

**APPEAL NO. 25-5641**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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RODERICK E. THEIS, II,

*Plaintiff-Appellant,*

v.

INTERMOUNTAIN EDUCATION SERVICE DISTRICT BOARD OF DIRECTORS, MARK  
S. MULVIHILL, Superintendent, and AIMEE VANNICE, Assistant  
Superintendent and Director of Human Resources,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Oregon  
Case No. 2:25-cv-00865-HL

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**REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

InterMountain allows its employees to decorate their workspaces with personal speech on all kinds of topics without seeking permission. Its employees and school employees display everything from family photos, personal books, and inspirational quotes to political and ideological posters. 2-ER-185–88. But when Rod exercised the same freedom, InterMountain censored and disciplined him.

InterMountain says Rod’s personal speech magically morphs into official duty speech whenever students happen to see it. But that merely parrots what the Supreme Court has already rejected: schools cannot “treat[ ] everything teachers ... say in the workplace as government speech subject to government control.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530–31 (2022) (*Kennedy III*).

InterMountain also conceded below that Rod spoke on a matter of public concern; it can’t try to resurrect the issue now. InterMountain’s only fallback is that it need not tolerate Rod’s allegedly “discriminatory” speech. *E.g.*, Answering.Br.30. That’s wrong factually and legally. Factually, the covers of the disputed books passively conveyed Rod’s religious views in a “positive” manner. No student ever complained about them. And Rod’s views align with those taught in science and English. It can’t be that when Rod conveys the same message as the school’s curriculum, it suddenly becomes discriminatory.

Legally, the First Amendment protects speech on issues of public concern, even if others are offended by the speech. *E.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And mischaracterizing Rod’s speech does not exempt InterMountain from its burden to show disruption—of which it has no evidence.

Rod will likely succeed on his free-exercise and due-process claims because InterMountain’s speech code arbitrarily targeted his religious beliefs. The Free Exercise Clause protects both religiously motivated speech and conduct. InterMountain’s epithet to describe Rod mirrors the religious hostility it showed when punishing him. *See* Answering.Br.36. So that punishment and InterMountain’s speech code trigger strict scrutiny, which it can’t meet. Finally, InterMountain’s nonsensical speech code, allowing administrators discretion to outlaw a “binary view of gender” as a “hostile expression of animus,” contradicts how other districts interpret the policy, licenses arbitrary enforcement, and chills Rod’s speech on this immense matter of public concern.

Now, InterMountain has fired Rod for expressing this same binary view of gender. He has just appealed the district court’s denial of his request to enjoin that termination. To vindicate fundamental constitutional rights and stop ongoing retaliation, this Court should reverse with instructions to enter a preliminary injunction protecting Rod.

## ARGUMENT

### I. Rod is likely to succeed on his free speech claim.

#### A. Rod's display was his private expression, not government speech.

In arguing that Rod's personal office decorations belong to the government, InterMountain clings to *Poway* even though it is clearly incompatible with *Kennedy III* and has been distinguished by this Court. Compare Answering.Br.22 (discussing *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011)), with Opening.Br.32–38 (discussing *Kennedy III's* rejection of the *Poway* rule). InterMountain has no response to whether “admittedly private speech morphs into government speech when a student sees it” and whether the government may “[d]iscriminate based on viewpoint out of fear that students may errantly attribute Rod's personal speech to it.” Opening.Br.3. The answer to both must be “no” lest the government speech doctrine swallow public employees' First Amendment rights at the schoolhouse gate.

#### 1. This Court reviews *de novo* whether Rod spoke as a private citizen.

InterMountain misunderstands the standard of review. Whether the speech in question was spoken as a public employee or a private citizen is not a factual finding for which clear error review applies. *Contra* Answering.Br.28. Rather, this Court views the issue as “a mixed

question of fact and law” that requires a delicate balancing of legal principles as applied to specific circumstances. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). And this Court “review[s] First Amendment questions de novo since they present mixed questions of law and fact” and require the Court “to apply principles of First Amendment jurisprudence to the specific facts of th[e] case.” *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993). Therefore, this Court reviews *de novo* whether Rod spoke as an employee or a private citizen.

**2. Relying exclusively on *Poway*, InterMountain presses the same arguments *Kennedy III* rejected.**

InterMountain’s response regurgitates *Poway*’s standard for government speech, a standard which the *Kennedy III* Court abrogated when it overturned *Kennedy II* and, by extension, *Kennedy I*. Opening.Br.33–34. Specifically, InterMountain reasserts that teachers “act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.” Answering.Br.25 (quoting *Poway*, 658 F.3d at 967–68). Ignoring the Supreme Court’s and this Court’s repeated warnings against “creating excessively broad job descriptions,” *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006); *Kennedy III*, 597 U.S. at 530–31, InterMountain says that Rod’s job “involves having students in his office, and talking to them.” Answering.Br.25. Therefore, under

*Poway*'s "reasonable observer" test, *id.* at 26, any expression in his office—including passive expression through his office decorations, which may not even be the subject of the discussion at hand—belong to the government.

