# VIRGINIA:

***In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 30th day of August, 2021.***

Loudoun County School Board, et al., Petitioners,

against Record No. 210584
Circuit Court No. CL21003254-00

Byron Tanner Cross, Respondent.

Upon a Petition for Review Under Code § 8.01-626
Justices Kelsey, McCullough, and Chafin

The defendants/petitioners, Loudoun County School Board, Superintendent Scott A. Ziegler, and Interim Assistant Superintendent Lucia V. Sebastian, petition under Code § 8.01-626 for review of the circuit court's order granting a temporary injunction to Byron Tanner Cross, a Loudoun County Public Schools teacher. Cross was placed on administrative leave following comments he offered in a public forum. We grant the petition for review for purposes of reviewing the lower court's decision on the merits. Having done so, we affirm the court's preliminary injunction and offer the following explanation.

BACKGROUND

Cross has worked in Loudoun County Public Schools as an elementary school physical education teacher for eight years. Pursuant to Code § 22.1-23.3,[*] the School Board is considering whether to adopt Policy 8040, "Rights of Transgender Students and Gender-Expansive Students" ("transgender policy"). If adopted, the transgender policy will: (1) allow students to use a name different than their legal name; (2) allow students to use gender pronouns different from those corresponding to their biological sex; (3) require school staff to use students' chosen name and gender pronouns; and (4) allow students to use school facilities and participate in extra-curricular activities consistent with their chosen gender identity. Cross' complaint asserted that, based on scientific evidence regarding gender and child development,

[*] Code § 22.1-23.3(A) provides that "[t]he Department of Education shall develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools." Further, "[e]ach school board shall adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education." Code § 22.1-23.3(B).

his philosophical views on the rights of parents and educators, and his Christian religious beliefs, he objects to (1) the idea that someone can be transgender, (2) treating children as transgender, and, accordingly, (3) numerous aspects of the transgender policy.

Cross learned the Board would be considering whether to adopt the transgender policy during its May 25, 2021 meeting. He registered to speak during the meeting's public comment period and delivered the following statement:

> My name is Tanner Cross. And I am speaking out of love for those who suffer with gender dysphoria. *60 Minutes*, this past Sunday, interviewed over 30 young people who transitioned. But they felt led astray because lack of pushback, or how easy it was to make physical changes to their bodies in just 3 months. They are now de-transitioning. It is not my intention to hurt anyone. But there are certain truths that we must face when ready. We condemn school policies like 8040 and 8035 because it will damage children, defile the holy image of God. I love all of my students, but I will never lie to them regardless of the consequences. I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God.

The next day, Cross alleged, he fulfilled his teaching duties as usual. That evening, however, a supervisor asked to speak with Cross the next morning. When they met, the supervisor informed Cross he was being placed on administrative leave with pay. As an explanation for this decision, Cross received a letter from Assistant Superintendent Sebastian stating Cross was under investigation for allegations he engaged in conduct that had a disruptive impact on the operations of Leesburg Elementary. The letter also informed Cross that, absent permission from Leesburg Elementary principal, Shawn Lacey, he was banned from Loudoun County Public Schools property and events. Later that day, an email was sent to "all Leesburg Elementary parents and staff" informing them of Cross' suspension.

On May 28, 2021, Cross, through counsel, contacted Assistant Superintendent Sebastian demanding that Cross be reinstated. The Board's counsel responded, refused Cross' demand, and stated his suspension was due to his public comments and the "significant disruption" they caused at Leesburg Elementary, including "multiple complaints and parents requesting that . . . Cross have no contact with their children."

Cross alleged he would like to offer further public comments at future Board meetings but he fears doing so will draw additional sanctions. Cross also alleged that other Loudoun County Public Schools employees wish to voice their opinions about the transgender policy but have refrained for fear of retaliation like Cross has experienced. Cross provided supporting

affidavits from five such employees. Finally, Cross alleged that "[o]ther [public school] employees have made public comments at . . . Board meetings on a variety of proposed policies, including in support of [the transgender policy] and other gender-identity related policies but [the Board] ha[s] not punished those employees because of their viewpoints."

