

IN THE
Supreme Court of the United States

KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* THE DEFENSE OF
FREEDOM INSTITUTE FOR POLICY STUDIES
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST¹

Amicus curiae the Defense of Freedom Institute for Policy Studies (“DFI”) is a nonprofit, nonpartisan 501 (c)(3) organization dedicated to defending and advancing educational freedom and opportunity for every American family, student, teacher, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school.

As part of its mission, DFI focuses on protecting parental rights like those threatened in this case. For example, DFI filed an amicus brief in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), and has provided testimony to the U.S. House Subcommittee on Early Childhood, Elementary and Secondary Education hearing on Defending Faith and Families Against Government Overreach on the implications of *Mahmoud*, see *Defending Faith and Families Against Government Overreach: Mahmoud v. Taylor*: Hearing Before the Subcomm. on Early Childhood, Elementary, and Second Educ. of the H. Comm. on Educ. and Workforce, 119th Cong. (Feb. 10, 2026).

DFI also focuses on protecting students, faculty, and staff in state-supported schools from the dangers to First Amendment rights posed by school district policies like the one at issue here. For example, DFI served as co-counsel in *Louisiana v. U.S. Dep’t of Educ.*, No. 24-30399,

1. No party or its counsel authored any of this brief, and no person other than amicus curiae, its members, or its counsel contributed monetarily to this brief. Undersigned counsel provided counsel of record timely notice of the amicus’s intention to file a brief more than ten days prior to the due date. Sup. Ct. R. 37.2.

2024 U.S. App. LEXIS 17886 (5th Cir. July 17, 2024), which challenged new regulations under Title IX published by the United States Department of Education (the “Department”) on April 29, 2024, *see Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the “2024 Rules”). In that case, and similar challenges discussed, *infra*, federal courts have squarely considered constitutional issues arising out of preferred pronoun requirements in schools, as in this case.

SUMMARY OF ARGUMENT

Interim decisions from this Court’s emergency docket are “not conclusive.” *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025). Yet primary guidance from this Court on the specific types of speech at issue in this case – compelling the use of a student’s preferred pronouns and silencing discussion of a student’s gender transitioning – comes from two recent, brief interim decisions, *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (*per curiam*) and *U.S. Dep’t of Educ. v. Louisiana*, 603 U.S. 866 (2024) (*per curiam*). This case presents an opportunity to confirm, on the merits and after full briefing and oral argument, what this Court indicated preliminarily in *Mirabelli* and *Louisiana*.

The MCPS Guidelines² challenged by Polk run counter to the constitutional rights of parents identified by this Court in *Mirabelli*. There, the Court found that parental rights include the right “not to be shut out of participation in decisions regarding their children’s mental health.”

2. Unless otherwise noted, the defined terms used herein have the same meanings as used in Polk’s Petition for a Writ of Certiorari.

Mirabelli, 607 U.S. at 496–97 (citations omitted). MCPS’s Guidelines facilitating the transition of students to different names and genders without the knowledge or involvement of their parents violate the same rights of parents at issue in *Mirabelli*.

Garcetti v. Ceballos, relied on by the Fourth Circuit for the decision below, does not permit MCPS to make Polk complicit in the denial of parental rights because, as a threshold matter, speech that government requires its employees to use must not convey a message that is “unlawful or otherwise inappropriate.” *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). MCPS cannot force Polk to engage in speech or other expressive behavior that violates the parental rights identified in *Mirabelli*.

As public school systems assert increasing authority over areas of students’ lives beyond academics, parents deserve solid guidance on the extent of their rights relative to the schools. Even though teachers like Polk are the parties directly regulated by the Guidelines, the ultimate targets of the concealed transition requirement are parents of MCPS students.³ Because *Mirabelli* is not conclusive, granting Polk’s petition and resolving her claims offers a chance to provide much needed clarification to a large class of interested third-parties, the parents of children attending public schools.

3. MCPS’s position on parental rights here echoes the one it took in *Mahmoud*, 606 U.S. 522, which this Court rejected. *Mahmoud* established that the transmission of truthful, relevant information by the state to a parent is fundamental to the exercise of parental rights, and the Guidelines fly in the face of the transparency required by *Mahmoud*.