That concept of government speech runs headlong into *Kennedy III*. 597 U.S. at 533 (rejecting the notion that the school district risked violating the Establishment Clause because a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." (quoting *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1018 (9th Cir. 2021) (*Kennedy II*)). InterMountain argues that *Kennedy III* does not "support any rule" that would allow Rod to convey a personal message in his office "so long as he is not at that very moment actively evaluating [students'] educational needs consistent with his job's description." Answering.Br.25–26. Yet that's what *Kennedy III* held. 597 U.S. at 530 ("Mr. Kennedy remained on duty after games."); *see id.* at 531 ("Others working for the District were free to engage briefly in personal speech and activity .... That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech.") The Court did not, as InterMountain claims, hold that Coach Kennedy prayed as a private citizen because 1) he was "effectively off the clock" and 2) "any players who remained on the field were effectively no longer students 'in school.'" Answering.Br.26 (quoting *Wood v. Fla. Dep't of Educ.*, 142 F.4th 1286, 1292–93 (11th Cir.

2025)). Indeed, InterMountain contradicts itself by suggesting that Coach Kennedy ceased being a coach and the players ceased being students when “the bell rings.” Answering.Br.5 (quoting *Poway*, 658 F.3d at 968). Regardless, both Coach Kennedy’s prayers and the players were “‘within the office’ environment—here, on the field of play.” *Kennedy III*, 597 U.S. at 530. And that didn’t transform Coach Kennedy’s prayer into official duty speech. Neither does it do so for Rod’s personal books.

**3. Like Coach Kennedy’s midfield prayers, Rod’s books are personal speech.**

Under *Kennedy III*’s standard, Rod spoke as a citizen when he displayed his books. Rod’s job responsibilities do “not include decorating his office,” “displaying certain books or instructing on them,” 1-ER-19, just as Coach Kennedy’s job did not include prayer. Rod “did not speak pursuant to government policy. He was not seeking to convey a government-created message.” *Kennedy III*, 597 U.S. at 529. And Rod did not use the books when performing his responsibilities. 2-ER-189; *Kennedy III*, 597 U.S. at 529–30 (“He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach.”).

Nor did Rod tell any students that it was “important they participate in any religious activity” or “pressure[ ] or encourage[ ] any

student” to read the books. *Id.* at 515. The books just sat on his windowsill or desk while he and the student completed the evaluation, just like if he had an LGBTQ flag or pro-LGBTQ poster on his wall.

InterMountain says teachers “clearly do not have a First Amendment right to teach students entrusted to their care in ways contrary to their school district’s instructions.” Answering.Br.23. But promoting a “binary view of gender” is not contrary to the public-school curriculum; it’s consistent with it. The “science” behind *He Is He* and *She Is She* reflects that DNA “determines” immutable biological truth for an individual. 2-ER-257. And that’s exactly what the school’s science class teaches: “secondary-sex characteristics are tied to a person’s biological sex,” Answering.Br.58, and reproduction requires one male and one female, 2-ER-287. Even InterMountain admits that “sex and gender” are at least “correlated.” Answering.Br.58. And even under InterMountain’s definition of sex and gender, the English lesson (unaddressed by InterMountain) shows that the school teaches a “binary view of gender.” Middle school English instructs students to use “he/him” or “she/her” pronouns when referring to a single, gendered individual, not “they/them.” 2-ER-205. Further, the administrator of Rod’s school in Elgin actually *approved* of his display. 2-ER-203.

Similarly, InterMountain’s arguments about “[t]rue comparators” miss the mark. Answering.Br.52. First, the record reflects that InterMountain employees could—and did—decorate their offices with their

own personal speech pursuant to policy. InterMountain employees like Rod use office space in the schools they serve, and InterMountain gives them a free hand to decorate those offices as they see fit. 2-ER-81. Thus, they decorate their offices with paintings, personal photos, plants, posters, inspirational quotes, books, and more. 2-ER-185. Some choose ideological décor, like the InterMountain employee who features a picture of workers standing in a picket line, holding rainbow-colored signs that spell “UNIONS”—a clear pro-LGBT message. 2-ER-186.

Even under the rejected “reasonable observer” test for official-duties speech, what matters is what students see in school. And they see teachers and staff using personal speech to decorate their offices, just like Rod. 2-ER-187–88. Therefore, Rod’s speech, just like his coworkers’ speech, was private expression, not government speech.