Based on these allegations, Cross' "First" and "Second Cause[s] of Action" (collectively, "free speech claims") claimed the Defendants were retaliating against him for exercising his right under the Virginia Constitution to express his views regarding "gender-identity education policy." Further, Cross asserted the Defendants erected a prior restraint by effectively banning him from Board meetings and that his suspension and the threat of further sanction was chilling his right to speak publicly as a private citizen. Relatedly, Cross claimed the Defendants violated the Virginia Constitution's prohibition on viewpoint discrimination by punishing and threatening to punish him in the future for expressing his opinion of the transgender policy but not disciplining other Loudoun County Public Schools employees who "expressed different views on proposed gender-identity education policy."

Cross' "Third" and "Fourth Cause[s] of Action" (collectively, "free exercise claims") claimed the Defendants violated his right to freely exercise his religion under the Virginia Constitution and the Act for Religious Freedom, Code § 57-2.02, when they sanctioned and threatened to sanction him for his public comments. Cross asserted his "views and expression related to gender-identity education policy are motivated by his sincerely held religious beliefs, are avenues through which he exercises his religious faith, and constitute[] a central component of his sincerely held religious beliefs." Therefore, Cross contended, his suspension substantially burdened his free exercise of religion by diminishing his ability to profess and maintain his opinions on religious matters.

As relief, Cross sought a declaration that the Defendants had unlawfully retaliated against him for his public comments. Further, Cross requested "a temporary restraining order" and a permanent injunction directing the Defendants to, among other things, reinstate him and refrain from punishing him for speaking about the transgender policy.

At a June 4, 2021 hearing on Cross' request for a temporary injunction pending the resolution of his complaint, the Board argued Cross is unlikely to succeed on his free speech claims because his public comments created a significant and continuing disruption at Leesburg Elementary and his suspension was an appropriate response. The Board also suggested the reasonable anticipation that Cross would not comply with Loudoun County Public Schools'

existing non-discrimination policy or the proposed transgender policy justified the actions taken against him.

To support these contentions, the Defendants provided an affidavit from Principal Lacey. Lacey recounted that, a little over one week before Cross' public comments, Cross sent a lengthy email to Superintendent Ziegler and the Board members professing his disagreement with the transgender policy. The email discussed how the concept of being transgender is contrary to Cross' Christian beliefs and how he believes supporting or facilitating children's desire to transition to another gender could harm them physically and psychologically. Cross also stated that his religious beliefs would prevent him from treating a child as other than their biological gender. Although a Board member interpreted Cross' email to indicate he would not follow Loudoun County Public Schools' "pronoun usage policy," no immediate disciplinary action was taken against Cross because, according to Principal Lacey, the email "did not cause any disruption to the operation of Leesburg Elementary."

Lacey further recalled that he witnessed Cross' public comments and, the next morning, learned from school staff that students' parents were discussing the comments on social media. Shortly before 6:30 a.m., Lacey received an email from a student's parent expressing concern over Cross' public comments and requesting that her daughter not attend any of Cross' classes. As a result, Lacey relieved Cross of his responsibility to greet children as they arrived at school that morning and for the rest of the week, so as to avoid possible confrontations between Cross and parents. Another employee was assigned to take Cross' place. Over the course of that day, Lacey received emails from the parents of four more students voicing concern over Cross' statements and requesting that their children not interact with him. One of those parents, who identifies as transgender, stated that, although her children had "looked up to" Cross, they were "absolutely hurt" to learn of his public comments.

Lacey has "continued to receive communications from parents regarding . . . Cross," including an email on June 2, 2021, from a parent asking that Cross not teach or supervise her child. That parent stated her child has "loved" being taught by Cross but that he has an older sibling who is transgender and who has struggled with serious mental health issues. Considering Cross' public comments and this lawsuit, the parent asked that Cross not teach or supervise her child out of concern for the mental health and safety of both of her children.

