UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Katie Wood *et al.*,

Plaintiffs

v. No. 4:23-cv-00526-MW-MAF

Florida Department of Education *et al.*,

Defendants.
_____/

PLAINTIFF AV SCHWANDES'S
MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff AV Schwandes respectfully requests that the Court preliminarily enjoin Defendants Florida Department of Education ("FDOE"), State Board of Education ("SBOE"), and Members of the State Board of Education ("SBOE Members") (collectively, "State Defendants"), their officers, agents, servants, employees, attorneys, and successors, and other persons who are in active concert or participation with any such person, from enforcing subsection 3 of Florida Statutes ("Fla. Stat.") § 1000.071 (2023) ("subsection 3").

Mx. Schwandes, a nonbinary teacher who uses they/them pronouns, was fired from their public-school teaching job because of subsection 3. On or about January

13, 2024

schedule for this motion.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

Mx. Schwandes was a public-school teacher at the Florida Virtual School and is a nonbinary person who uses the title Mx. and they/them pronouns.

allowing them to use the title Mx. and they/them pronouns if they wish, it treats Mx. Schwandes differently from those teachers on the basis of sex, in violation of Title VII.

Subsection 3 also violates the First Amendment because it unconstitutionally restrains Mx. Schwandes' speech by requiring them to conceal or misrepresent who they are in all interactions with students. "[T]he First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Although governments may exercise considerable control over teachers' speech, that does not mean that "everything teachers … say in the workplace [i]s government speech subject to government control." *Id.* at 2425. To hold otherwise would mean "a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria." *Id.*

The Court has made clear that prohibiting such expressive activity would violate not only the Free Exercise Clause, but also the Free Speech Clause "under any" applicable standard, *id.* at 2426, notwithstanding the fact that a Muslim teacher's choice to wear a headscarf will inevitably result in students learning about that teacher's deeply held commitments. Just as Florida cannot constitutionally require

Black employees to wear makeup to lighten their skin to conceal their race, bar Latino employees from using certain names in order to conceal their national origin, or require pregnant employees to take leave to conceal their pregnancies, it cannot require Mx. Schwandes to conceal their title and pronouns.

The investigation of Mx. Schwandes will inflict irreparable harm upon Mx. Schwandes. They will have to expend time and effort responding to the inquiry, including potentially by retaining counsel, providing responses to inquiries, and attending hearings. If they are disciplined by the commission, that will interfere with their ability to seek future employment and injure their reputation further. The Constitution and

performance evaluations in that role. *Id.* ¶ 8.

Mx. Schwandes has been gender nonconforming since they were a child, and those feelings continued into adulthood. *Id.* ¶ 4. Those feelings culminated with their realization in 2023 that they are nonbinary. *Id.* ¶ 5. As part of that realization, they began using the title Mx. *Id*.

Instruction at FLVS is fully remote for a frequently changing student population, so Mx. Schwandes regularly was called upon to introduce themself to new pupils. *Id.* ¶ 7. Initially, they did so using the titles professor and Mrs. *Id.* ¶ 9. Once Mx. Schwandes began using their nonbinary title Mx., they informed their principal that they would introduce themselves to students at work accordingly. *Id.* Their principal initially agreed with this decision. *Id.*

In August 2023, however, Mx. Schwandes received an email from their principal stating that they could no longer use that title. *Id.* ¶ 11. Mx. Schwandes refused to comply. *Id.* This email was followed on September 15 by a written document titled a "directive" from FLVS that they change their title in FLVS's systems that day. *Id.* ¶ 13. Mx. Schwandes did not do so. *Id.* They were suspended that same day with pay *Id.* ¶ 15. soo

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received a letter from Defendant FDOE informing them that the Office of Professional Practices Services had "determined an investigation is warranted into allegations that [they] failed to follow directives from [their] employer." *Id.* ¶ 23. This is an apparent reference to Mx. Schwandes's refusal to stop using the title Mx., as that is the only written "directive" Mx. Schwandes received from FLVS and hence the only one which they refused to follow. *Id*.

II. Content and enforcement of subsection 3 and implementing regulations.

Section 1000.071 was enacted by the Florida Legislature as part of Florida House Bill 1069 (2023). Subsection 1 states that "it shall be the policy of every public K-12 educational institution that is provided or authorized by the Constitution and laws of Florida that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex." Section 1000.071, however, "does not apply to individuals born with a genetically or biochemically verifiable disorder of sex development, including, but not limited to, 46, XX disorder of sex development; 46, XY disorder of sex development; sex chromosome disorder of sex development; XX or XY sex reversal; and ovotesticular disorder." *Id.* Individuals with these sex characteristics sometimes refer to themselves as intersex and sometimes refer to themselves using they/them pronouns and gender-neutral titles.

