IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

DAVID J. BLOCH, *Plaintiff,* v. **HEATHER BOUCHEY,** et al., *Defendants.*	Civil Case No. 2:23-CV-209 **ORAL ARGUMENT REQUESTED** **EXPEDITED HEARING REQUESTED**

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED HEARING

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff David J. Bloch respectfully moves this Court for a preliminary injunction against Defendants Heather Bouchey, Jay Nichols, Windsor Central Supervisory Union Board, and Sherry Sousa. Defendants are currently violating the First Amendment to the United States Constitution.

On February 9, 2023, Defendant Superintendent Sherry Sousa terminated Coach Bloch from his position as Woodstock Union High School snowboarding coach and informed him he would not be considered for any future coaching positions within the school district. Defendant Sousa claimed Coach Bloch violated Defendant Windsor Central Supervisory Union Board's harassment, hazing, and bullying (HHB) policy and Vermont Principals' Association Policy for expressing his views on differences in sex and the appropriateness of a teenage male competing against teenage females in an athletic competition.

Defendant Board adopted its HHB policy and procedures, as required by Vermont law, from the model policy and procedures issued by Defendant Secretary of Education Heather Bouchey. *See* Vt. Stat. Ann. tit. 16, § 570. Both Defendant Board and Defendant Secretary's policies and procedures implement the statutory

prohibition on "harassment." The Vermont Principals Association (VPA) has also implemented the statutory prohibition on "harassment." The VPA's executive director, Defendant Jay Nichols, enforces its policies.

By terminating Coach Bloch, Defendants Sousa and Board unconstitutionally retaliated against him based on his protected speech. And Defendants' HHB law, policies, and procedures are unconstitutionally overbroad, discriminate based on content and viewpoint, and impose a prior restraint. Both Defendants' actions and their law, policies, and procedures have inflicted irreparable injury on Coach Bloch and all other employees who wish to voice views like his.

Therefore, Plaintiff respectfully moves this Court for a preliminary injunction pending final case disposition. Specifically, Plaintiff moves this Court for a preliminary injunction against Defendants, their agents, officials, servants, employees, and any other persons acting on their behalf:

1. Ordering Defendants to reinstate him as snowboarding coach; refrain from enforcing their ban on considering him "for any future coaching positions"; and purge from any records in their possession, custody, or control any reference to his termination as snowboarding coach; and
2. Enjoining enforcement of Defendants' HHB law, policies, and procedures in so far as they prohibit (i) "harassment" that is not so severe, pervasive, and objectively offensive that it effectively bars a student's access to an educational benefit, (ii) expressing views on differences in and the immutability of sex and the appropriateness of a teenage male competing against teenage females in an athletic competition, and (iii) referring to a male as a male.

Plaintiff respectfully moves this Court to waive the security requirement under Federal Rule of Civil Procedure 65(c). The "bond is only intended to afford security for damages that might be proximately caused by the wrongful issuance of an injunction." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) (cleaned

up). When "there has been no proof of likelihood of harm" from the issuance of the injunction—as in cases alleging constitutional violations—courts properly waive the requirement. *Id.* (collecting cases); *accord A.H. ex rel. Hester v. French*, 511 F. Supp. 3d 482, 502 (D. Vt. 2021). Here, Defendants will suffer no damages from a preliminary injunction. The injunction would simply prevent them from infringing Coach Bloch's speech rights.

Coach Bloch files this motion simultaneously with his Verified Complaint. Defendants are as of yet unrepresented, so Counsel for Plaintiff had no opportunity to confer with Defendants' counsel under D. Vt. L.R. 7(a)(7). Counsel for Plaintiff welcomes the opportunity to discuss this motion once counsel for Defendants enters an appearance.

In support of this motion, Coach Bloch relies on the attached memorandum of points and authorities and his Verified Complaint and exhibits thereto.

Respectfully submitted,

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**Pro Hac Vice application pending*

CERTIFICATE OF SERVICE

I hereby certify that on July 17th, 2023, I electronically filed the foregoing, and will serve the same with Plaintiff's Verified Complaint on the following parties:

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Sherry Sousa
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Dated: July 17th, 2023

Anthony R. Duprey
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

DAVID J. BLOCH,

Plaintiff,

v.

HEATHER BOUCHEY, *et al.*,

Defendants.