The Defendants also provided an affidavit from Superintendent Ziegler, in which he averred (1) he was apprised of the circumstances of Cross' situation as they developed, (2) the

"disruption to Leesburg Elementary . . . and to [Loudoun County Public Schools] has continued since . . . Cross was placed on administrative leave," and (3) he has received "many emails in response to . . . Cross' comments from community members and parents, including parents of transgender students, who expressed the harm that transgender students suffer when their gender identity is not affirmed or their choice of preferred pronoun or name is not respected." Ziegler provided one such email, sent on June 3, 2021, from a concerned former Board member and "youth suicide prevention advocate." Superintendent Ziegler also claims that Loudoun County Public Schools has a generally applicable practice of suspending with pay any employee whose speech or conduct disrupts Loudoun County Public Schools' operations and has so suspended at least seven other employees in the past two years.

Further, the Defendants offered a June 3, 2021 letter Assistant Superintendent Sebastian provided Cross. The letter explains in greater detail why Cross was suspended, including that his public comments "significantly interfered" with the operations of Leesburg Elementary and Loudoun County Public Schools, "impair the maintenance of discipline, impede the performance of [Cross'] duties, . . . undermine the mission of Leesburg Elementary as well as Loudoun County Public Schools, and are in conflict with [Cross'] responsibilities as an employee of Loudoun County Public Schools." While acknowledging that Loudoun County Public Schools had yet to adopt the transgender policy, the letter claimed Cross' public comments conflicted with existing Loudoun County Public Schools policies and state and federal law. Specifically, the letter pointed to Loudoun County Public Schools' policy of providing an equitable and safe learning environment to all persons regardless of "gender identity" and of prohibiting demeaning or harmful actions, particularly if those actions are directed at personal characteristics such as sexual orientation, perceived sexual orientation, gender identity, or gender expression. Similarly, the letter cited Title IX of the Education Amendments Act of 1972 and the Virginia Human Rights Act, Va. Code § 2.2-3900, et seq., as prohibiting discrimination based on gender identity. The letter added that Cross could attend Board meetings with Principal Lacey's permission. Finally, the Defendants drew the circuit court's attention to *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), and *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), and their citation to research indicating that treating transgender students differently or singling them out is significantly detrimental to their mental wellbeing.

In granting Cross a temporary injunction, the circuit court explained the parties agreed that the four factors defined in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7

(2008), should guide the court's decision. Those factors include (1) Cross' likelihood of success on his claims, (2) whether Cross would suffer irreparable harm absent an injunction, (3) the balance of the equities, and (4) the public interest. The court then found Cross was likely to succeed on his claim that "his suspension was an act of retaliation" for his public comments. Looking to *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), to guide its analysis, the court determined Cross made his comments as a private citizen speaking on a matter of public concern. Turning to whether Cross' interest in making his public comments outweighed the Defendants' interest in restricting his speech, the court relied on the nine factors outlined in *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292 (4th Cir. 2006), to gauge the strength of the Defendants' interest. Those factors question whether Cross' comments (1) impaired the maintenance of discipline by supervisors, (2) impaired harmony among coworkers, (3) damaged close personal relationships, (4) impeded the performance of Cross' duties, (5) interfered with the operation of Loudoun County Public Schools, (6) undermined the mission of Loudoun County Public Schools, (7) were communicated to the public or to coworkers in private, (8) conflicted with Cross' responsibilities within Loudoun County Public Schools, and (9) abused the authority and public accountability Cross' role entailed.

The court explained that, with respect to "many" of the *Ridpath* factors, there was simply an "absence of evidence," and, "[f]or others, the evidence lacked the persuasiveness that would weigh in support of [the Board's] actions." The court further explained that, when Cross was reassigned from greeting children, the school had only received one parent email expressing concern about Cross. Thus, no actual disruption of school operations had occurred at that time. Moreover, the court declined to give any weight to the disruption caused by communications Loudoun County Public Schools received regarding Cross following the decision to suspend him on May 26, 2021.

Because Leesburg Elementary serves at least 391 students, the court determined the relatively limited number of parental complaints lodged before Cross' suspension caused a "de minimis" disruption to the school's operations that could not justify "the actions taken by [the Board]." The court concluded its analysis of the *Ridpath* factors by stating that

> [t]hese facts are not exclusive to the Court's consideration but are reflective of some that were given greater weight than others not specifically mentioned herein. The Court finds that in balancing all of the factors and weighing the facts presented, [Cross'] interest in expressing his First Amendment speech outweigh[s] the [Defendants'] interest in restricting the same and the level of

> disruption that [Defendants] assert[] did not serve to meaningfully disrupt the operation or services of Leesburg Elementary School.

