

# LIBERTY COUNSEL



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## REPLY TO VIRGINIA

November 27, 2024

### Via Email Only

[REDACTED], Superintendent  
Montgomery County Public Schools  
750 Imperial Street  
Christiansburg, VA 24073  
[REDACTED]

RE: Unconstitutional Denial/Rescission of Substitute Teacher Application Approval

Dear Superintendent [REDACTED]:

Liberty Counsel writes to Montgomery County Public Schools (“MCPS” or “District”) on behalf of substitute teacher applicant **TEACHER** who was removed from her position for impermissible reasons.

Liberty Counsel believes that MCPS has taken unlawful retaliatory action against **TEACHER** in removing her as a substitute teacher (or belatedly “disapproving” her application), because she has publicly expressed her sincerely held religious and political beliefs on various matters of public concern.

We hereby request that the MCPS School Board comply with clearly established law, including Virginia law and the First Amendment to the U.S. Constitution, and reinstate **TEACHER** substitute teacher status and provide further relief set forth below. Please provide a written response confirming the same by December 31, 2024. If we do not receive this response, we will take additional action to prevent irreparable harm to cherished liberties.

### LIBERTY COUNSEL’S BACKGROUND

As you may know, Liberty Counsel is a national non-profit litigation, education, and public policy organization with an emphasis on First Amendment liberties, and a particular focus on religious freedom and the sanctity of human life.

In 2020 and 2021, our groundbreaking lawsuits coast-to-coast freed houses of worship in numerous states, including Kentucky, Illinois, Maine, Virginia, and California, from discriminatory

COVID-19 restrictions. Several of these cases reached the United States Supreme Court and resulted in injunctions prohibiting discriminatory COVID-19 restrictions on religious worship. For example, our case against California and its Governor Gavin Newsom resulted in a permanent injunction against them, *see Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021), and a subsequent final judgment requiring them to pay Liberty Counsel **\$1,350,000** in attorney's fees and costs. *See Harvest Rock Church, Inc. v. Newsom*, No. 2:20-cv-06414, C.D. Cal. (May 14, 2021).

Liberty Counsel achieved a settlement on behalf of employees of NorthShore Health who had been subjected to unlawful discrimination on the basis of their religious beliefs about the COVID injections, amounting to **\$10,300,000**. *See Jane Does 1-13 v. NorthShore University HealthSystem*, No. 1:21-cv-05683, N.D. Ill. (December 23, 2022).

You may have also read in the national press about our 9-0 unanimous Supreme Court victory against the City of Boston, in connection with its religious discrimination against Christians. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), (*See, e.g., Adam Liptak, Supreme Court Rules Against Boston in Case on Christian Flag*, New York Times (May 2, 2022) <https://www.nytimes.com/2022/05/02/us/supreme-court-boston-flag-free-speech.html>).

These are a sampling of our successes on behalf of our many clients. Additional examples may be reviewed at <https://lc.org/newsroom/press-releases>.

### TIMELINE & FACTS

We understand the following timeline and facts to be true, based on the information provided by **TEACHER** and documentation she has received from MCPS in response to records requested under the Virginia Freedom of Information Act ("FOIA").

On August 8, 2024, **TEACHER** applied for a substitute teacher position with MCPS. She was scheduled for an interview, which she attended, and was then scheduled to meet with MCPS to provide necessary employment documentation. **TEACHER** attended an orientation on September 11, 2024. On that same day, her personnel report was sent to **SUPERINTENDENT**. **TEACHER** was later provided access to the MCPS internal scheduling system, and on September 14, 2024, she received her first substitute teacher assignments.

On September 15, 2024, **SUPERINTENDENT** identified **TEACHER** and stated that she was "a problem," because he was aware of her political and religious beliefs that she had publicly expressed in the past. The following day, September 16, 2024, **BOARD MEMBER**, a school board member (and a prior School Board District C candidate who ran against **TEACHER**) sent a text message to **TEACHER** and **TEACHER** citizens of Montgomery County requesting content and photos of a social media comment made by **TEACHER**.