Civil Case No. 2:23-CV-209

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

When Coach Dave Bloch respectfully offered his view that males and females are different, Defendant Superintendent Sousa fired him. She accused Coach Bloch of "harassment based on gender identity" merely for "question[ing] the legitimacy and appropriateness" of a teenage male snowboarding against teenage females.

The First Amendment does not allow Defendants to enforce their orthodoxy by firing Coach Bloch and chilling the speech of all other employees who share his views. Coach Bloch spoke as a private citizen in an ongoing nationwide conversation about whether males should compete against females. His three-minute respectful conversation occurred wholly outside the presence of any transgender-identifying snowboarder and caused no disruption. Yet, the very next day, Defendant Sousa terminated him, while admitting that the investigation into his conversation was incomplete. Defendants' harassment, hazing, and bullying (HHB) law, policies, and procedures used to justify Coach Bloch's termination are breathtakingly broad, discriminate based on content and viewpoint, and impose a prior restraint. They apply to even a single comment made by an employee while at home and off duty. Unsurprisingly, they have chilled the speech of a number of other employees.

To redress the irreparable injury to him and other employees, Coach Bloch moves for a preliminary injunction:

1. Ordering Defendants to reinstate him as snowboarding coach; refrain from enforcing their ban on considering him "for any future coaching positions"; and purge from any records in their possession, custody, or control any reference to his termination as snowboarding coach; and
2. Enjoining enforcement of Defendants' HHB law, policies, and procedures in so far as they prohibit (i) "harassment" that is not so severe, pervasive, and objectively offensive that it effectively bars a student's access to an educational benefit, (ii) expressing views on differences in and the immutability of sex and

the appropriateness of a teenage male competing against teenage females in an athletic competition, and (iii) referring to a male as a male.

FACTUAL BACKGROUND

I. Coach Bloch founded the school's snowboarding program and has led it to success both on and off the slopes.

In 2011, Coach Bloch created the snowboarding program at Woodstock Union High School. V. Compl. ¶ 73. He has served as the head coach every year since. *Id.* ¶ 75. To start the program and provide an activity to develop students' athletic, social and teamwork skills, Coach Bloch coached as a volunteer for the first three seasons. *Id.* ¶ 76. The program has achieved enormous athletic and personal success. *Id.* ¶ 77. Its snowboarders have consistently won top three placements statewide, with at least three individual state champions. *Id.* ¶ 78. Many students join the team reluctantly at the behest of their parents to become more involved, but over the course of the season become motivated to work not only on their physical fitness and snowboarding skills but also on their academic progress. *Id.* ¶ 81.

II. Coach Bloch and his athletes discuss a male snowboarder competing against females.

On February 8, 2023, Coach Bloch and his team were waiting in the lodge for a competition to start. *Id.* ¶ 92. No other teams or snowboarders were present in that area of the lodge. *Id.* That day, Coach Bloch's team was to compete against a team from another school district that had a male snowboarder who identifies as a female and competes against females. *Id.* ¶ 93.

While waiting, Coach Bloch was sitting at a table with two of his snowboarders, Student 1 (a male) and Student 2 (a female), who were discussing transgender-identifying athletes. *Id.* ¶ 95. Student 1 offered his opinion that males competing against females was unfair based on biological differences. *Id.* ¶ 97. Student 2 responded by accusing Student 1 of being transphobic. *Id.* ¶ 98. At that point, Coach Bloch joined the conversation. *Id.* ¶ 99. Coach Bloch recognized that people express

themselves in different ways and that there can be masculine women and feminine men. *Id.* ¶ 100. He also asserted his belief that as a matter of biology, males and females have different DNA. *Id.* ¶ 101. Coach Bloch said that those differences in DNA cause males to develop differently from females and to have different physical characteristics, which generally give males competitive advantages in sports. *Id.* ¶ 102–03.

Despite disagreeing with Coach Bloch's views, Student 2 thanked him for a good conversation. *Id.* ¶ 108. The respectful conversation lasted no longer than three minutes. *Id.* ¶ 106. No other people were present during the conversation. *Id.* ¶ 107. And Coach Bloch at no point referred to the transgender-identifying snowboarder. *Id.* ¶ 104. In fact, after the competition, Coach Bloch and his team shared a bus home with the team with the male who identifies as a female, who was also on the bus. *Id.* ¶ 111. There was no tension on the bus, and Coach Bloch did not have any further discussion about the appropriateness of males competing against females. *Id.* ¶ 112.

