executed by classroom teachers.¹⁹⁶

Religious exemptions to these neutral and generally applicable policies should not be granted because of the harm those exceptions would cause gender nonconforming students. Title VII of the Civil Rights Act requires employers to accommodate employees' sincerely held religious beliefs and provide accommodations that do not result in hardship when the rules of employment conflict with those beliefs.¹⁹⁷ However, misgendering or deadnaming students causes substantial harm, and in doing so violates the third-party harm principle.¹⁹⁸

This Section pulls together relevant laws and precedents to demonstrate why First Amendment exceptions to pronoun policies are unconstitutional and should not be granted.

¹⁹² *Id.* at 7.

¹⁹³ *Id.* at 11.

¹⁹⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972).

¹⁹⁵ *Pickering*, 391 U.S. 563, 568 (1968).

¹⁹⁶ *See Kluge*, 432 F. Supp. 3d at 839.

¹⁹⁷ Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (1964).

¹⁹⁸ Deadnaming occurs when a transgender person is called by their birth name when they have changed their name as part of their gender transition. *Why Deadnaming is Harmful*, CLEVELAND CLINIC, (Nov. 18, 2021), <https://health.clevelandclinic.org/deadnaming/>.

A. *Application of Title IX and States' Anti-Discrimination Laws*

The Department of Education's Office of Civil Rights has made clear that Title IX's prohibition against sex discrimination for schools receiving federal funds extends to discrimination based on gender identity.¹⁹⁹ The Department of Education has said that under Title IX transgender students have a right to be treated according to their gender identity,²⁰⁰ including when it comes to names, pronouns, dress codes,²⁰¹ and restroom access.²⁰² Although enforcement of this law can change based on the priorities of the current administration, seventeen states along with the District of Columbia also have laws in place that prohibit discrimination based on gender identity.²⁰³

Deadnaming and using a student's improper pronouns are forms of discrimination that violate Title IX and similar state laws prohibiting discrimination based on gender identity.²⁰⁴ At its heart, discrimination is best characterized as the unequal or unfair treatment of a person based on some fixed identity characteristic. Students whose pronouns match the sex they were assigned at birth are not called by the opposite pronouns. Using cis-gendered students' preferred pronouns and names and not using gender nonconforming students' preferred pronouns and names is discriminatory and a clear violation of the Department of Education's directive.²⁰⁵ This discrimination denies students the full benefit of their education guaranteed by Title IX.²⁰⁶ Research shows that gender nonconforming students who have negative perceptions of their school climate are absent more, impacting their ability to perform well in school.²⁰⁷ On the contrary,

¹⁹⁹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See Grimm*, 972 F.3d at 602.

²⁰³ *Policy Map*, *supra* note 4.

²⁰⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972); *Policy Map*, *supra* note 4.

²⁰⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020). Adopting policies that respect all students' gender identities—such as the use of the name a student goes by, which may be different from their legal name, and pronouns that reflect a student's gender identity—and implementing policies to safeguard students' privacy—such as maintaining the confidentiality of a student's birth name or sex assigned at birth if the student wishes to keep this information private, unless the disclosure is legally required. *Id.*

²⁰⁶ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972).

²⁰⁷ Pollitt et al., *supra* note 6, at 330-34.

supportive teachers are associated with less victimization and absenteeism and greater feelings of school connectedness among transgender youth.²⁰⁸

B. *Classroom Pronoun Use Is Not Protected Expression*

The guiding precedent to determine whether the First Amendment protects a teacher's expression comes from *Pickering*.²⁰⁹ The balancing test set out in *Pickering* considers the teacher's interests as a citizen commenting upon a matter of public concern and the interest of the State as an employer, promoting the efficiency of the public services it performs through its employees.²¹⁰ When a teacher is acting in his role as a government employee discussing a private matter, his expression may be curtailed.²¹¹ However, if teachers are speaking as private citizens on a matter of public concern, then their expression is likely to be protected by the First Amendment. To assess whether speech is about a public concern, courts will look at the content, form, and context of speech.²¹² In other words, courts examine what is being said and where it is being said. As seen in *Cross v. Loudoun*, a teacher speaking out against the pronoun policy at a school board meeting is acting in her capacity as a citizen discussing a matter of public concern, which in this case was a new rule passed by the School Board that required teachers to use students' preferred names and pronouns.²¹³ When teachers address students in a classroom, they are acting in their capacity as government employees engaged in curricu-