Just a few days ago, this Court held that *Poway* applied to speech “not directly attributed to an individual speaker and” occurring in “spaces that were not acknowledged to be the purview of the faculty.” *Reges v. Cauce*, No. 24-3518, 2025 WL 3685613, at \*11 (9th Cir. Dec. 19, 2025) (citation modified). The *Reges* defendants couldn’t rely on *Poway* because the plaintiff professor spoke on the syllabus and the university admitted that syllabi were “the purview of the faculty” and “not reviewed by the university before posting;” faculty had “great flexibility in determining the contents of their syllabi.” *Id.* at \*10 (citation modified). Additionally, students wouldn’t have thought the university

was speaking through the professor because his statement began with a first-person pronoun. *Id.*

Similarly here, InterMountain has admitted that employees do not have to receive advance permission to decorate their offices. 2-ER-82. Employees and school staff decorate their offices with all manner of personal speech, which shows that students would think the décor spoke for the individual, not the school. *Poway* doesn't control.

**B. Rod's display constituted speech on a matter of public concern.**

**1. InterMountain conceded below that Rod spoke on a matter of public concern.**

InterMountain conceded below that Rod's book display concerns speech on a matter of public concern. 1-ER-16; 2-ER-112. InterMountain can't litigate the issue for the first time on appeal. *Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978) ("Where an issue is conceded below, it cannot be raised for the first time on appeal."). Nor can InterMountain evade that concession by couching its arguments as "additional reasons" for affirmance. Answering.Br.16. That's because, "[a] party remains bound by a concession in the district court notwithstanding a contrary position on appeal." *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 811 (9th Cir. 2020).

## 2. Rod spoke on a matter of public concern.

Both the law and the facts demonstrate that Rod spoke on a matter of public concern when he displayed his books. The quintessential “mediums of expression” are “written or spoken words.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). The covers of *He Is He* and *She Is She* feature the titles and the phrase “a book about your identity.” 2-ER-189. Rod displayed each of the books’ covers to express his view that God created every person as male or female, that we should accept our God-given sex and not seek to change it, and that this sex is revealed through our DNA, which cannot change. 2-ER-179, 197.

InterMountain officials recognized as much. Superintendent Mulvihill took issue with Rod’s “prominent[ ]” display because it “communicate[d] a message[.]” 2-ER-205, 243–44 (emphasis added). HR Director VanNice concluded that Rod’s books “display[ed]” or “portray[ed] a view.” 2-ER-261, 266. He just couldn’t “express views and opinions on specific subjects,” *id.*, namely “a view that might be contrary to someone else’s beliefs or views,” or more specifically, a view that did “not support transgender or gender neutral.” 2-ER-261. Put simply, InterMountain officials agreed Rod’s display constituted expression. They just didn’t like his viewpoint.

InterMountain prohibited Rod’s display because it promoted a “binary view of gender.” 2-ER-204–05. That shows Rod spoke on a

matter of public concern. “[G]ender identity” is a “matter[ ] of profound value and concern.” *Janus v. AFSCME, Council 31*, 585 U.S. 878, 913–14 (2018) (citation modified).

InterMountain’s contention that Rod “never sought to inform the public of anything” is belied by fact and law. Answering.Br.12. When Rod brought *He Is He* and *She Is She* to his La Grande Middle School office in early October 2024, he placed them on the windowsill behind his desk. 2-ER-188–89. There they stayed until La Grande’s Principal instructed Rod to remove the books from the school three weeks later. 2-ER-193. Likewise, Rod displayed *Johnny the Walrus* on his desk for two years. 2-ER-190–91. The covers were visible to anyone who entered or passed through his office. 2-ER-191. This isn’t just “the world according to Rod” either. InterMountain’s investigation concluded that Rod “prominently displayed” his books in his office, which was “an area accessed by both school staff and middle-school-aged students.” 2-ER-243. It is false that Rod “kept the books secreted in his office and only ever showed them to students, alone.” *Contra* Answering.Br.12.

Nor does the fact that Rod’s expression took place in his office undermine the conclusion that any message he conveyed was a matter of public concern. A government employee doesn’t lose the right to speak about issues of public concern in forums closed to the general public. *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983); *Thomas v. City of Beaverton*, 379 F.3d 802, 810 (9th Cir. 2004) (“Because content is the

most important factor, we have concluded that speech about a matter of public concern may be protected even when made in a private context.”). The content, form, and context of Rod’s speech demonstrate that it was a matter of public concern. *See Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 777 (9th Cir. 2022) (holding that employee spoke on a matter of public concern in “a teacher-only training with a limited audience.”).

### **3. Labelling speech as “discriminatory” doesn’t transform it into conduct.**

InterMountain’s hostility towards Rod’s views does not convert Rod’s speech into conduct. InterMountain considers Rod’s speech as unworthy of being called speech on a matter of public concern because it deemed his passive, respectful, and benign display as “blatantly transphobic.” Answering.Br.28–30. To it, such views are just “discriminatory conduct” that have “no legitimate, social value worth considering,” and are thus undeserving of First Amendment protection. *Id.* at 31. And InterMountain improperly attempts to inject extra-record evidence about views it ascribes to the author of *Johnny the Walrus*. *See* Answering.Br.4–5 & n.1. But no information about the author besides his name appears on the cover of the book. 2-ER-190. InterMountain did not even mention the author below. *See* 2-ER-79–120. All InterMountain offers is a viewpoint-discriminatory test for determining when employee expression constitutes speech on a matter of public concern. *See, e.g.,* Answering.Br.29 (concluding that complaining about

or discussing why “*Johnny the Walrus* exists at all” is a matter of public concern, but displaying or promoting the book itself is not).