In the second, recent interim decision, *Louisiana*, this Court weighed in on whether governmental efforts to compel public school teachers, students, and others to use a student’s preferred pronouns violate the First Amendment. Like MCPS’s Guidelines, the 2024 Rules, which were regulations promulgated under Title IX and published in April 2024, required teachers (and others) to use pronouns that match a student’s preferred gender identity, biology notwithstanding. Denying the federal government’s application to stay preliminary injunctions on the 2024 Rules, this Court let stand decisions from the Fifth and Sixth Circuits concluding that the preferred pronoun requirement likely infringed on constitutionally-protected speech. *Louisiana*, 603 U.S. at 868.

Again, like *Mirabelli*, this short, arguably “under-reasoned” decision offers little specific guidance on the constitutionality of government-compelled use of preferred pronouns. Again, conclusive guidance on this recurring issue would be beneficial.

ARGUMENT

I. THIS CASE OFFERS A VEHICLE FOR GIVING PARENTS CONCLUSIVE DIRECTION AS TO THEIR RIGHTS VIS A VIS PUBLIC SCHOOLS.

This Court needs to speak clearly and on a non-interim basis to the rights of parents faced with efforts by public schools to conceal their children’s intentions to change their pronouns and genders to no longer match their biological sex, and to whether “misgendering” is protected speech under the First Amendment. In addition to relief

for the parties in this case, a final decision on the merits would yield a significant, ancillary benefit for parents of children in public schools, as well as teachers facing speech requirements that conflict with their sincerely-held beliefs.

While interim decisions may “inform” how lower courts should rule “in like cases,” they are “not conclusive.” *Boyle*, 145 S. Ct. at 2654. Rather, interim decisions reflect the Court’s current leanings on the merits of a case, and how lower courts should exercise their equitable discretion in like cases. *Id.* But without a comprehensive, written decision addressing relevant issues that have been fully briefed and argued, it may be difficult for lower courts to determine how this Court’s preliminary conclusions should apply in other cases presenting similar but distinct issues.

Viewpoints on the precedential or other value of an interim decision differ. *Compare Trump v. CASA, Inc.*, 606 U.S. 831, 874 (2025) (when faced with a “decision on the interim legal status of a major new federal statute or executive action,” “this Court should not and cannot hide in the tall grass”) (Kavanaugh, J., concurring) with *Boyle*, 145 S. Ct. at 2655 (objecting to majority using interim decision to “all but overturn[] . . . a near-century old precedent of this Court”) (Kagan, J., dissenting). Similarly, whether an interim decision controls the outcome of subsequent proceedings in the same case can be subject to dispute. *See, e.g., Nat’l TPS All. v. Noem*, 163 F.4th 1152, 1157-58 (9th Cir. 2025). One practical effect of an interim decision may be to generate further litigation over whether, for example, a case is sufficiently “like” another in which such a decision has been rendered.

Besides misinterpretation, lower courts may try to avoid this Court’s direction by framing a decision as “merely” interim pending appeal. *See Nat’l Insts. of Health v. Am. Pub. Health Ass’n*, 145 S. Ct. 2658, 2663 (2025) (noting that interim docket decisions have “precedential weight”) (citations omitted)) (Gorsuch, J., concurring).

Parties may try to do so as well. For example, *Regino v. Blake* involved a local school district policy derived directly from the California state-wide transition concealment policy at issue in *Mirabelli*, *see Mirabelli v. Olson*, 820 F. Supp. 3d 1123, 1133 n.2 (S.D. Cal. 2025) (citing *Regino v. Staley*, 133 F.4th 951, 956 n.1 (9th Cir. 2025)); nonetheless, California asserted⁴ that *Mirabelli* did not mean that parents have the right to *consent* when the state socially transitions their children at school, but only the right to *participate* in that decision, *see* Brief of the State of California as Amicus Curiae In Support of Defendant-Appellee (Dkt. 33.1), at 7–8, *Regino v. Blake*, Case No. 26-475 (9th Cir. 2026) (quoting *Mirabelli*, 607 U.S. at 497).