Finally, the court determined the Defendants' suspending Cross was in response to and adversely impacted his constitutionally protected speech. The court explained that Cross was quickly suspended after his public comments and noted the affidavits of other Loudoun County Public Schools employees who feared speaking publicly due to Cross' suspension. Of particular concern to the court was that the Defendants did not merely suspend Cross, they "took the added, and seemingly unnecessary" step of drastically limiting his ability to offer further public comments at Board meetings. In turn, the court rejected the Defendants' contention that their actions were not retaliatory because they had not disciplined Cross for his email that expressed views similar to his public comments. Accordingly, the court concluded, Cross' suspension and the "additional restrictions placed on him" adversely affected his constitutionally protected speech.

The court found Cross' likelihood of success on his free exercise claims was less clear because, although "intertwined" with his free speech claims, the "direct facts in support of th[e] claim[s] are more vague." However, the court determined, the Defendants had a premature and misplaced expectation that Cross would violate the transgender policy if it was adopted because, as the court noted during the hearing, Cross could conceivably avoid using gender pronouns for any students. After commenting that establishing a likelihood of success on the merits "is a relatively low threshold when compared to other legal standards that fix a much higher bar," the court found Cross made the requisite showing.

Considering whether Cross may suffer irreparable harm absent a temporary injunction, the court determined he was suspended due to his speech and barred from further speech and that others were dissuaded from speaking as a result. The court concluded it need look no further than federal authority holding that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute[s] irreparable injury."

The court found the balance of the equities and the public interest also favored granting Cross a temporary injunction because stopping a retaliatory suspension would not harm the Defendants, restoring Cross to his position could ameliorate the potential damage to his reputation, and upholding individual constitutional rights against government repression serves the public good. The court noted the Defendants suspended Cross only three weeks before the end of the school year and then emailed the entire Leesburg Elementary "community" to

announce the suspension. To the court, these actions appeared unnecessarily extreme and vindictive.

The court ordered the Defendants to reinstate Cross to his position and remove the ban prohibiting him from Loudoun County Public Schools property and events. The injunction will remain in force until December 31, 2021, unless otherwise dissolved or enlarged.

The Defendants raise the following assignments of error:

1. The trial court erred in finding that Respondent is likely to succeed on the merits of his claims.

2. The trial court erred in finding that Respondent was likely to suffer irreparable harm in the absence of temporary injunctive relief.

3. The trial court erred in failing to consider the totality of the circumstances and placing undue emphasis on the single factor of likelihood of success on the merits.

## ANALYSIS

We conclude that the Defendants have not established the circuit court abused its discretion in granting Cross a temporary injunction. *See Commonwealth ex. Rel. Bowyer v. Sweet Briar Institute*, 2015 WL 3646914 (2015) (considering a petition for review under Code § 8.01-626 and reviewing the denial of a temporary injunction for an abuse of discretion). A court abuses its discretion when it (1) does not consider a relevant factor that should have been given significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) considers proper factors but commits a clear error of judgment while weighing those factors. *Lawlor v. Commonwealth*, 285 Va. 187, 263 (2013). Although this Court has not definitively delineated the factors that guide granting the equitable relief of a temporary injunction, an "injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case" and is meant to preserve the status quo between the parties while the litigation is ongoing. *Bowyer*, 2015 WL 3646914 at *2; *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). Further, "[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity," Code § 8.01-628, and whether to grant a "temporary injunction requires consideration of the requesting party's allegations and the veracity and magnitude of the asserted harm." *Bowyer*, 2015 WL 3646914 at *2. Similarly, a court may contemplate the substance and adequacy of factual support for a plaintiff's allegations. *See Deeds v. Gilmer*, 162 Va. 157, 269-70 (1934).