But that has never been the test. “Far from embracing a notion like that,” the Supreme Court has “rejected it time after time—including in the context of public accommodations laws.” *303 Creative LLC v. Elenis*, 600 U.S. 570, 599–600 (2023) (collecting cases). Anti-discrimination laws that target speech place much more than an “incidental burden[ ]” on “First Amendment liberties.” *Id.* (citation modified). Further, “[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). But the books track the binary view of gender the school teaches in science and English; they aren’t discriminatory. *Supra* Section I.A.3; *infra* Section I.C.1. And the First Amendment protects speech on matters of public concern even when others are offended by it. *E.g.*, *Snyder*, 562 U.S. at 458.

**C. InterMountain can’t meet its *Pickering* balancing burden of showing disruption.**

Because Rod’s speech on an important matter “of public concern occupies the highest rung of the hierarchy of First Amendment values,” InterMountain “must make an even stronger showing of disruption.” *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1107, 1139 (9th Cir. 2025). The only defense InterMountain offers for its censorship is the

label “discriminatory.” Answering.Br.30. That gets both the facts and the law wrong. First, Rod’s respectful speech conveys his religious views and doesn’t discriminate against anyone. Indeed, the school teaches the same view in its classes. Second, the “context, form, and content” and “manner, time, and place” show InterMountain must meet the highest burden under *Pickering*, which it can’t. *See Damiano*, 140 F.4th at 1139. Third, InterMountain still has to prove disruption beyond the bald allegation that it considers the book covers “discriminatory.” But it doesn’t—and cannot—dispute that no evidence of actual disruption exists. Opening.Br.38–43.

**1. The books convey a positive, truthful message.**

The book covers and the books themselves don’t discriminate against anyone. The covers of *He Is He* and *She Is She*—the only things visible to anyone entering Rod’s offices—depict an illustration of a smiling boy and girl respectively, the title, and the phrase “a book about your identity.” 2-ER-189. *Johnny the Walrus*’s cover features a cartoon walrus and a boy pretending to be various things. 2-ER-190–91.

As to the content, *She Is She* talks about how “girls can do anything” and how it is “great to be a girl.” 2-ER-195, 257, 263. Similarly, *He Is He* talks about how “[b]oys can do great things” with “tons of examples.” 2-ER-195, 257, 263. The books’ messages are “[n]ot

confusing;” they simply say it is “good to be a girl” and “good to be a boy.” 2-ER-257, 263.

Similarly, *Johnny the Walrus* presents a fictitious “tale of identity and imagination” about a boy pretending to be a “big scary dinosaur” one day, “a knight in shining armor or a playful puppy” the next, and then a walrus. 2-ER-190–91. The book explores the difference between Johnny’s “make-believe” and his identity as a “boy.” 2-ER-191. It doesn’t mention gender identity at all. *See* Doc. 34.1. *Contra* Answering.Br.37.

All three books urge children to prize the way that God created them—as either boys or girls. Opening.Br.13; *see* Doc. 34.1. All three reinforce Rod’s view that God created every person as male or female, that we should accept our God-given sex and not seek to change it, and that this sex is revealed through our DNA, which cannot change. 2-ER-179, 197. And the books parallel what a school Rod serves teaches in science and English. *Supra* Section I.A.3.

This Court has not previously treated similar speech as discriminatory. The *Damiano* plaintiffs disagreed with their Oregon school district’s requirement to use pronouns inconsistent with sex and to allow students to access locker rooms and bathrooms of the opposite sex. 140 F.4th at 1128–29. So they proposed a policy alternative, which led to the superintendent questioning how they would “continue to support ... transgender students should they feel emotionally

threatened” and a student criticizing one of them for “openly speak[ing] against [transgender-identifying students’] rights.” *Id.* at 1131, 1133.

The *Damiano* Court’s analysis didn’t focus on alleged discrimination. *Id.* at 1140. Instead, it concluded that the speech concerned “District policy and legislation” about a school matter. *Id.* And some speech weighed less in the balance, not because it was “discriminatory,” but because it allegedly “share[d] personal, sensitive information about a real middle school student” and occurred during the school day. *Id.*

## **2. InterMountain must shoulder a heavy burden to show disruption.**

InterMountain has a high burden to show disruption because the “content, form, and context” and “time, place, and manner” of Rod’s speech show it receives the utmost protection. *See Damiano*, 140 F.4th at 1140–41. Here, as to the content and form, the book covers reflect Rod’s respectful religious views. They depict “positive kid-friendly artwork.” 2-ER-202–03, 271. They don’t “impugn” anyone nor do they “target[ ]” or reveal confidential information about any student. *See Answering.Br.51*; 2-ER-206. As to the context, Rod respectfully expressed his views on an important topic of immense public discussion. *See, e.g., Damiano*, 140 F.4th at 1131–35 (discussing various views on this topic). That discussion existed within InterMountain and the schools it served. An InterMountain employee’s office features a clear pro-LGBT

message. 2-ER-186. A middle school teacher's office displays a transgender pride flag. 2-ER-187. And InterMountain itself banned the "binary view of gender." 2-ER-205.