On September 16, 2024, **TEACHER** set up her internal MCPS email account and on the following day, she reported for her first substitute teacher assignment. Only two hours after beginning her assignment as a substitute teacher, **TEACHER** was escorted out of the building around 10:30 AM by **TEACHER**, the MCPS HR Director. On that same day, **TEACHER** emailed **SUPERINTENDENT** requesting the audio/visual for the School Board meeting regarding personnel list discussions and accountability. **SUPERINTENDENT** and School Board Chair **BOARD MEMBER** later discussed denying the audio/visual request submitted by **TEACHER**.

On September 17, 2024, the MCPS School Board entered a closed session and took action to remove **TEACHER** from the personnel list, which would have required a majority vote of the board.

On September 18, 2024, a text exchange occurred wherein **BOARD MEMBER**, a School Board Member and **SUPERVISOR** the Chair of Montgomery County Board of Supervisors, commented on **TEACHER** social media posts regarding lack of School Board approval.

On information and belief, there have been no other substitute teachers who have been approved by staff, and who were later disapproved by the Board, in the manner experienced by **TEACHER**

## I. VIRGINIA LAW

### A. **The Constitution of Virginia protects teachers’ political speech and religious speech – and religious free exercise.**

The Constitution of Virginia declares that “the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments.” This provision ensures that “any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.” It further guarantees that “the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble and to petition the government for the redress of grievances.” See Va. Const. art. I, § 12.

The Supreme Court of Virginia, in *Loudoun County School Board v. Cross*, described Va. Const. art. I, § 12 as “coextensive with the free speech provisions of the federal First Amendment.” *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021) (quoting *Elliott v. Commonwealth*, 593 S.E.2d 263 (Va. 2004)). The Court further held that Loudoun County School Board’s interests did not outweigh the interests of Cross and other teachers in “exercising their constitutionally protected right to speak on the [school board’s] proposed transgender policy...” *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021).

Religious free exercise is protected by the Virginia Constitution, which plainly declares that “**all men are equally entitled to the free exercise of religion**, according to the dictates of conscience.” Among other things, this means that “[n]o man ... shall be enforced, restrained, molested, or burthened in his body or goods, **nor shall otherwise suffer on account of his religious opinions or belief**” and that “all men shall be free to profess and by argument to maintain their opinions in matters of religion, **and the same shall in nowise diminish, enlarge, or affect their civil capacities.**” See Va. Const. art. I, § 16 (emphasis added).

The Constitution of Virginia has included the first sentence of Art. I, § 16 since 1776. The remaining two sentences in this section draw heavily on Thomas Jefferson’s 1786 Statute for Religious Freedom, which the Virginia General Assembly enacted in 1786, and which remains in effect today. “This famous statute set the baseline for two centuries of thought on the relationship between religion and government in a free society. Jefferson’s Act for Religious Freedom has been viewed as ‘the most decisive element in an epochal shift in the Western world’s approach to relations between civil and religious spheres of life after fourteen centuries.’” *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 720–21 (Va. 2023) (internal citations omitted). In the Commonwealth of Virginia,

the constitutional right to free exercise of religion is among the “natural and unalienable rights of mankind.” *Id.* at 721 (Va. 2023).

### **B. The Virginia Religious Freedom Restoration Act Protects Teacher Speech**

In addition to the Constitution of Virginia, Code § 57-2.02, the Virginia Religious Freedom Restoration Act (“VRFRA”), sets forth the general rule that “[n]o government entity shall substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability.” See Va. Code § 57-2.02(B). The narrow exception adds that a violation of the general rule will only be excused if the government “demonstrates that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.” *Id.*

The VRFRA is quite specific about who must prove what. The claimant has the initial obligation to show that the government “substantially burden[ed]” the “free exercise of religion,” *id.*, which includes any act that “inhibit[ed] or curtail[ed]” the “religiously motivated practice,” Code § 57-2.02(A). If the claimant makes that prima facie showing, the government then has “the burdens of going forward with the evidence and of persuasion under the standard of clear and convincing evidence,” *id.*, to show that the specific “application of the [government’s] burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest,” Code § 57-2.02(B).

*Wlaming*, 895 S.E.2d 705, 735 (Va. 2023).