Cross relies on Art. I, § 12 of Virginia's Constitution. Although we have not had occasion to map the precise contours of the rights protected by this Clause, we have generally described Art. I, § 12 of Virginia's Constitution as "coextensive with the free speech provisions of the federal First Amendment." *See Elliott v. Commonwealth*, 267 Va. 464, 473-74 (2004). Looking to federal precedent as persuasive, it is settled law that the government may not take adverse employment actions against its employees in reprisal for their exercising their right to speak on matters of public concern. *See Love-Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004) (citing *Pickering*, 391 U.S. at 573). Determining whether the Defendants transgressed that prohibition involves a "two-step inquiry," where the first step asks whether Cross spoke on an "issue of social, political, or other interest to a community." *Urofsky v. Gilmore*, 216 F.3d 401, 406-07 (4th Cir. 2000) (citing *Connick*, 461 U.S. at 146). The Defendants do not dispute that Cross did. The targeted speech in our case 'did not amount to fighting words' and were 'not obscene' but rather were 'the kind of pure speech to which . . . the First Amendment would provide strong protection.'" *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2047 (2021) (citations omitted).

The second step requires weighing Cross' interest in making his public comments against the Defendants' "interest in providing effective and efficient services to the public." *Billioni v. Bryant*, 998 F.3d 572, 576 (4th Cir. 2021) (internal quotation marks omitted). Performing this "difficult" balancing of interests required the circuit court to examine the unique circumstances of this case, including the context in which Cross made his public comments and the extent to which they disrupted Loudoun County Public Schools' "operation and mission." *Connick*, 461 U.S. at 150; *Ridpath*, 447 F.3d at 319 (internal quotation marks omitted). As the parties and the circuit court recognized, the Fourth Circuit has developed nine factors to consider when gauging the magnitude of the disruption a public employee's speech causes his employer. *See Ridpath*, 447 F.3d at 317.

The Defendants incorrectly minimize Cross' interest in making his public comments. *See Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 195 (4th Cir. 1994) ("When an employee's speech substantially involves matters of public concern . . . the state must make a stronger showing of disruption in order to prevail."). Cross made those comments at a public Board meeting where one of the issues under consideration was whether to adopt the transgender policy. As the Fourth Circuit has recognized, "[b]oth the [teacher] and the public are centrally interested in frank and open discussion of agenda items at public meetings." *Piver v. Pender Cnty. Bd. Of Educ.*, 835

F.2d 1076, 1081 (4th Cir. 1987) (examining claim that teacher was retaliated against, in part, for comments made at a public hearing); *see also Pickering*, 391 U.S. at 573 ("free and unhindered" debate on matters of public importance is the "core value" of the First Amendment). Further, in addition to expressing his religious views, Cross' comments also addressed his belief that allowing children to transition genders can harm their physical or mental wellbeing. This is a matter of obvious and significant interest to Cross as a teacher and to the general public. *See Janus v. American Fed. of State, Cnty., and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2476 (2018) (commenting that speech on sensitive and controversial political subjects that are of "profound value and concern to the public," like "sexual orientation and gender identity," "occupies the highest rung of the hierarchy of First Amendment values and merits special protection.") (internal quotation marks and citation omitted). Moreover, Cross was opposing a policy that might burden his freedoms of expression and religion by requiring him to speak and interact with students in a way that affirms gender transition, a concept he rejects for secular and spiritual reasons. Under such circumstances, Cross' interest in making his public comments was compelling. *See Meriwether v. Hartop,* 992 F.3d 492, 509-10 (6th Cir. 2021) (explaining that a Christian university professor's First Amendment interest in not using students' preferred gender pronouns was "especially strong . . . because [his] speech also relates to his core religious and philosophical beliefs" and because requiring the professor to use students' preferred gender pronouns "potentially compelled speech on a matter of public concern"); *see also Boy Scouts of Am. v. Dale,* 530 U.S. 640, 660 (2000) ("[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."). Although the Board may have considered Cross' speech to be "a trifling and annoying instance of individual distasteful abuse of a privilege," we believe Cross has a strong claim to the view that his public dissent implicates "fundamental societal values" deeply embedded in our Constitutional Republic. *Mahanoy,* 141 S. Ct. at 2048. (citation omitted).