The manner, time, and place of Rod's speech similarly show it's entitled to the utmost protection. Rod passively displayed the book covers in his office. 2-ER-190–91. He never used the books as part of his duties. 2-ER-195. He only ever discussed the book with a *single* student—not multiple students—and only after that student completed the assignment. 2-ER-275. *Contra* Answering.Br.12, 16, 24, 28. In displaying the book covers, Rod exercised the same freedom his colleagues have to decorate offices with personal speech. InterMountain does not—and cannot—dispute that it doesn't require employees "to ask permission before they present specific views or decorate their workspace." 2-ER-81. So naturally, employees decorate their offices with the ideological décor discussed above, as well as paintings, personal photos, plants, posters, inspirational quotes, books, and more. 2-ER-185–86.

How other employees and teachers decorated their offices matters to the analysis. *See supra* Section I.A.3. *Contra* Answering.Br.52. The evidence of InterMountain's other employees and other school staff decorating their workspaces, 2-ER-187–88, shows the pervasiveness of personal decorations and ideological messages. That supports Rod's claim of personal speech on a matter of public concern and the lack of

any reasonable forecast of disruption when a multitude of teachers have engaged in personal speech. *See infra* Section I.C.3.

### 3. InterMountain must prove disruption; it cannot.

InterMountain errs in assuming it doesn't have to prove disruption whenever it arbitrarily labels speech "discriminatory." *See* Answering.Br.34. It "must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace." *Damiano*, 140 F.4th at 1138. InterMountain "must support its claim that it reasonably predicted disruption by some evidence, not rank speculation or bald allegation." *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 725 (9th Cir. 2022) (citation modified).

InterMountain doesn't dispute that there was no actual disruption. It similarly doesn't show reasonably forecasted disruption to any student. In the two years Rod displayed *Johnny the Walrus*, no one complained about it. Opening.Br.12; *see* 2-ER-258. *Contra* Answering.Br.29. Neither did any student complain about the other books. 2-ER-190. Only one teacher lodged a complaint. As InterMountain concluded, the mere display of these book covers didn't "target[ ]" anyone. 2-ER-206. InterMountain has failed to meet its burden.

InterMountain's out-of-circuit cases don't exempt it from its burden to show actual disruption. InterMountain's "closest analogy"

involved a high school counselor and female basketball coach who wrote a “sexually explicit” relationship advice book. Answering.Br.34; *Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110, 1114 (7th Cir. 2013). The book drew on the plaintiff’s experience “providing counseling to thousands of students, parents, clients, and friends.” *Craig*, 736 F.3d at 1114 (citation modified). The plaintiff “reference[d] his employment ... throughout” the book and even included his “students” in the acknowledgment section. *Id.* at 1115. And to “establish[ ] his qualifications,” the plaintiff cited his experience “coaching girls basketball, working in an office where [he was] the only male counselor, and being responsible for roughly 425 high school students a year, about half of whom are females.” *Id.* (citation modified). The district received “concerns from members of the School District community” and fired him. *Id.*

The Seventh Circuit held that the district met its “potential disruption” burden because of how the counselor’s female students “would respond upon reading or hearing about the hypersexualized content of his book” and the complaints from the community. *Id.* at 1119. The plaintiff had referenced his students in the book and discussed how his “weakness for cleavage ... momentarily distracts him during his encounters with women.” *Id.* at 1120.

The *Craig* school district forecast reasonable disruption based on existing complaints and the fact that the book discussed the plaintiff’s

students and confessed the plaintiff's objectionable behavior toward them. That's nothing like the facts here. Unlike in *Craig*, no one in the school community complained about *Johnny the Walrus*. Opening.Br.12. And no student complained about the other books. That's also unlike the 60 parent complaints and "hundreds" of student complaints in InterMountain's other cited case. *Riley's*, 32 F.4th at 727 (citing *Melzer v. Bd. of Educ.*, 336 F.3d 185, 190–91 (2d Cir. 2003)).

Also unlike in *Craig*, the books do not reference any of Rod's students—or any student at all. And no evidence shows Rod has treated students with anything but "dignity and respect." 2-ER-179. As InterMountain concedes, *Johnny the Walrus* "sat alone in Theis' office apparently unnoticed for some long period." Answering.Br.30.

Finally, InterMountain's viewpoint discrimination means it flunks *Pickering* balancing. *Contra* Answering.Br.53–54. Its policy prohibits a "hostile expression of animus," which "may include derogatory language or behavior" (as subjectively interpreted by InterMountain). 2-ER-233. And "[g]iving offense is a viewpoint." *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality). Deepening the discrimination, InterMountain interprets its policy to prohibit a "binary view of gender," but not the "continuum" view of gender InterMountain prefers. Answering.Br.58. That's the essence of viewpoint discrimination. This type of viewpoint discrimination means InterMountain can't meet its *Pickering* burden.