Of course, the nature of the emergency docket means that the Court does not have the luxury of time. But granting certiorari here would allow for full briefing and argument on significant, recurring issues. *Cf. Trump v. Illinois*, 146 S. Ct. 432, 436 (2025) (in disposing of interim applications, “the Court can help guard against mistakes or misjudgments by employing additional process when

4. Although the school district defendants did not mention *Mirabelli* in their appellate briefing, non-party California argued as amicus that the interim decision did not apply.

sufficient time is available – recognizing, of course, that time will not always be available”) (Kavanaugh, J, concurring). Although *Mirabelli* and *Louisiana* are not “unreasoned” orders, this case now presents an opportunity for a final decision on the merits that parents, teachers, and others can rely on going forward.

II. MCPS CANNOT COMPEL SPEECH THAT IS UNLAWFUL OR INAPPROPRIATE.

As a threshold matter to any analysis under *Garcetti*, speech that government requires its employees to use must not convey a message that is “unlawful or otherwise inappropriate.” *Garcetti*, 547 U.S. at 426; *see also Janus v. AFSCME, Council 31*, 585 U.S. 878, 908 (2018) (government authority to compel employee speech requires that speech convey “lawful message”). Put differently, the “official duties” of a government employee, *see Garcetti*, 547 U.S. at 421-24, cannot include unwarranted interference with constitutional rights. Thus, MCPS cannot force Polk to engage in speech or other expressive behavior that does so.

Mirabelli and *Louisiana* indicate that the speech that MCPS seeks to compel – namely, a student’s preferred pronouns and nondisclosure of gender transitioning to parents – is not lawful or appropriate because (1) it infringes upon parents’ right to direct the upbringing and education of their children, and (2) it violates the First Amendment rights of the speaker. This Court can conclusively confirm these “preliminary” interpretations through a grant of certiorari here.

a. This Court Should Confirm Conclusively the Constitutional Rights Of Parents That Were Identified in *Mirabelli*.

Mirabelli found that the parent-petitioners would most likely prevail on both Free Exercise and substantive due process grounds. *See Mirabelli*, 607 U.S. at 496-97. The California policies would trigger strict scrutiny under the First Amendment because they substantially interfered with the “right of parents to guide the religious development of their children.” *Id.* at 496 (citing *Mahmoud*, 606 U.S. at 559 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972))). The policies could not survive such review because they “cut out the primary protectors of children’s best interests: their parents,” thereby undermining any purported governmental interest. *Mirabelli*, 607 U.S. at 496-97 (citing *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality opinion)).

Parental substantive due process rights include the right “not to be shut out of participation in decisions regarding their children’s mental health.” *Mirabelli*, 607 U.S. at 497 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)). Further, this Court stated,

Gender dysphoria is a condition that has an important bearing on a child’s mental health, but when a child exhibits symptoms of gender dysphoria at school, California’s policies conceal that information from parents and facilitate a degree of gender transitioning during school hours. These policies likely violate parents’ rights to direct the upbringing and education of their children.

Mirabelli, 607 U.S. at 497. Thus, *Mirabelli* denied the request to stay a district court’s permanent injunction on enforcement of the policies while the state’s appeal proceeded.

Under *Mirabelli*, MCPS’s Guidelines would compel Polk to violate rights on both constitutional grounds, while keeping secret from parents personal crises that their children are experiencing.

Mirabelli also supports consideration of parental interests in deciding Polk’s petition. “[E]ven though the school districts and their employees are the ‘directly regulated parties,’ the ultimate ‘target[] of [California’s policies] are the objecting *parents* who, under its terms, may not be granted the constitutionally required mandatory access to information about their children’s exhibiting symptoms of gender dysphoria.” *City of Huntington Beach v. Newsom*, No. 25-3826, 2026 U.S. App. LEXIS 17884, at *11 (9th Cir. June 18, 2026) (citing *Mirabelli*, 607 U.S. at 497-98 and *Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 114-15 (2025)) (preliminarily enjoining on substantive due process grounds state law prohibiting mandatory disclosure of student gender dysphoria information to parents). Parents of MCPS student are not parties to this case, but the Court need not put blinders on to their important, constitutional interests implicated here.