Further, the Defendants have not identified an abuse of discretion in the circuit court's conclusion that its interest in disciplining Cross was comparatively weak. First, the Defendants fault the court for acknowledging the *Ridpath* factors but then failing to "discuss or consider any of them" before concluding there "was an absence of evidence" and that the "evidence lacked the persuasiveness that would weigh in support of [the Board's] actions." However, and setting aside that *Ridpath* is merely persuasive precedent, following the comments the Board regards as

too cursory, the court supplied discussion of the evidence it found particularly germane to its analysis. The court further stated that such evidence was not "exclusive to the [c]ourt's consideration but [was] reflective of some that [was] given greater weight than others not specifically mentioned." The record thus reflects that the circuit court did not engage in an inappropriately myopic or summary application of the law to the facts before it. *See Bottoms v. Bottoms*, 249 Va. 410, 414 (1995) ("Absent clear evidence to the contrary . . . the judgment of a trial court comes . . . with a presumption that the law was correctly applied to the facts.").

We also find unpersuasive the Defendants' suggestion that the circuit court did not give sufficient weight to their heightened interest in regulating Cross' speech because, as a teacher, he occupies a position of significant public contact and trust. Although the Board is correct that public employers have a greater interest in controlling the speech of employees who interact with the public and rely on the public's trust to perform their duties, such as police officers and teachers, there is no indication the court disregarded or did not appropriately consider the unique position Cross occupies. *See McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) ("The more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer.") (internal brackets and quotation marks omitted); *see also, e.g.*, *Melzer v. Bd. of Educ.*, 336 F.3d 185, 198 (2d Cir. 2003) (a teacher's position "by its very nature requires a degree of public trust not found in many other positions of public employment").

Next, the Defendants argue the circuit court erred in refusing to consider that Cross' suspension was justified by the disruption school officials reasonably anticipated once parents quickly expressed their concern over his public comments. As evidence of this purported refusal, the Defendants point to the court's comment that no actual disruption to school operations had occurred when Principal Lacey reassigned Cross from meeting children because, at that time, Lacey had received only one parental complaint regarding Cross. The Board also cites that the court's order does not otherwise mention the subject of anticipated disruption.

Although the Defendants are correct that the negative consequences a public employer reasonably anticipates will result from an employee's speech may under some circumstances justify anticipatory adverse action against the employee to mitigate those consequences, the operative adverse action in this case is not Cross' reassignment from greeting children but the subsequent decision to suspend him and limit his access to public school events. Accordingly,

the circuit court could sensibly discount the fact that Cross was removed from morning greeting duty.

Further, no evidence corroborates the Defendants' assertion that Cross was suspended because, after several parents complained, there was a reasonable expectation that parents and students would avoid interacting with Cross to the point he could not fulfill his duties. Principal Lacey's and Superintendent Ziegler's affidavits do not aver they took their terminal adverse employment actions against Cross because they thought doing so would quell further disruption at Leesburg Elementary. To the contrary, Superintendent Ziegler's affidavit suggests Cross was suspended due to "a neutral and generally applicable practice of utilizing suspension or paid administrative leave when an employee engages in speech or conduct that causes a disruption in the operations of the school or school division." Of course, any such practice would be unconstitutional to the extent the Defendants deploy it overzealously to thwart protected employee speech. Consequently, the Defendants have not demonstrated the circuit court committed an error of law or otherwise abused its discretion. *See Bowyer*, 2015 WL 3646914 at *2 (concluding a circuit court abused its discretion in granting a temporary injunction based on an error of law).

Likewise, the circuit court did not improperly discount the Defendants' interests in ensuring student wellbeing and that its employees support and comply with existing and proposed gender identity policies and corollary anti-discrimination laws. Those concerns appear pretextual because, first, they were not mentioned in either Principal Lacey's or Superintendent Ziegler's affidavits explaining Cross' suspension. Instead, they were raised for the first time in the second letter Cross received from Loudoun County Public Schools several days after he was suspended. More importantly, Cross' email to the Board and Superintendent Ziegler expressed, in even stronger terms than his public comments, his opposition to and unwillingness to comply with the transgender policy. However, the Defendants took no action based on that email because, as Superintendent Ziegler states, it "did not cause any disruption with the operation of Leesburg Elementary." Considering also that the Defendants have never attempted to specify how Cross' continuing to teach at Leesburg Elementary might pose a real and present threat that he or the Loudoun County Public Schools will contravene any anti-discrimination policy or law, neither that concern nor the Defendants' attendant concern that Cross might harm children can justify his swift suspension. *See Craig v. Rich Tp. High School Dist. 227*, 736 F.3d 1110, 1119 (3d Cir. 2013) ("[A]n employer's assessment of the possible interference caused by the speech