### **C. Virginia Employment Nondiscrimination Law Protects Teacher Religious Free Exercise**

Virginia law protects employees – including teachers – by providing employees with the same protections from discrimination as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a). On July 1, 2020, the Virginia General Assembly’s amendments to the Virginia Human Rights Act took effect under the “Virginia Values Act” (“VVA”). See Va. Code § 2.2-3905. The VVA makes it an unlawful discriminatory practice for an employer to:

- a. Fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to such individual’s compensation, terms, conditions, or privileges of employment because of such individual’s . . . religion, [or] sex. . . or
- b. Limit, segregate, or classify employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect an individual’s status as an employee, because of such individual’s . . . religion [or] sex.  
. . .

Courts have found that the Virginia Human Rights Act (VHRA) and Title VII are virtually identical in their provisions. Consequently, a VHRA claim will succeed as a matter of law for the same reasons set forth in Title VII. *See, Dufort v. Liberty Univ.*, No. 6:21-CV-00054, 2023 WL 137496 (W.D. Va. Jan. 9, 2023).

Thus, under the Virginia Constitution, and relevant Virginia Code sections as interpreted by the Supreme Court of Virginia, it cannot be gainsaid that **TEACHER** has the right in her capacity as a

citizen to freely speak and write regarding her religious views and political views as they are informed by her faith – and neither she nor any other teacher of MCPS may be penalized for speech expressed in a private capacity – whether that speech takes place pre-employment, or during employment but in a private capacity.

## II. FEDERAL CONSTITUTION & TITLE VII

### A. The First Amendment Protects Religious Exercise and Political Speech

The First Amendment to the U.S. Constitution protects teachers’ religious free exercise and free speech rights. The “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.*, 597 U.S. 507 (2022) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). “It is well settled that ‘a State cannot condition public employment on a basis that **infringes the employee’s constitutionally protected interest in freedom of expression.**” *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983))(emphasis added).

In *Pickering v. Board of Education*, the U.S. Supreme Court held that a teacher’s speech on matters of public concern could not serve as grounds for dismissal unless the speech was shown to interfere with the school’s operations. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563 (1968). This decision underscored that public employees do not forfeit their First Amendment rights under the U.S. Constitution by virtue of their employment. In *Garcetti v. Ceballos*, the Court held that when public employees speak pursuant to their official duties, they are not protected by the First Amendment, as they are not speaking as private citizens. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, **speech on matters of public concern, outside the scope of official duties, remains protected.** *Id.* at 423 (emphasis added).

In *Loudoun County School Board v. Cross*, the Supreme Court of Virginia held that the “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.” *Loudoun Cnty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021). The Court reasoned that Cross’ comments at a public-school board meeting that were made against the board’s adoption of transgender policies were protected by the First Amendment. *Id.* The Court went on to conclude that Cross was simply voicing his beliefs that concerned the overall wellbeing of a child which constituted a “significant interest to Cross as a teacher and to the general public.” *Id.*

While the government (in this case, MCPS) may generally speak its own message, it is required to meaningfully accommodate the religious free exercise rights of its employees who may hold sincere religious objections to the government’s message or policy proposals. The government may not retaliate against private political or religious speech of teachers where such is made in their private capacity – during employment, or pre-employment, as the case may be; and the government is not permitted to establish a religious or political orthodoxy. “If there is any fixed star in our constitutional constellation, it is that **no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.**” *West Virginia v. Barnette*, 319 U. S. 624 (1943) (emphasis added).

In addition to *Cross*, another recent case in which the government school district tried (and failed) to establish an “orthodoxy” was *Mirabelli v. Olson*. Here, a U.S. district court found that teachers Elizabeth Mirabelli and Lori Ann West had sincere religious beliefs which the government had to accommodate. *Mirabelli v. Olson*, 691 F. Supp. 3d 1197 (S.D. Cal. 2023). In that case, the Escondido Union School District’s policy required teachers to withhold information from parents regarding their child’s gender identity, which conflicted with the teachers’ religious belief in the importance of honesty and parental rights. *Id.* The court determined that enforcing this policy would violate the teachers’ rights under the Free Exercise Clause of the First Amendment, necessitating an accommodation for their beliefs. *Id.*

## **B. Title VII Prohibits the District From Discriminating On the Basis of Religious Belief**

Title VII of the Civil Rights Act of 1964 prohibits the District from discriminating against its employees on the basis of religion and religious beliefs. *See* 42 U.S.C. §2000e-2(a) (“It shall be an unlawful employment practice for an employer . . . 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 . . . religion...”); *Groff v. DeJoy*, 600 U.S. 447, 457 (2023); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (same). **Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief.”** 42 U.S.C. §2000e(j) (emphasis added).