²⁰⁸ See Elizabeth Diaz, Joseph Kosciw & Emily Greytak, *School Connectedness for Lesbian, Gay, Bisexual, and Transgender Youth: In-School Victimization and Institutional Supports*, 17 THE PREVENTION RESEARCHER 15, 15-18 (2010); see also Emily Greytak, Joseph Kosciw & Madelyn Boesen, *Putting the "T" in "Resource:" The Benefits of LGBT-Related School Resources for Transgender Youth*, 10 J. OF LGBT YOUTH 45, 55-61 (2013); Tamara Murdock & Megan Bolch, *Risk and Protective Factors for Poor School Adjustment in Lesbian, Gay, and Bisexual High School Youth: Variable and Person Centered Analyses*, 42 PSYCHOL. IN THE SCHOOLS 159, 159-70 (2005); Kristie Seelman, N. Eugene Walls, Cynthia Hazel & Hope Wisneski, *Student School Engagement Among Sexual Minority Students Understanding the Contributors to Predicting Academic Outcomes*, 38 J. OF SOC. RES. 3, 3-15 (2011).

²⁰⁹ *Pickering*, 391 U.S. at 564.

²¹⁰ *Id.* at 568.

²¹¹ *Id.*

²¹² See *Chaklos*, 560 F.3d at 712. Motive can be considered as part of the employee's motive for speaking as a relevant consideration. *Milwaukee Deputy Sheriff's Ass'n v. Clarke*, 574 F.3d 370, 377 (7th Cir. 2009).

²¹³ *Cross*, No. CL21003254-00, at 2 (Va. Cir. Ct. June 8, 2021), <https://adfflegal.org/sites/default/files/2021-06/Cross-v-Loudoun-County-Public-Schools-TRO-PI-Decision-2021-06-08.pdf>.

lar speech. Addressing students is part of a public school teacher's professional responsibilities—to educate and provide an inclusive learning environment for students.²¹⁴ Although schoolteachers provide more than academic knowledge to their students, it is not a court's obligation to determine which messages of social or moral values are appropriate in a classroom. Instead, it is the school board, whose responsibility includes the well-being of the students, that must make such determinations.²¹⁵

Moreover, as the court recognized in *Kluge*, the communication that occurs inside the classroom between teacher and student is a private matter, rather than a matter of public concern.²¹⁶ *Pickering* defines “public concern” as an issue of societal importance or significance.²¹⁷ Although the rights of transgender individuals meets the *Pickering* definition of a matter of public concern, an individual teacher's choice to use a student's preferred pronouns makes no contribution to any broader public debate on transgender issues.²¹⁸

Courts have also looked at the extent to which speech disrupts the learning environment when applying *Pickering*'s balancing test. For example, the U.S. Court of Appeals for the Sixth Circuit stated in *Anderson v. Evans* that a teacher's racist comments were so disruptive to the learning environment that they warranted her dismissal.²¹⁹ According to school administrators, the teacher's anti-Black comments strained her relationship with students and degraded her classroom's efficient and orderly operation.²²⁰ In *Hazelwood School District v. Kuhlmeier*, the Supreme Court said that restrictions on a teacher's expression might be constitutional when they are related to a legitimate pedagogical concern.²²¹ How teachers address their students is a critical component of delivering the curriculum and creating a productive learning environment.²²²

²¹⁴ Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, at 5 (Va. Aug. 30, 2021), <https://adfmlegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf>; cf. *Garcetti*, 547 U.S. 410, 421-22 (2006).

²¹⁵ See *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007).

²¹⁶ *Kluge*, 432 F. Supp. 3d at 839.

²¹⁷ *Pickering*, 391 U.S. at 568.

²¹⁸ *Kluge*, 432 F. Supp. 3d at 839.

²¹⁹ 660 F.2d 153, 159 (6th Cir. 1981).

²²⁰ *Id.* at 156.

²²¹ *Hazelwood*, 484 U.S. at 273.

²²² *Lee*, 484 F.3d at 697-98.