In some contexts, “complaints from a school district’s current students and parents” and staff may be “legally relevant.” *Damiano*, 140 F.4th at 1146. But here only one staff member filed a complaint, which solely targeted Rod’s views. Opening.Br.42. InterMountain doesn’t argue that this heckler’s veto constitutes disruption. As Rod established, InterMountain punished him because of his “binary view of gender”—not any actual or reasonably forecast disruption.

## **II. Rod is likely to succeed on his free-exercise claim.**

### **A. InterMountain prohibited Rod’s religious speech.**

InterMountain’s astonishing claim that the First Amendment “is not a general protection of religion or religious beliefs” (at 39) shows—at the very least—“an incomplete understanding of the Free Exercise Clause.” *Bates v. Pakseresht*, 146 F.4th 772, 790 (9th Cir. 2025). The First Amendment protects “religious speech and practice as a way of life and not merely as private thought.” *Id.* The Free Exercise Clause “does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life”—not merely allowing them “to harbor religious beliefs inwardly and secretly.” *Kennedy III*, 597 U.S. at 524.

As InterMountain acknowledges, Rod “derives his ... views from his religious beliefs,” and it issued a “directive barring him from spreading those views.” Answering.Br.40. That concedes a free-exercise

burden. InterMountain’s arguments to the contrary appear to rest on a misunderstanding that Rod’s religion must *require* him to speak about God’s design for people as male and female. *See id.* This Court has rejected that argument.

In *Bates*, Oregon argued that the plaintiff could “continue to hold her own religious views” about “sexuality and gender identity,” she just had to “suppress her sharing of those religious views.” 146 F.4th at 790. This Court concluded that Oregon had burdened the plaintiff’s free-exercise right because she could no longer openly live out her religion. *Id.* So too here.

For the same reason, InterMountain’s cites to other cases don’t help it. In *Olympus Spa v. Armstrong*, this Court concluded that the anti-discrimination law did “not prohibit the Spa from expressing its religious beliefs.” 138 F.4th 1204, 1218 (9th Cir. 2025). But here, InterMountain’s directive “restrict[s] speech ... that is contrary to traditional religious views.” *Bates*, 146 F.4th at 793 n.3. “*Olympus Spa* therefore does not govern here.” *Id.* Even so, the *Olympus Spa* Court proceeded to the neutral and generally applicable analysis, 138 F.4th at 1218, which InterMountain’s directive fails, *infra* Section II.C. Another of InterMountain’s cases involved “non-regulatory or non-compulsory governmental action”—the opposite of InterMountain’s policy and directive. *See Am. Fam. Ass’n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1124 (9th Cir. 2002).

In fact, *Olympic Spa* invalidates InterMountain’s bold claim that “no cases” hold that “a standard anti-discrimination regulation ... would even incidentally affect a plaintiff’s religious beliefs.” Answering.Br.41–42. “Courts have repeatedly recognized that where public accommodations laws impermissibly burden constitutional rights, public accommodations laws must give way.” *Olympus Spa*, 138 F.4th at 1213 (citing *inter alia* *Fulton v. City of Phila.*, 593 U.S. 522 (2021)). InterMountain’s application of its policy puts Rod to the choice of keeping his job or speaking in accord with his religious beliefs. That burdens his religious exercise.

**B. InterMountain doubles down on its religious hostility.**

While disclaiming religious hostility, InterMountain casts Rod as a “bigot[ ],” “hoping” to spread “anti-transgender propaganda” and “discriminatory rhetoric,” *i.e.*, his religious beliefs. Answering.Br.36–37. Those demeaning statements mirror InterMountain’s religious hostility to Rod during the investigation. Opening.Br.44–45.

The hostility extends far beyond banning Rod’s display of *Johnny the Walrus*—though it includes that, too. *Contra* Answering.Br.45. InterMountain labeled Rod’s display of *Johnny the Walrus* and *He Is He* and *She Is She* as “transphobic” and “a hostile expression of animus toward another.” 2-ER-201–02. VanNice conducted her interrogation into the religious views expressed in *He Is He* and *She Is She* in an

“accusatory and leading” manner, “much like a prosecuting attorney[.]” 2-ER-195–96, 276. And Mulvihill ruled that merely displaying the books “communicates a message of exclusion and diminishes the validity of non-binary and transgender experiences” and “contributes to an unwelcoming environment.” 2-ER-204–05.

InterMountain disputes none of these facts, and the district court didn’t make any “factual finding[s],” so clear-error review doesn’t apply. *Contra* Answering.Br.45–46. The district court made the (erroneous) determination that InterMountain didn’t show hostility to Rod’s religion. 1-ER-27. That’s a legal issue with no findings of underlying fact. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 690 (9th Cir. 2023) (en banc) (assessing religious hostility claim even when “the district court made no findings in this regard”).