must be reasonable - the predictions must be supported with an evidentiary foundation and be more than mere speculation.") (internal quotation marks omitted); *see also Meriwether*, 992 F.3d at 510-11 (rejecting university's assertion that its purported interests in preventing discrimination against transgender students and complying with anti-discrimination laws outweighed a professor's interest in refusing to use students' preferred pronouns).

Further, although the Defendants assert the circuit court should have considered that Cross' public comments necessitated that students' schedules be changed or that they miss required physical education instruction, they presented no evidence of that to the circuit court. There was also no evidence that it would have been problematic or administratively taxing to accommodate the parents who requested Cross not teach their children, nor was there any clear evidence Principal Lacey has diverted material time from his other obligations to manage the fallout from Cross' public comment.

The only disruption the Defendants can point to is that a tiny minority of parents requested that Cross not interact with their children. However, the Defendants identify no case in which such a nominal actual or expected disturbance justified restricting speech as constitutionally valued as Cross' nor have they attempted to explain why immediate suspension and restricted access to further Board meetings was the proportional or rational response to addressing the concerns of so few parents. *See Nat'l Gay Task Force v. Bd. Of Educ. Of City of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir. 1984) ("[A] state's interests outweigh a teacher's only when the expression results in a material or substantial interference or disruption in the normal activities of the school," and "a teacher's First Amendment rights may be restricted only if the employer shows that some restriction is necessary to prevent the disruption of official functions or to ensure effective performance by the employee"); *see also Dougherty v. School Dist. of Philadelphia*, 772 F.3d 979, 991 (3d Cir. 2014) (where speech occupies the "highest rung of First Amendment protection," an employer "bear[s] a truly heavy burden" to demonstrate that speech was too disruptive to warrant protection) (internal quotation marks omitted).

Indeed, it appears only two cases have considered similar situations, and those cases support the conclusion that Cross has a potentially successful claim. In *Meriwether v. Hartop*, the Sixth Circuit emphatically held that a university professor stated viable free speech and free exercise claims based on his university's disciplining him for refusing, based on his Christian faith, to use a student's preferred pronouns. *Meriwether*, 992 F.3d at 509-17. Further, although a federal district court determined a teacher did not have a constitutionally protected right to

disobey a policy requiring that he refer to students by their preferred pronouns and names, the court cautioned that, "[i]mportantly, [the teacher] is not asserting that he was disciplined for criticizing or opposing the [p]olicy." *Kluge v. Brownsburg Cmty. School Corp.*, 432 F. Supp. 3d 823 (S.D. Ind. 2020); *see also Garcia v. Kankakee Cnty. Housing Auth.*, 279 F.3d 532, 534 (7th Cir. 2002) ("Although the [F]irst [A]mendment protects rank-and-file employees from discharge for taking a public stand on how the agency should be managed, it does not protect those who *act* on their views, to the detriment of the agency's operations."). Persuasive authority thus supports the circuit court's determination that at least some of Cross' claims have merit.

Finally, the Defendants are also mistaken in their assertion that the circuit court erred in weighing the other factors it considered when granting Cross a temporary injunction. The Defendants do not contest the court's determination that Cross would be irreparably harmed absent an injunction other than to say it was incorrect because Cross is unlikely to succeed on his claims. However, as explained above, the Defendants have not shown as much. Further, although the Defendants fault the court for not taking adequate account of the need to protect the wellbeing of students and prevent what they term unlawful discrimination, no evidence in the record suggests there is any present threat Cross might be in a position to interact with a transgender student. Because the remaining interests the Defendants raise do not override Cross' and other teachers' interests in exercising their constitutionally protected right to speak on the proposed transgender policy, the circuit court did not abuse its discretion.

This order shall be certified to the Circuit Court of Loudoun County.

Justice Powell took no part in the resolution of the petition.

A Copy,

Teste:

Acting Clerk