As the court in *Kluge* noted, although addressing students may not be part of the actual curriculum, it is necessary to communicate with them and teach them the material.²²³ The U.S. Court of Appeals for the Seventh Circuit has said that how teachers relate to students is part of their jobs, and classroom management is central to their academic duties.²²⁴ To effectively deliver their curriculum, teachers need to be able to address students. Misgendering students or deadnaming them negatively impacts the learning environment. As seen in the *Vlaming* case, Mr. Vlaming's misgendering of Doe in the classroom led to the student's decision to withdraw from the course.²²⁵ Thus, there is a pedagogical necessity to use students' preferred names and pronouns.

To summarize, when addressing students by their names, pronouns, or honorifics, teachers in K-12 public schools are speaking as government employees about a matter of private concern. Addressing students is a critical part of delivering the curriculum, and failure to use a student's preferred name or pronouns disrupts the learning environment. Thus, it should not be considered protected speech.

C. *Religious Exemptions to Pronoun Policies Harm Students*

As discussed in Part III, the First Amendment protects individuals' right to exercise their religion and supports special accommodations for religious practice. When generally applicable laws violate people's right to freely exercise their religion, exemptions are offered. This is provided that the exemptions do not inflict substantial harm on others. The "third-party harm principle" generally considers the magnitude and likelihood of the harm caused, the religious interest at stake, and whether secular exceptions have been offered to others.²²⁶ Although the Supreme Court's application of the principle has been inconsistent in recent years, the Court has historically said that religious exemptions to anti-discrimination laws will not be supported.²²⁷ When it comes to discriminatory practice, the Supreme Court has

²²³ *Kluge*, 432 F. Supp. 3d at 839.

²²⁴ *Wozniak*, 932 F.3d at 1010.

²²⁵ *Vlaming*, 480 F. Supp. 3d at 716.

²²⁶ Lund, *supra* note 92, at 1377-81.

²²⁷ See *Newman*, 390 U.S. at 402 n.5; *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 694-95 (2014).

demonstrated it has little tolerance for efforts to claim religious exemptions as a justification for discrimination.²²⁸

In addition to First Amendment protections, Title VII of the Civil Rights Act prohibits discrimination based on religion. Religious discrimination occurs when someone is treated unfavorably because of their religious beliefs.²²⁹ Title VII requires employers to accommodate employees' sincerely held religious beliefs when they conflict with the rules of employment and when providing an accommodation would not result in undue hardship.²³⁰

The *Kluge*, *Vlaming*, and *Cross* cases are the first of what could eventually be many challenges to school districts' anti-discrimination policies requiring teachers to use gender nonconforming students' preferred names and pronouns. In both *Kluge* and *Vlaming*, public school teachers claimed that these policies violated their right to free exercise of religion.²³¹ In *Kluge*, the plaintiff also argued that the disciplinary actions taken against him violated his right under Title VII not to be discriminated against because of his religion.²³²

This Section will demonstrate that pronoun policies are neutral and generally applicable laws that do not discriminate based on religion. It will also show that religious exemptions to these policies cause harm to gender nonconforming students and, thus, should not be granted.

1. Pronoun Policies Are Neutral and Serve a Compelling Government Interest

Although it is not possible to examine every U.S. school district's policy directing teachers and staff to use students' preferred names and pronouns, it is important to recognize the similarity between these policies and other, similar anti-discrimination policies already in place in most public schools. A teacher's sincerely held religious beliefs are not exempt from policies that prohibit sexual harassment of students or discrimination against them based on their race. The policies in

²²⁸ *Burwell*, 573 U.S. at 753-60 (Ginsburg, J., dissenting).

²²⁹ *Religious Discrimination*, EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/religious-discrimination> (last visited Oct. 20, 2021).

²³⁰ Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

²³¹ See generally *Kluge*, 432 F. Supp. 3d at 832; *Vlaming*, 480 F. Supp. 3d at 715; Loudoun Cnty. Sch. Bd. v. Cross, No. 210584, at 1-2 (Va. Aug. 30, 2021), <https://adfmlegal.files.blob.core.windows.net/files/CrossOrderVSC.pdf>.