Subsection 3 of the statute then states that "[a]n employee or contractor of a

public K-12 educational institution may not provide to a student his or her preferred personal title or pronouns if such preferred personal title or pronouns do not correspond to his or her sex."[1]

The exact limits of subsection 3's prohibition are not clear. For example, it is unclear whether Mx. Schwandes would violate the statute by stating "I am nonbinary" or "I don't go by 'Ms.'" These statements do not state explicitly the speaker's title or pronouns but are arguably proscribed by the statute. Moreover, subsection 3's reach is not limited to the workplace or work hours; it applies wherever, whenever, and however an employee interacts with students.

Following the enactment of subsection 3, the Commissioner and the SBOE issued regulations empowering State Defendants to discipline school employees who violate subsection 3, including by suspending or revoking their certifications to teach—generally an eligibility requirement for employment as a public-school teacher in Florida. Fla. Stat. § 1012.55(b). Specifically, they amended the Principles of Professional Conduct for the Education Profession in Florida (the "Principles"), Fla. Admin. Code r. 6A-10.081, to make violating § 1000.071, including subsection

[1] "Sex" under subsection 3 means "the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth." Fla. Stat. § 1000.21(9). This definition of sex is referred to as "biological sex" by some or "sex assigned at birth" by others. Plaintiff assumes for purposes of this case that this definition of sex is consistent with the meaning of sex under the federal constitutional provisions and statutes from which their claims arise.

3, a disciplinary violation, which in turn constitutes grounds for suspension or revocation of a certificate, Fla. Stat. § 1012.795(1)(j).

State Defendants may learn about violations of subsection 3 in several ways, including from school boards,

injunction may cause the opposing party; and (4) that if issued, the injunction would not be adverse to the public interest." *L.E. by & Through Cavorley v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296, 1299 (11th Cir. 2022).

I. Mx. Schwandes is substantially likely to prevail on the merits of their claims.

A. Mx. Schwandes has standing.

Mx. Schwandes seeks only an injunction against enforcement of a single statutory provision—subsection 3, and they have standing to do so. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008); *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1271–72 (11th Cir. 2006). Standing requires "(1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Granite State Outdoor Adver., Inc. v. City of Clearwater*, 351 F.3d 1112, 1116 (11th Cir. 2003).

Mx. Schwandes faces an imminent injury from Defendants'

demands, and travel to and attend one or more hearings. Enjoining the investigation will remedy all of these injuries.

B. Mx. Schwandes is likely to succeed on the merits of their claim that they are being discriminated against on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.

1. Subsection 3 discriminates "because of sex."

Florida's treatment of Mx. Schwandes is precisely the kind of sex-stereotyping long condemned as unlawful sex discrimination by the Supreme Court and the Eleventh Circuit: stereotyping that penalizes individuals for "failing to act and appear according to expectations defined by gender." *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989)); *see also id.* at 1320–21 (holding that an employer fired a transgender woman for dressing as a woman and noting that, "[i]f this were a Title VII case, the analysis would end here"); *Price Waterhouse*, 490 U.S. at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."). Mx. Schwandes has been penaliz]TJ0 Tc 0 Tw (fn (i)8.52.1 (ly)8.3 (b)8.2 ti)8.5 [(ng)8.2 (tl)8.5

664 F.3d at 1316–17 (quoting *Price Waterhouse*, 490 U.S. at 251) (cleaned up). But that is precisely what subsection 3 requires.

Subsection 3 also discriminates against Mx. Schwandes by treating them differently from intersex people. If Mx. Schwandes had one of the intersex conditions listed in Section 1000.071(1), they would be exempt from the entire Section and hence free to use the title Mx. and they/them pronouns (as some, but not all, intersex people prefer to do). However, because the state deems their sex to be female, they cannot. Hence, the statute discriminates on the basis of sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. at 1741 (2020) ("[A]n employer who intentionally treats a person worse because of sex—*such as by firing the person for actions or attributes it would tolerate in an individual of another sex*—discriminates against that person in violation of Title VII."). Treating people differently based on the presence, or absence, of intersex characteristics is no less discrimination on the basis of sex than treating men and women differently. *See Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576 n. 4 (6th Cir. 2018*), aff'd sub nom. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 ("discrimination because of a person's … intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all");

discrimination on the basis of 'sex' must encompass discrimination on the basis of all the biological markers that comprise an individual's 'biological sex'—including inter alia their organs, their chromosomes, their hormones, and their gender identity").

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to [their] … terms, conditions, or privileges of employment, because of such individual's … sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Even policies that apply to all genders are still discriminatory if employees are discriminated against on account of their sex at the individual level. *Bostock*, 140 S. Ct. at 1748 ("Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability."). Here, the law treats Mx. Schwandes differently from intersex individuals and so it treats them differently on the basis of sex.