III. Defendant Sousa terminates Coach Bloch under Defendants' HHB policies and procedures.

The very next day, Defendant Sousa summoned Coach Bloch to her office. *Id.* ¶ 117. Before any discussion began, she handed him a notice of his "immediate termination." *Id.* ¶ 118. The notice accused him of violating Defendant Windsor Central Supervisory Union Board's HHB Policy and "the Vermont Principals' Association Athletics [(VPA)] Policy." *Id.* It claimed that Coach Bloch "made reference to [a] student in a manner that questioned the legitimacy and appropriateness of the student competing on the girls' team to members of the WUHS snowboard team." *Id.* ¶ 119. The notice also asserted that "administrators investigated" and their "findings confirmed that" Coach Bloch's comments "constituted harassment based on gender identity." *Id.* ¶¶ 120–21. To complete the punishment, Defendant Sousa barred Coach

Bloch from even "consider[ation] for any future coaching positions within" the school district. *Id.* ¶ 122.

IV. Defendants' unconstitutional HHB law, policies, and procedures.

Vermont law requires every school board to adopt and enforce HHB policies "at least as stringent as model policies developed by the Secretary." Vt. Stat. Ann. tit. 16, § 570(b). The statute "prohibit[s]" harassment, which it defines as including

> "an incident or incidents of verbal, written, visual, or physical conduct . . . based on or motivated by a student's or a student's family member's actual or perceived race, creed, color, national origin, marital status, sex, sexual orientation, gender identity, or disability that has the purpose or effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources or creating an objectively intimidating, hostile, or offensive environment." *Id.* § 11(a)(26)(A).

The statutory definition of "harassment" also

> "includes conduct that violates subdivision (A) of this subdivision (26) and constitutes . . . conduct directed at the characteristics of a student's or a student's family member's actual or perceived creed, national origin, marital status, sex, sexual orientation, gender identity, or disability and includes the use of epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, display, or circulation of written or visual material, taunts on manner of speech, and negative references to customs related to any of these protected categories." *Id.* § 11(a)(26)(B).

Defendant Secretary of Education Heather Bouchey has adopted a model policy and procedures implementing the statutory definition of "harassment" in full. V. Compl. ¶¶ 147–48. Consistent with Vermont law, Defendant Board adopted Defendant Secretary's model policy and procedures substantively verbatim. *Id.* ¶ 149. Both the model policy and Defendant Board's policy threaten "termination for employees" for "substantiated complaints" of "harassment." *Id.* ¶¶ 151–52. The VPA has also adopted the statutory definition and prohibition of "harassment." *Id.* ¶ 160. The VPA governs athletic competitions across Vermont, including those for Coach Bloch's snowboarding team. *Id.* ¶¶ 34–36, 91.

V. Defendants' actions, law, policies, and procedures are causing ongoing injury.

Defendants are inflicting ongoing irreparable injury not only on Coach Bloch but also on numerous other employees who share his views. Absent his termination, Coach Bloch's contract to coach the 2023–24 season would have been automatically renewed, just like it had been for the previous ten seasons. *Id.* ¶¶ 135–36. Defendants' termination has also caused other school district employees to self-censor. *Id.* ¶ 168. A number of members of the school district community agree with Coach Bloch's views but will not voice them out of fear that what happened to him, will happen to them. *Id.* ¶ 169. And Defendants have made it clear that merely speaking about the appropriateness of a teenage male competing against teenage females constitutes "harassment based on gender identity, justifying terminati[on]" under their law, policies, and procedures. *Id.* ¶¶ 121, 167.

LEGAL STANDARD

To obtain a preliminary injunction, a party must show "(1) that it will be irreparably harmed if an injunction is not granted, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of the hardships tipping decidedly in its favor." *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348–49 (2d Cir. 2003). Because the loss of First Amendment freedoms "unquestionably constitutes irreparable injury," the "dominant, if not the dispositive, factor" is the questions on the merits. *New Hope Family Srvs., Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020).