The District is not permitted to determine which religious adherent has a “correct” or “proper” or “valid” understanding of religious doctrine. Employees’ “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [legal] protection.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (same). Additionally, though membership in or adherence to the tenets of an organized religion is plainly sufficient to provide protection for an individual’s sincerely held religious beliefs, it is not a necessary precondition. *See Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834 (1989) (“**Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection [for sincerely held religious beliefs], one must be responding to the commands of a particular religious organization.**” (emphasis added)); *see also Office of Foreign Assets Control v. Voices in the Wilderness*, 329 F. Supp. 2d 71, 81 (D.D.C. 2004) (noting that the law provides protection for “sincerely held religious beliefs,” “not just tenets of organized religion”); *Young v. Colorado Dep’t of Corr.*, No. 22-CV-00145-NYW-KLM, 2023 WL 1437894 (D. Colo. Feb. 1, 2023) (“Title VII’s prohibition on discrimination protects members of both historically disfavored groups and historically favored ones”).

## **DISTRICT POLICIES**

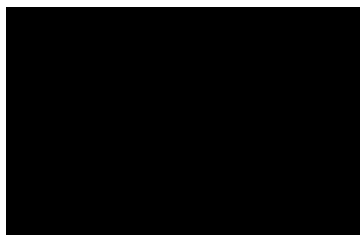
MCPS Policy [Section 5-1.1 Equal Employment Opportunity](#), provides additional protections to those set forth in Virginia and federal law. MCPS is expressly prohibited from engaging in any form of employment discrimination throughout the recruitment, selection, hiring, and retention processes. District Policy Section 5-1.1 explicitly prohibits discrimination on the basis of race, color, **religion**, ethnic or national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, sexual orientation, gender identity, disability, **political affiliation**, status as a veteran, and genetic information (including family medical history). (Emphasis added).

Moreover, MCPS Policy [Section 5-3.4, titled \*Staff Participation in Political Activities and Professional Organizations\*](#), states that the MCPS “Board **recognizes the rights of its employees to engage in political activity,**” and allows employees to “solicit support for political candidates **or political issues outside regular work hours and off school property.**” (Emphasis added). Thus, the District recognizes the freedom of its employees to engage in political activities while employed, with the corollary that employees (or applicants) have at least as much (if not more) freedom to participate in such activities prior to their employment by the District.

### CONCLUSION

Liberty Counsel hopes to resolve the concerns set forth above amicably. In light of the above authority and facts, **we seek 1) the immediate reinstatement of TEACHER as a substitute teacher with MCPS. We further request that 2) MCPS compensate TEACHER** the lost wages for the 2 days per week for each of the nine weeks (and counting) she would have worked, while she has been unjustly barred from work due to her protected religious beliefs and religious and political speech. By our calculations the amount comes to at least \$ [REDACTED], and will continue to grow until she is reinstated.

If we do not receive these favorable responses by December 31, 2024, Liberty Counsel will take additional action to prevent continuing irreparable harm to the rights of TEACHER. Thank you for your consideration.



c.

**Via Email**

Montgomery County School Board

BOARD MEMBER, Chair

BOARD MEMBER, Vice-Chair

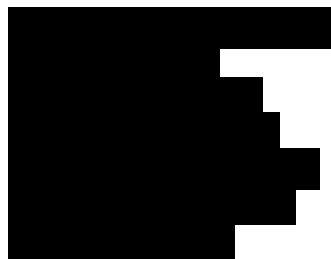
BOARD MEMBER

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<sup>†</sup>Licensed in Virginia