2. Defendants are "discriminat[ing] against" Mx. Schwandes " with respect to [their] … t rtdi- Ti368 (n)aw 6.915 Tdj Tj-0 Tc 0 0

need not be an ultimate employment decision, so long as it "alter[s] the employee's compensation, terms, conditions, or privileges of employment, deprive[s] [them] of employment opportunities, or adversely affect[s] [their] status as an employee." *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) (citation omitted).[2]

"Termination is an ultimate employment action that is undeniably adverse." *Freytes-Torres v. City of Sanford*, 270 F. App'x 885, 894 (11th Cir. 2008). Defendant's investigation, if successful, could lead to the revocation or suspension of Mx. Schwandes's teaching license. Fla. Stat. § 1012.796(7). This will have an effect similar to, or even greater then, being terminated because it will prevent Mx. Schwandes from being employed by *any* Florida public school. *See Bogden-*

101, 115 (D.D.C. 2022) (loss of license to serve as a police officer constituted adverse employment action in context of a due process claim because it was similar to loss of employment). It may also affect their ability to teach in other states. Schwandes Decl. ¶ 24.

3. Defendants are subject to liability under Title VII.

Title VII provides that it is "an unlawful employment practice for *an employer*—(1) to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex[.]" 42 U.S.C. § 2000e-2(a) (emphasis added).

The FDOE, SBOE, and EPC are Mx. Schwandes's "employer[s]" within the meaning of Title VII. *See* 42 U.S.C. § 2000e(a)–(b). "It is clear from the language of [Title VII] that Congress intended that the rights and obligations it created under Title VII would extend beyond the immediate employer-employee relationship." *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 1259, 1262 (11th Cir. 1988) (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. Nat'l Mediation Bd.*, 425 F.2d 527, 539 (D.C. Cir. 1970)).

disciplinary violations. Fla. Stat. § 1012.795(1)(j). Similar to the California teacher credential at issue in *Association of Mexican-American Educators*, 231 F.3d at 582, Florida's educator certificate is required for public school teachers in the state, but it is not mandatory for private school teachers. *See* Fla. Stat. § 1012.32. Thus, the State Defendants "dictate[] whom the districts may and may not hire," which subjects them to the coverage of Title VII. *Ass'n of Mexican-Am. Educators*, 231 F.3d at 582.

C. Mx. Schwandes is likely to succeed on their claim that subsection 3 violates the First Amendment.

The Supreme Court has made clear that the government may not use its power as an employer to censor teachers by denying them the right to engage in core speech activities merely because students might witness them doing so. *Kennedy*, 142 S. Ct. at 2407. Just as the government may not "fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria," *id.* at 2425,

concern.'" *Kennedy*, 142 S. Ct. at 2423 (quoting *Garcetti*, 547 U.S. at 421, 423). If the public employee's speech implicates a matter of public concern, courts proceed to the second step, at which they evaluate whether the "employee's speech interests are outweighed by 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Garcetti*, 547 U.S. at 417).

1. Mx. Schwandes spoke as a

Muslim teacher from wearing a headscarf.

2. The balance of interests favors Mx. Schwandes.

The second step of the *Pickering–Garcetti* test, interest balancing, is almost automatically resolved in Mx. Schwandes's favor to the extent that the government is attempting to compel them to speak the government's message. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018) ("[I]t is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree. And we have never applied *Pickering* in such a case."). Here, the state is compelling Mx. Schwandes to call themself something they are not.

Even if interest balancing were to apply, "widespread" government policies which "chill[] potential speech before it happens" give rise to "far more serious concerns" than the specific responses to individual speech acts considered in the standard *Pickering–Garcetti* case. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995); *see also Janus*, 138 S. Ct. at 2472. In such cases, "the Government's burden is greater": it must "show that the interests of … a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Nat'l Treasury Emps. Union*, 513 U.S. at 468; *see also Janus*, 138 S. Ct. at 2472 (characterizing this as a "heavier" burden than most *Pickering–Garcetti* cases). "The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Janus*, 138 S. Ct. at 2472. Moreover, government suppression of speech before it is spoken constitutes a prior restraint on speech, "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any system of prior restraint … comes to [the] Court bearing a heavy presumption against its constitutional validity." *F.W/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975)).

The government cannot meet its heavy burden to justify its blanket policy of prior restraint. Mx. Schwandes's strong interest in not losing their license for using

II. Mx. Schwandes

CONCLUSION

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‡ Admission to GA pending

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CERTIFICATE OF WORD COUNT

According to Microsoft Word, the word-processing system used to prepare this Motion and Memorandum, there are 272 total words contained within the Motion, and there are 5213 words contained within the Memorandum of Law.

January 29, 2024

/s/ Sam Boyd
Sam Boyd