ARGUMENT

I. Coach Bloch will likely succeed on the merits of his free speech claims.

A. Defendants retaliated against Coach Bloch because of what he said.

To establish a First Amendment retaliation claim, a public employee must show that (1) he spoke "as a citizen on a matter of public concern, rather than

pursuant to his employment responsibilities"; (2) "he suffered an adverse employment action"; and (3) "a causal connection existed between the adverse action and the protected activity." *Specht v. City of N.Y.*, 15 F.4th 594, 600 (2d Cir. 2021). Once the employee makes that prima facie showing, the burden shifts to the employer to show under *Pickering* balancing that its "interest in promoting an efficient workplace" outweighs the employee's interest in free speech or that it would have taken the same action absent the protected speech. *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F.3d 158, 163–64 (2d Cir. 2006).

Right off the bat, Coach Bloch meets the adverse action prong: "adverse employment actions include discharge [and] refusal to hire." *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 226 (2d Cir. 2006) (cleaned up). He also establishes the public concern and causation factors. Defendants cannot meet their burden of showing that their knee-jerk termination of Coach Bloch outweighs his significant free speech interests or that they would have taken the same action regardless. Coach Bloch is likely to succeed on the merits of his retaliation claim.

1. Coach Bloch spoke as a citizen on a matter of profound public concern.

Courts in the Second Circuit "ask two questions to determine whether a public employee speaks as a citizen: (A) did the speech fall outside of the employee's official responsibilities and (B) does a civilian analogue exist?" *Matthews v. City of N.Y.*, 779 F.3d 167, 173 (2d Cir. 2015) (cleaned up). Coach Bloch's statements about the immutability of sex and the appropriateness of teenage males competing against females are not "part-and-parcel" of his position as snowboarding coach. *Id.* at 174. Coach Bloch's contract proves the point. Defendants hired him to coach snowboarding skills, schedule practices and competitions, recommend the purchase of equipment, maintain relevant paperwork, and ensure safe snowboarding conditions. V. Compl. ¶ 84. Defendants did not employ Coach Bloch to engage in such conversations. *See id.*

He "did not speak pursuant to government policy" nor did he "seek[ ] to convey a government-created message." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424 (2022). And Coach Bloch's statements have a paradigmatic "civilian analogue" because he merely had a conversation—like countless others every day. During the downtime before the competition, coaches and players were free to do homework or other work, communicate with family or friends, play on their phones, or chat among themselves. V. Compl. ¶ 94. Coach Bloch's conversation was one of those "channels available to citizens generally," regardless of any "status as a public employee." *Matthews*, 779 F.3d at 175.

Coach Bloch also spoke on a profound issue of public concern: the immutability of sex and the appropriateness of a teenage male competing against teenage females. A matter of public concern is "any matter of political, social or other concern to the community," as revealed by the "content, form, and context of a given statement." *Cioffi*, 444 F.3d at 163–64. To begin with content, the Supreme Court has already recognized that "gender identity" is "undoubtedly [a] matter[ ] of profound 'value and concern to the public.'" *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018). Coach Bloch's statements "reflected his conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and has become an issue of contentious political debate." *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021) (cleaned up).

On context, Coach Bloch voiced his views "against [a] backdrop of existing community debate" on the appropriateness of teenage males competing against teenage females. *Cioffi*, 444 F.3d at 165. That issue has spurred debate not only locally in Vermont, but also nationwide. *Compare* V. Compl. Ex. 12 at 4 ("The VPA is committed to providing all students with the opportunity to participate in VPA activities in a manner consistent with their gender identity."), *with B.P.J. v. W.V. State Bd. of Educ.*, --- F. Supp. 3d ----, 2023 WL 111875 (Jan. 5, 2023), *appeal pending*

(rejecting equal protection and Title IX challenges to West Virginia's law requiring participation in sports according to sex).

As to form, Coach Bloch's speech "was no mere private employment grievance" but rather a conversation with two students directly affected by a teenage male competing as a female. *See Cioffi*, 444 F.3d at 165. In sum, discussing the immutability of sex and how sex affects athletic competitions "presents significant questions of general public concern." *Adams ex rel. Kasper v. Sch. Bd.*, 57 F.4th 791, 820 (11th Cir. 2022) (Lagoa, J., concurring specially).