The district court made a legal error when it rejected Rod’s free-exercise claim. InterMountain’s contemporaneous statements—and its legal brief continuing the hostility—fit well within this Court’s and other’s prior holdings of hostility in similar circumstances. *See id.* at 691–92 (hostility existed from comments labeling religious views as violating certain “core values” such as “inclusiveness [and] open-mindedness,” being “of a discriminatory nature,” “bullshit,” and without “validity,” and “creating a hostile work environment”); *Mid Vermont Christian Sch. v. Saunders*, 151 F.4th 86, 94 (2d Cir. 2025) (religious

hostility existed from comments about “blatant discrimination under the guise of religious freedom” and urging passage of “legislation that doesn’t continue to allow misuses of taxpayer dollars to effectively discriminate against many of our children”). That hostility means this Court should “set aside” InterMountain’s censorship “without further inquiry.” *Kennedy III*, 597 U.S. at 525 n.1, and at least subject it to strict scrutiny.

**C. InterMountain’s ban lacks neutrality and general applicability.**

InterMountain faults Rod for “address[ing] how InterMountain applied the policy to [Rod] and his conduct.” Answering.Br.44. But “the effect of a law in its real operation is strong evidence of its object.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993). InterMountain doesn’t dispute the targeted effects of its speech code on Rod and those with similar views. InterMountain prohibits a “binary view of gender” but celebrates “gender exist[ing] along a continuum.” Answering.Br.58. Its policy thus lacks neutrality because it favors “those who promote the validity of non-binary and transgender experiences” while punishing and labeling as “transphobic” those who hold the binary view. Opening.Br.47 (quoting 2-ER-243).

Similarly, the speech code lacks general applicability because it prohibits Rod from displaying a “binary view of gender” but allows the same view to be taught in English and science. Opening.Br.55. Rod

believes that God created each person either male or female and that a person should accept his or her God-given sex, which is the message *He Is He* and *She Is She* conveys. 2-ER-179, 257. And that’s exactly what science class teaches. *Supra* Section I.A.3. English class aligns by teaching use of pronouns consistent with sex. *Id.* Enforcing the speech code against Rod but not in the schools is the antithesis of general applicability.

So InterMountain’s arguments about the Oregon legislature and InterMountain’s original adoption of the policy are irrelevant. *See* Answering.Br.43–44. This Court examines “the totality of the circumstances surrounding” the “application” of a government “policy.” *Bates*, 146 F.4th at 791. Rod has shown that InterMountain applies its policy to prohibit expressing a “binary view of gender,” which lacks neutrality and general applicability applied to Rod and those who share his views. *See* Opening.Br.49–52.

**D. InterMountain triggers and fails strict scrutiny.**

InterMountain argues that *Smith* applies, Answering.Br.42, which means that it must meet strict scrutiny because its policy flunks neutrality and general applicability. *Supra* Section II.C; *Fulton*, 593 U.S. at 533. InterMountain makes no attempt to meet its strict-scrutiny burden. It therefore violated the Free Exercise Clause. Opening.Br.49–52.

InterMountain can't distinguish *Kennedy III* in the free-exercise context, either. It claims that its policy didn't burden Rod's religion and is neutral towards religion. Answering.Br.47–48. Both arguments fail. Like Coach Kennedy's prayer, Rod's books express his religious beliefs. *Supra* Section II.A. InterMountain's discipline under its speech code for expressing those beliefs targeted his religion. *Supra* Section II.C.

InterMountain concedes that "*Kennedy [III]* could be read as implicitly" overruling this Court's case applying *Pickering* to a public employee free-exercise claim when a public employer prohibits "an employee's religious practice, by expressly targeting it because the practice was religious." Answering.Br.49 (discussing *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642 (9th Cir. 2006)). That's what happened here. InterMountain barred Rod from displaying the books despite his repeated objections that the books conveyed his religious beliefs. *E.g.*, 2-ER-195, 259.

The Supreme Court "has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause." *Kennedy III*, 597 U.S. at 545 (Thomas, J., concurring). And *Kennedy III* bulldozed the foundation for the *Berry* Court's application of *Pickering*. This Court applied *Pickering* because of the "important, but sometimes competing, concerns" about the then-existing "Scylla of not respecting" free-exercise rights and the "Charybdis of violating the Establishment Clause ... by appearing to endorse religion." *Berry*, 447 F.3d at 646, 650.

Post-*Berry* the Supreme Court recognized it had “abandoned *Lemon* and its endorsement test offshoot.” *Kennedy III*, 597 U.S. at 534. The Establishment Clause does not require schools “to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.” *Id.* at 535 (citation modified). The Court’s rejection of the reasonable observer test shows that schools need not fear Establishment Clause liability from failing to censor religious speech and that *Pickering* shouldn’t apply. Strict scrutiny provides the appropriate framework. Opening.Br.47–49. InterMountain can’t meet its strict scrutiny burden. In any event, it can’t meet its *Pickering* burden either. *Supra* Section I.C.