²³² *Kluge*, 432 F. Supp. 3d at 844.

question here are in line with existing anti-discrimination policies. The example offered earlier in this paper shows how the Howard County Public School system simply updated its Sexual Discrimination, Sexual Harassment, and Sexual Misconduct policy to include prohibitions against discrimination based on a person's gender identity or gender expression (including transgender or gender nonconforming).²³³ The School Board accompanied this change with a memo indicating that students have the right to be addressed by a name and pronoun that corresponds to the student's gender identity. As this example indicates, the policy itself is neutral and does not single out religious individuals for disfavored treatment.²³⁴ This was the same conclusion the *Kluge* court came to in dismissing Mr. Kluge's claim that the policy violated his right to free exercise of religion.²³⁵

Even when a policy is facially neutral, courts may also be asked to analyze whether it disparately impacts certain employees because of their protected status. It is unlawful for employers to engage in practices that cause a disparate impact on the basis of race, color, religion, sex, or national origin.²³⁶ In these instances, employers must demonstrate that the task is related to the position and is necessary for the business at hand. For teachers, the task of addressing students is necessary to communicate with them and teach them the material.

Finally, these policies serve a compelling government interest. For decades, the Supreme Court has recognized that protecting individuals from discrimination on the basis of sex serves a compelling government interest.²³⁷ The state has a compelling reason to protect transgender students from discrimination—these practices are necessary to protect their physical and emotional health. Research shows that safeguarding transgender and gender nonconforming students from the discriminatory practice of deadnaming and misgendering reduces anxiety, depression, and other maladaptive behaviors.²³⁸

²³³ *Policy 1020 – Sexual Discrimination, Sexual Harassment, and Sexual Misconduct*, HOWARD CNTY. PUB. SCH. SYS., <https://policy.hcpss.org/1000/1020/> (last visited Sept. 4, 2021).

²³⁴ See *Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017).

²³⁵ *Kluge*, 432 F. Supp. 3d at 859.

²³⁶ Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

²³⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984).

²³⁸ See Amber M. Bennett, *Examining Factors That Explain Depression and Anxiety Among Transgender College Students*, UNIV. OF PA. 1, 59-60 (2018); see also Lydia Sausa, *Translating Research Into Practice: Trans Youth Recommendations for Improving School Systems*, 3 J. OF GAY & LESBIAN ISSUES IN EDUC. 29, 38-39 (2005).

Birth name use, on the other hand, is linked to increased suicidal thoughts and behavior.²³⁹

2. Addressing Students Is an Administrative Function

The question that remains at issue in *Kluge* is whether the school failed to offer him an adequate religious accommodation.²⁴⁰ Moving forward, the court plans to examine Mr. Kluge's religious beliefs and the policy itself to determine whether addressing students is considered an administrative function. Much like the law clerk who was required to issue marriage licenses to LGBTQ couples despite her religious objections,²⁴¹ teachers should be required to address students using their chosen names and pronouns despite their personal beliefs regarding gender identity. In *Summers v. Whitis*, the court said that processing a license was an administrative function that did not conflict with her religious belief that gay marriage was a sin.²⁴² When addressing students, teachers are not being asked to endorse a student's gender identity, but rather only to use the name and pronoun in the official school records. The court also noted that Ms. Summers was acting on behalf of the state, not on her own behalf. Similarly, teachers in these situations are acting not as private citizens, but as public school employees.

3. Exceptions to These Policies Harm Students

Exceptions to pronoun policies should not be granted because of the harm they cause transgender and gender nonconforming students. When assessing the harm a religious exemption will cause third parties, courts generally examine the magnitude and likelihood of the harm caused, the religious interest at stake, and whether secular exceptions have been offered to others.²⁴³

Research regarding the magnitude and likelihood of harm the practices of deadnaming and misgendering have on students is conclusive. Incorrect use of pronouns and deadnaming can negatively impact transgender and gender nonconforming students' sense of self,

²³⁹ Pollitt et al., *supra* note 6, at 334-36.

²⁴⁰ *Kluge*, 432 F. Supp. 3d at 839.

²⁴¹ *Summers*, No. 4:15-cv-00093-RLY-DML, at *3.

²⁴² *Id.* at *7.