2. Defendants fired Coach Bloch because of his speech.

A causal connection exists when "protected speech was a substantial motivating factor in the adverse employment action." *Smith v. Cnty. of Suffolk*, 776 F.3d 114, 118 (2d Cir. 2015). Either "direct[ ]" evidence of "retaliatory animus" or an indirect "showing that the protected activity was followed closely by the adverse action" demonstrates causation. *Id.* Defendant Sousa could not have been clearer. She terminated Coach Bloch the very day after his statements and informed him that he "made reference to [a] student in a manner that questioned the legitimacy and appropriateness of the student competing on the girls' team," thus "justifying terminati[on]." V. Comp. ¶¶ 117–21; *see Smith*, 776 F.3d at 121 (direct evidence of causation when disciplinary charges "characterized the content of the speech and cited that characterization as the basis for [those] disciplinary charges").

3. Defendants discriminated based on the viewpoint of Coach Bloch's statements and those statements in no way undermined the operation of the school.

Defendants' viewpoint discrimination here obviates the need for *Pickering* balancing. "[V]iewpoint-based government regulations on speech are nearly always presumptively suspect." *Amalgamated Transit Union Local 85 v. Port Auth.*, 39 F.4th 95, 108 (3d Cir. 2022). "That is no less true in the [employee-speech] context, outside of certain narrow exceptions." *Id.* Indeed, "[c]oncern over viewpoint discrimination is

the very reason *Pickering* rejected the older rule that the First Amendment does not protect government-employee speech." *Id.*

Defendants engaged in textbook viewpoint discrimination. They terminated Coach Bloch for expressing the view that there is a difference between females and males identifying as females when it comes to athletic competitions and referring to a male as a male. V. Compl. ¶ 119. If he had expressed the opposite view—that a male student identifying as female should be permitted to compete as a female—he would not have been fired. Indeed, the VPA's policy requires participation in athletics "consistent with [a player's] gender identity." V. Compl. Ex. 12 at 4. There is no need to engage in further balancing. When a public employee speaks as a private citizen on a matter of public concern, "[a]ny" viewpoint-based restriction "completely undercut[s]" our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (cleaned up).

Not only do Defendants flunk *Pickering* for viewpoint discrimination, they also cannot satisfy their balancing burden. Because Coach Bloch spoke on an issue of "significant public concern," Defendants must show a "greater level of disruption to the government." *Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011). The government must show: "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech." *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir. 2001). The disruption must be significant enough that it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Coach Bloch's speech in no way interfered with government functioning. He had a single, respectful conversation, commenting on a matter of public concern, which lasted less than three minutes and which occurred during downtime when coaches and players were free to attend to any manner of personal business. V. Compl. ¶¶ 94, 104–06. His statements did not impede his performance as a snowboarding coach or interfere with the snowboarding team's activities. In fact, after the conversation, the snowboarding team competed without incident. *Id.* ¶ 110. The context of Coach Bloch's speech also weighs heavily in his favor. He served only as a snowboarding coach. *Id.* ¶ 114. He had no policymaking or discretionary role within the school district. *Id.* "Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Rankin*, 483 U.S. at 390–91.

Defendant Sousa's proffered rationale for terminating Coach Bloch—"harassment"—fails on its own terms. Coach Bloch did not harass anyone. He had a short conversation respectfully discussing his deeply held beliefs, all outside the presence of the student allegedly harassed. V. Compl. ¶¶ 105–07. No one else from the transgender-identifying snowboarder's team was present. *Id.* ¶ 107. Defendant Sousa pointed only to Coach Bloch's statements and made no mention of disruption. *Id.* ¶¶ 119–21. What's more, Defendant Sousa terminated Coach Bloch only one day after the conversation and admitted that the investigation into that conversation wasn't even complete. *Id.* ¶ 124. By targeting Coach Bloch for that purported "harassment," Defendant Sousa unconstitutionally terminated him based on his protected speech. *See Locurto*, 264 F.3d at 166 ([E]ven if the *Pickering* balance is resolved in the employer's favor, the employee may still demonstrate liability by proving that the employer disciplined the employee in retaliation for the speech, rather than out of fear of the disruption.").