1. ***Mahmoud* requires that public schools – and MCPS specifically – offer parents greater transparency into their children’s lives, not less.**

MCPS’s position in this case regarding parental rights echoes the position it took in *Mahmoud*, which this Court considered and rejected.⁵

Mahmoud centered on whether the MCPS policy of introducing LGBTQ-inclusive storybooks into the pre-K, kindergarten, and elementary school curriculum, without

5. Like the parents in *Mahmoud*, Polk seeks only modest relief, and a resolution short of this litigation was readily available. *See Mahmoud*, 606 U.S. at 568 (“What the parents seek here is not the right to micromanage the public school curriculum, but rather, to have their children opt out of a particular education requirement that burdens their well-established right ‘to direct the religious upbringing’ of their children.”)(citation omitted); *see also Mirabelli*, 820 F. Supp. 3d at 1146 (plaintiff-parents did not claim “right to prescribe school curriculum, or force the schools to administer medical care, or disclose student private personal information to unrelated adults”). Similarly, Polk does not seek to micromanage the curriculum or direct the administration of her school, which are clearly the province of MCPS. She simply wants to use student’s last names, not their preferred pronouns when the pronouns conflict with biology and Polk’s sincerely-held beliefs. Nonetheless, MCPS rejected this reasonable compromise. *See Meriwether v. Hartop*, 992 F.3d 492, 510-11 (6th Cir. 2021) (describing professor’s proposal to use transgender student’s last name instead of preferred pronoun as “a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive.”). As in *Mahmoud*, it is again baffling why MCPS chose this hill to die on, other than to make some noncurricular, ideological point.

notifying parents or allowing them to opt their children out of participating in the storybook series, violated the parents' Free Exercise right to direct the religious upbringing of their children. *See Mahmoud*, 606 U.S. at 528-30. This Court concluded that the parents were entitled to a preliminary injunction, finding that the MCPS policy "substantially interfer[ed]" with parental rights under the Free Exercise Clause. *See id.* at 565 (quoting *Yoder*, 406 U.S. at 218).

The right to opt a child out of portions of the curriculum that deeply undermine a family's faith is meaningless without prior knowledge about the curriculum. Thus, the *Mahmoud* Court ordered MCPS to notify parents in advance whenever the storybooks or similarly controversial materials were to be used, and then to allow children to be excused from such instruction.⁶ *Mahmoud*, 606 U.S. at 569.

Mahmoud makes clear that the parental right discussed in *Mirabelli* included prior notice, which is contrary to the Guidelines requirement that a student's transitioning be kept hidden from his or her parents.

6. As a direct result of *Mahmoud*, each semester MCPS students now receive refrigerator magnets detailing the upcoming curriculum, including books to be read, and the same information is made readily available to parents online, so that parents can then decide whether to exercise their opt out rights. *See* Suzanne Pollack, 'Refrigerator Curriculum' Includes Form to Opt Out of Class, MyMCM (Aug. 21, 2025), <https://shorturl.at/BeZN1>.

b. Consistent With *Louisiana*, This Court Should Confirm Conclusively That Government-Compelled Use Of Preferred Pronouns Violates A Speaker’s First Amendment Rights.

Like MCPS’s Guidelines, the 2024 Rules required teachers (and others) to use a student’s preferred pronoun, regardless of whether the pronoun was consistent with the student’s biological sex.⁷ *See, e.g.*, 89 Fed. Reg. 33,514-16 (noting that refusal to use pronouns based on self-professed gender identity could “create a hostile environment” and that “verbal . . . hostility based on the student’s . . . gender identity” can be impermissible discrimination). Because 34 C.F.R. § 106.10 of the 2024 Rules included “gender identity” in Title IX’s definition of “sex,” intentional misgendering would constitute sex discrimination under the new, expanded definition of “harassment” in 34 C.F.R. § 106.2. *See Tennessee v. Cardona*, No. 24-5588, 2024 U.S. App. LEXIS 17600, at *4 (6th Cir. July 17, 2024) (“In view of the new scope of sex-based discrimination under § 106.10, this addition to § 106.2 covers the refusal to use a student’s preferred pronoun.”) (citing 89 Fed. Reg. 33,516).