### **III. Rod is likely to succeed on his due process claim.**

InterMountain’s argument that its policy and letter of directive inflict no due-process injury misunderstands how the vagueness doctrine works. *See* Answering.Br.55. The Due Process Clause protects against (1) “punishing people for behavior that they could not have known was” prohibited; (2) “subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers;” and (3) “any chilling effect on the exercise of First Amendment freedoms.” *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (citation modified).

The letter of directive and policy violate all three. First, Rod could not have known that promoting a “binary view of gender” constituted a “bias incident” and a “hostile expression of animus” when a school he serves promotes that binary view in English and science class. Opening.Br.55; *supra* Section I.A.3. As InterMountain concedes, the schools it serves are bound by the same Oregon law it purports to follow. *See* Answering.Br.1–2. If other schools don’t understand a “binary view of gender” to be a prohibited “hostile expression of animus” under Oregon law and related policy, then it makes no sense to say that Rod’s identical view is mere bigotry.

Second, that disparity in treatment shows how the policy licenses subjective enforcement: InterMountain can interpret it to prohibit speech school districts allow in other contexts.

InterMountain has also continued to enforce the policy subjectively. In punishing Rod for displaying the books, InterMountain concluded that its speech code “does not require evidence of direct targeting for it to be violated.” 2-ER-245. And thus Rod violated it even though he indisputably didn’t target anyone. But since then, InterMountain has interpreted the same speech code to require “animus toward another person.” Pl.’s Corrected Decl. ¶¶ 56–59, No. 2:25-cv-00865-HL (D. Or. Nov. 14, 2025), Dkt. No. 48; Ex. 6, Dkt. No. 48-6; Ex. 7, Dkt. No. 48-7. This Court should take judicial notice of these facts. *See* Fed. R. Evid. 201. InterMountain’s own documents establish these

facts, and InterMountain did not dispute their veracity before the district court. *See* Resp., No. 2:25-cv-00865-HL (D. Or. Dec. 1, 2025), Dkt. No. 50. This Court “may take judicial notice of court filings.” *Frlekin v. Apple, Inc.*, 979 F.3d 639, 643 n.1 (9th Cir. 2020).

Third, the speech code and letter of directive chill Rod’s speech on this important matter of public concern. 2-ER-207–08. InterMountain has prohibited him from expressing his religiously motivated beliefs. Rod must steer clear of any speech that may appear to InterMountain as a “binary view of gender” or suffer “discipline up to and including termination of [his] employment.” 2-ER-202, 240. And InterMountain recently terminated Rod for expressing that view. This Court has held that even a “change in work assignment within the same job description” or “issuance of an undeserved negative performance review” chills protected speech. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1079 (9th Cir. 2013) (en banc). A letter directing Rod not to speak and conditioning his employment on silence chills his protected speech.

Because of chill, InterMountain must provide “an even greater degree of specificity and clarity of laws.” *Foti*, 146 F.3d at 638; *see Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668 (8th Cir. 2023) (applying heightened vagueness scrutiny to school policy that chilled protected speech). Using the policy to label Rod’s children’s books—which do not directly discuss gender identity—a “hostile expression of animus” shows the policy’s lack of clarity.

The problem is not just the speech code’s “general language.” *Contra* Answering.Br.57. The problem is that InterMountain has used the policy’s general language to (1) label a “commonplace” view a “hostile expression of animus,” *Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732, 738 (6th Cir. 2025) (en banc); (2) prohibit views not prohibited by other Oregon school districts bound by the same law, Opening.Br.54; and (3) ban views commonly taught in English and science, Opening.Br.55. *See Parents Defending Educ.*, 83 F.4th at 668 (“Because the policy does not define or limit the term [‘respect’], it could cover any speech about gender identity that a school administrator deems ‘disrespectful’ of another student’s gender identity.”). InterMountain’s speech code thus fails the constitutional vagueness standard facially and both the policy and letter of directive are unconstitutionally vague as applied to Rod’s speech.

#### **IV. Rod meets the remaining preliminary injunction factors.**

InterMountain doesn’t dispute that Rod meets the remaining injunction factors. For good reason. InterMountain is causing ongoing injury by preventing Rod from displaying the books, especially when colleagues remain free to display all manner of ideological personal speech in the workplace. *Supra* Section I.A.3. And it’s always in the public interest to vindicate fundamental constitutional rights.

Opening.Br.56.

## CONCLUSION

This Court should reverse with instructions to enter a preliminary injunction that prevents InterMountain from enforcing its speech code to prohibit Rod from displaying his books or similar messages in his offices and that removes any reference to the investigation and discipline of Rod in InterMountain's records.

Respectfully submitted this 22nd day of December, 2025.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2025, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the ACMS system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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December 22, 2025

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FOR THE NINTH CIRCUIT

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