4. Defendants would not have terminated Coach Bloch absent his speech.

Coach Bloch founded the snowboarding program as a volunteer, had coached the team every year for its 11-year history, and had led it to enormous success. V. Compl. ¶ 75–77. Each year, Defendants Board and Superintendent renewed his contract. *Id.* ¶ 82. He has had only respectful interactions with his colleagues and his players and their parents. *Id.* ¶¶ 89–90. And he has never faced any allegations of misconduct or discipline as a result of his coaching. *Id.* ¶ 87. His personnel record is spotless. *Id.* ¶ 88; *see Nagle v. Marron*, 663 F.3d 100, 112 (2d Cir. 2011) (employer failed to meet burden when "[t]here was no pattern of bad evaluations, complaints, and warnings"). As Defendant Sousa's letter asserted, she fired Coach Bloch because of his "reference," *i.e.*, his speech. V. Compl. ¶ 119.

B. Coach Bloch will likely succeed on his challenges to Defendants' HHB law, policies, and procedures.

Defendants bear a "particularly heavy" burden to save their law, policies, and procedures. *Harman v. City of N.Y.*, 140 F.3d 111, 118 (2d Cir. 1998). They operate as "blanket polic[ies] designed to restrict expression by a large number of potential speakers." *Id.* "To justify this kind of prospective regulation, 'the Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government.'" *Id.* (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995)) (cleaned up).

Defendants must meet "exacting scrutiny." *See Janus*, 138 S. Ct. at 2472. They must show their law, policies, and procedures "serve a compelling state interest that cannot be achieved through means significantly less restrictive of [First Amendment] freedoms." *Id.* at 2465. That scrutiny imposes a narrow tailoring requirement: government cannot use "means that broadly stifle personal liberties when the end

can be more narrowly achieved." *Scott v. Meyers*, 191 F.3d 82, 88 (2d Cir. 1999). So, "the government must do more than simply posit the existence of the disease sought to be cured." *Latino Officers Ass'n, N.Y., Inc. v. City of N.Y.*, 196 F.3d 458, 463 (2d Cir. 1999) (cleaned up). Defendants "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* Defendants neither have a compelling interest nor do they employ means narrowly tailored to any interest.

1. Defendants have no compelling interest.

Defendants impose an ex ante speech restriction of near limitless breadth. Defendants' definition of "harassment" "is not limited to employment-related speech, let alone speech that reasonably could cause a disruption." *Barone v. City of Springfield*, 902 F.3d 1091, 1106 (9th Cir. 2018). Rather it applies to employees' speech anytime and anywhere. It prohibits even an off-duty social media post sharing an article questioning advantages males generally have over females in sports. And, as shown by this case, it applies even to speech outside the presence of a person in one of the protected categories. Defendants' law, policies, and procedures "make[ ] no distinction between speech" that "reasonably could be expected to disrupt [Defendants' operations] and speech that plainly would not, or that would do so only inasmuch as it engendered legitimate public debate." *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017).

No doubt Defendants have an interest in regulating unlawful harassment in schools. But their definition of "harassment" "sweeps, more broadly" to target protected speech. *See Scott*, 191 F.3d at 87. Even so, the First Amendment does not tie Defendants' hands. The Supreme Court has crafted a constitutional standard for actionable harassment. Schools can regulate harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities. *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*,

526 U.S. 629, 650 (1999); *accord Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216–17 (3d Cir. 2001) (Alito, J.) (invalidating under the First Amendment school anti-harassment policy that prohibited "conduct" that either "substantially interfer[ed] with a student's educational performance" or "creat[ed] an intimidating hostile, or offensive environment"). Defendants' definition goes far beyond that standard to censor protected speech and thus does not serve a compelling state interest.

2. Defendants cannot meet their narrow tailoring burden.

Defendants' definition of harassment is overbroad, discriminates based on content and viewpoint, and imposes a prior restraint, which all show that it flunks narrow tailoring. *See Harman*, 140 F.3d at 118 ("[T]he concerns that lead courts to invalidate a statute on its face may be considered as factors" in assessing an ex ante public employee speech restriction.).

On overbreadth, the terms of Defendants' definition render "a substantial number of its applications" unconstitutional. *United States v. Stevens*, 559 U.S. 460, 473 (2010). It targets even a single "incident" of "verbal" conduct and uses the open-ended prefatory phrase "includes." V. Compl. ¶¶ 216–17. It prohibits "comments," "epithets," and "derogatory remarks." *Id.* ¶ 218. And it licenses government officials to consider "all the facts and surrounding circumstances" when determining whether speech constitutes "harassment." *Id.* ¶ 153. "[I]n short," Defendants' definition of harassment "is staggeringly broad." *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125 (11th Cir. 2022) (holding policy overbroad that "prohibit[ed] a wide range of 'verbal' . . . expression"; censored speech "including verbal acts, name-calling, graphic or written statements"; and "employ[ed] a gestaltish 'totality of known circumstances' approach to determine whether particular speech" was prohibited).