Challenges were brought against the 2024 Rules immediately after they were published, resulting in preliminary injunctions against them in nearly every

7. Numerous other aspects of the 2024 Rules were challenged beyond the misgendering requirements discussed here, and the 2024 Rules were ultimately vacated in their entirety. *See Carroll Indep. Sch. Dist. v. U.S. Dep’t of Educ.*, No. 4:24-cv-00461-O, 2025 U.S. Dist. LEXIS 124115, at **5, 8 (N.D. Tex. Feb. 19, 2025); *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 621-23 (E.D. Ky. 2025).

federal district and circuit court hearing the cases.⁸ *See, e.g., Kansas v. U.S. Dep’t of Educ.*, 739 F. Supp. 3d 902 (D. Kan. 2024); *Texas v. United States*, 740 F. Supp. 3d 537 (N.D. Tex. 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep’t of Educ.*, 741 F. Supp. 3d 515 (N.D. Tex. 2024); *Arkansas v. U.S. Dep’t of Educ.*, 742 F. Supp. 3d 919 (E.D. Mo. 2024); *Oklahoma v. Cardona*, 743 F. Supp. 3d 1314 (W.D. Okla. 2024) (collectively, “the 2024 Rules Litigation”).

When preliminary injunctions on the 2024 Rules from the Fifth and Sixth Circuits reached this Court, it upheld them in a short interim decision. *See Louisiana*, 603 U.S. at 867-68. The Court stated, “Importantly, all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to” Sections 106.2 and 106.10. *Id.* at 867; *see also id.* at 868-69 (Sotomayor, J., dissenting) (agreeing that “respondents are entitled to interim relief as to three provisions”). The decision mentioned Sections 106.2 and 106.10 only briefly, and did not discuss specifically the prohibition on mis-pronouncing.

However, the decisions from the Fifth and Sixth Circuit addressed the issue directly. For example, in its preliminary injunction decision, the Eastern District of Kentucky considered at length whether Section 106.2 unconstitutionally compelled the use of preferred pronouns. *See Tennessee v. Cardona*, 737 F. Supp. 3d 510, 543-47 (E.D. Ky 2024). The Kentucky court stated, “Individuals

8. The sole outlier was from the Northern District of Alabama, which denied a motion to preliminarily enjoin the 2024 Rules. *See Alabama v. Cardona*, No. 7:24-cv-533-ACA, 2024 U.S. Dist. LEXIS 137759 (N.D. Ala. July 30, 2024). The next day, however, the Eleventh Circuit granted the requested relief. *Alabama v. U.S. Sec’y of Educ.*, No. 24-12444, 2024 U.S. App. LEXIS 22248 (11th Cir. July 31, 2024).

cannot be coerced into affirming messages with which they fundamentally disagree.” *Id.* at 543 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Furthermore, “[i]n addition to compelling affirmation of gender identity through policy, [the 2024 Rules] compel[] silence of opposing viewpoints.” *Tennessee*, 737 F. Supp. 3d at 544; *see also Louisiana v. U.S. Dep’t of Educ.*, 737 F. Supp. 3d 377, 400 (W.D. La. 2024) (“Essentially, the harassment standard allows for one political ideology to dominate the educational landscape while either silencing the other or calling the other ‘harassment’ under these standards.”). Ultimately, the *Kentucky* court concluded that Section 106.2 represented “a tacit endorsement of a content-based heckler’s veto. So long as the offended individuals complain with sufficient vigor, the refusal to abide by preferred pronouns can be deemed harassment” under Section 106.2. *Tennessee*, 737 F. Supp. 3d at 545-46.

Besides the Fifth and Sixth Circuits, other federal courts in the 2024 Rules Litigation also held that the 2024 Rules preferred pronoun requirement infringed on the constitutionally-protected speech of teachers, students, and others. *See, e.g., Arkansas*, 742 F. Supp. 3d at 945; *Oklahoma*, 743 F. Supp. 3d at 1327-28.

Like the 2024 Rules, the Guidelines compel Polk to speak in a manner inconsistent with her good faith, deeply-held views in violation of the First Amendment. Granting her petition would allow for conclusive direction from this Court on a recurring issue that does not seem likely to be worked out through the states.

CONCLUSION

For the foregoing reasons, as well as those set forth in Polk's Petition For a Writ of Certiorari, this Court should grant Polk's petition.

Respectfully submitted,

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