²⁴³ Lund, *supra* note 92, at 1377-81.

safety, and overall mental health.²⁴⁴ Failure to use a student's chosen name and pronouns can increase self-scrutiny, which can cause students to internalize the homophobia or transphobia targeted at them.²⁴⁵ By not affirming their gender identity, teachers may cause transgender and nonbinary students' feelings of gender dysphoria, which "can cause debilitating distress, depression, impairment of function, substance use, self-mutilation to alter one's genitals or secondary sex characteristics, other self-injurious behaviors, and suicide."²⁴⁶ In a study examining the effects of chosen name use on adolescents, the results indicated that teachers addressing students by their preferred name led to students' improved mental health, including less depression and decreased suicidal thoughts or behavior.²⁴⁷ When transgender and nonbinary students are addressed with gender appropriate pronouns, those students reflect the same healthy, psychological profile as their peers.²⁴⁸ Studies have shown that when chosen name use increased in the school context, suicidal behavior decreased by 56 percent, and thoughts of suicide decreased by 29 percent.²⁴⁹

In terms of the religious interest at stake, only a handful of teachers will suffer discomfort from having to adhere to the policy.²⁵⁰ Additionally, no secular exemptions to the policy have been offered. Instead, data conclusively shows that pronoun policies are necessary to protect transgender and nonbinary students from discrimination. Failure to use a student's chosen name and pronouns increases depression and suicidal thoughts and behavior.²⁵¹ Facially, these policies are neutral and generally applicable. They serve a compelling government interest and are narrowly drawn. Adhering to these policies when they address students does not violate a teacher's right to free exercise, as this is purely an administrative function.

²⁴⁴ Pollitt et al., *supra* note 6, at 334-36.

²⁴⁵ Lauren Munro, Robb Travers & Michael R. Woodford, *Overlooked and Invisible: Everyday Experiences of Microaggressions for LGBTQ Adolescents*, 66 J. OF HOMOSEXUALITY 1439, 1446 (2019).

²⁴⁶ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, 451-53, 455-58 (5th ed. 2013).

²⁴⁷ Pollitt et al., *supra* note 6, at 330-36.

²⁴⁸ See *Grimm*, 972 F.3d at 597.

²⁴⁹ Pollitt et al., *supra* note 6, at 330-36.

²⁵⁰ Cf. *Little Sisters of the Poor Saints Peter and Paul Home*, 140 S. Ct. at 2401 (Ginsburg, J., dissenting).

²⁵¹ Munro et al., *supra* note 245, at 1446.

CONCLUSION

The idea that a teacher's actions inside the classroom could discriminate against an already vulnerable population of students, causing them harm, is troubling. Fortunately, Title IX offers a clear federal policy against sex discrimination among institutions receiving federal funds.²⁵² The Supreme Court's ruling in *Bostock* makes clear that "sex" includes gender identity.²⁵³ The Fourth Circuit's ruling in *Grimm* underscores that discrimination against transgender students is a violation of both Title IX and the Equal Protection Clause of the Fourteenth Amendment.²⁵⁴

Despite these protections, some teachers have refused to adhere to their school district's pronoun policies on the grounds that it violates their right to free expression and freedom of religion, and that forcing them to use a student's preferred pronouns should be considered religious discrimination under Title VII of the Civil Rights Act. After reviewing these cases and relevant legal frameworks, this paper has set forth the argument that these policies do not violate a teacher's First Amendment rights, nor are they religiously discriminatory.

When addressing students by their names, pronouns, or honorifics, teachers in K-12 public schools speak as government employees on a matter of private concern. Addressing students is a critical part of delivering the curriculum, and failure to use a student's preferred name or pronouns disrupts the learning environment. Thus, it should not be considered protected speech.

Exceptions to these policies based on religious grounds harm transgender and gender nonconforming students and, thus, should not be granted. Research demonstrates that failure to use chosen names and pronouns can result in suicidal thoughts and behavior among transgender and nonbinary youth.²⁵⁵ Facially, these policies are neutral, generally applicable, and administrative. They serve a compelling government interest—to protect transgender and gender nonconforming youth from discrimination.

²⁵² Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1972).

²⁵³ *Bostock*, 140 S. Ct. at 1741 (2020).

²⁵⁴ *Grimm*, 972 F.3d at 618-19.

²⁵⁵ Pollitt et al., *supra* note 6, at 330-36.

Moving forward, it is our sincere hope that courts agree with the analysis offered here by recognizing that exemptions to pronoun policies on First Amendment grounds are unconstitutional at best and dangerous at worst.