Defendants' definition of harassment also discriminates based on content and viewpoint, which "weighs against the government." *Harman*, 140 F.3d at 120. Defendants' definition draws facial distinctions based on the speech's subject

matter—that is, speech about a student's protected characteristic. *See Speech First*, 32 F.4th at 1115, 1126 (prohibiting "discriminatory harassment" based on "gender identity" discriminates based on content). It discriminates based on viewpoint by prohibiting "epithets, stereotypes, slurs, . . . insults, derogatory remarks, . . . and negative references." V. Compl. ¶ 193; *see Iancu v. Brunetti*, 139 S. Ct. 2294, 2298–99 (2019) (A "ban on registering marks that 'disparage' any 'person[ ], living or dead'" is "viewpoint-based."). And it also discriminates based on viewpoint by granting Defendants unbridled discretion in two ways to determine what is "harassment." *See Harman*, 140 F.3d at 120 (unbridled discretion "justifies an additional thumb on the employees' side of the scales" (cleaned up)). First, Defendants' definition of "harassment" uses the open-ended prefatory phrase "includes," granting them the power to fill in the gaps as to what speech they consider "harassment." V. Compl. ¶ 192. Second, Defendants have the discretion to target disfavored speech that they subjectively label as "epithets, stereotypes, slurs, comments, insults, derogatory remarks, gestures, threats, graffiti, . . . and negative references." *Id.* ¶ 193.

Defendants' definition imposes a prior restraint by "prohibit[ing]" in advance "harassment." *Id.* ¶ 204. These "regulations run afoul of the general presumption against prior restraints on speech" because they "chill[ ] potential speech before it happens." *Harman*, 140 F.3d at 119 (cleaned up). Other employees who hold views similar to Coach Bloch's have in fact self-censored because of Defendants' law, policies, and procedures. V. Compl. ¶¶ 168–70. The litany of First Amendment violations show that Defendants' definition brings a sledgehammer to bear in an area where a scalpel is necessary to preserve precious speech freedoms.

II. Defendants are inflicting ongoing irreparable injury.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (public employee preliminary injunction case). Coach Bloch remains

terminated and will not be able to coach next season, all because of his protected speech. *See Huminski v. Rutland Cnty.*, 134 F. Supp. 2d 362, 364 (D. Vt. 2001) (retaliation for exercising First Amendment freedoms is irreparable injury). Given that a contract for the next season will be signed no later than early December, V. Compl. ¶ 138, Coach Bloch does not have time to proceed through the standard litigation process to vindicate his rights.

What's more, "retaliatory discharge carries with it the distinct risk that other employees may be deterred from" exercising their First Amendment rights. *See Holt v. Cont'l Grp.*, 708 F.2d 87, 91 (2d Cir. 1983). That's also irreparable injury. *See id.* Here, Defendants have short-circuited debate on a matter of immense public concern and have attempted to enforce their orthodoxy by terminating Coach Bloch. Defendants' heavy-handed tactics have stopped other employees from speaking out on issues of gender identity for fear of receiving the same discipline. V. Compl. ¶ 168. Finally, Defendants' HHB law, policies, and procedures "directly limit[ ] speech," which is "presumed" irreparable injury. *Bronx Household*, 331 F.3d at 349; *see also Latino Officers*, 196 F.3d at 469 (affirming preliminary injunction against unconstitutional policy in public employee speech case).

III. An injunction will promote the public interest.

Because Coach Bloch has shown irreparable injury and a likelihood of success on his claims, he merits an injunction. *Bronx Household*, 331 F.3d at 348–49. But the balance of equities also tips decidedly in their favor. "[S]ecuring First Amendment rights is in the public interest." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). And the government "does not have an interest in the enforcement of an unconstitutional" punishment and unconstitutional policies. *Id.*

CONCLUSION

This Court should grant Plaintiff's motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17th, 2023, I filed the foregoing and will serve the same with Plaintiff's Verified Complaint on the following parties:

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