IN THE SUPREME COURT OF MISSISSIPPI
No. 2022-CA-00464

JACKSON PUBLIC SCHOOL DISTRICT

Appellant - Defendant

v.

JACKSON FEDERATION OF TEACHERS AND PSRPS

Appellee - Plaintiff

Appeal of the decision of Justice Jess H. Dickinson,
sitting as Special Judge in the Circuit Court of Hinds County, Mississippi
Civil Action No. 25CI1:21-CV-00152

BRIEF FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Jackson Public School District v. Jackson Federation of Teachers and PSRPs

Case No. 2022-CA-00464 in the Supreme Court of Mississippi

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Employees of the Jackson Public School District, including the majority of members of the Jackson Federation of Teachers and PRSPs. These persons are directly impacted by the actions of JPSD which are enjoined.
2. Board Members, superintendents, principals and other managers or supervisors of the Jackson Public School District.
3. LaToya Merritt, Nicholas Morisani, Mallory Bland, Phelps Dunbar LLP, and Larrissa Moore, attorneys for Jackson Public School District involved in this matter
4. Joel Dillard and Jay Kucia of Joel Dillard & Associates, attorneys for Jackson Federation of Teachers and PSRPs
5. Honorable Tomie Green
6. Honorable Jess Dickinson

/s/ Joel F. Dillard Date: February 28, 2023
Joel F. Dillard
Attorney of record for Appellee, Jackson Federation of Teachers and PSRPs

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1. Whether the Defendant should be enjoined from violating the Mississippi Constitution.
2. Whether the Plaintiff adequately pled standing by identifying violations of its constitutional rights or those of its members.
3. Whether the case became moot when the Defendant partially altered some of the challenged policies after the Plaintiff's case in chief.

STATEMENT OF ASSIGNMENT

The Mississippi Supreme Court should retain this case as it involves "constitutional questions" under Rule 16.

STATEMENT OF THE CASE

1. An evidentiary hearing is held before Justice Dickinson on February 16, 2022.

This matter came on for a hearing on a preliminary injunction before Justice Jess Dickinson, sitting as a Special Judge by order of this Court, on February 16, 2022.[1] JFT presented five witnesses. However, just before the presentation JFT's case in chief was finished, the court reporter had other obligations and the evidentiary trial was continued. However, the Court heard extensive legal argument off the record from counsel on February 16, 2022. In this argument, the Court made clear to JPS counsel that the Court had very serious misgivings about JPS's arguments, closely questioned JPS concerning the inconsistency between its actions and

[1] An order entered by a prior judge assigned to the case, Judge Tomie Green, stated that the parties were limited to two witnesses, but Justice Dickinson abrogated that order. C.R. 586-87. However, Justice Dickinson made certain that everyone had "an opportunity to come back with additional evidence on the question of a permanent injunction . . . I'm not going to cut anybody off." C.R. 563-64.

the caselaw on freedom of speech, and urged the parties to discuss a consent decree. The case then stood in recess. JPS refused to discuss any resolution.

2. JPS has an opportunity to prepare its case and present all the witnesses it wishes. The parties agree to consolidate the hearing on the preliminary injunction with the merits.

While in recess, JPS requested a period of time to more fully prepare its case in chief. The Court granted the motion and the matter was continued for more than a month, to resume on March 23, 2022. On March 22, 2022, JPS requested an additional continuance, and represented that it was currently considering changing some of the challenged policies. The Court denied this continuance. The policies at issue remained in effect.

The parties completed the trial on March 23, 2022. JPS had the opportunity to present as many witnesses as it wished, which was two. The day closed with oral closing arguments. The Court again closely questioned counsel for Defendant and urged the parties to discuss a consent decree. The Court also instructed the parties to provide either follow-up briefs or proposed decisions, as they saw fit. Defendant elected to file a brief while Plaintiff elected to provide a proposed decision and order to the Court by email. JPS later emailed the Court and asked that it take "judicial notice" of changes in some of the policies at issue. The Court emailed counsel for the Plaintiff "please provide a response next week." In response to this request, Plaintiff filed a brief. C.P. 309-16.

In addition, the Court asked counsel for their position on a potential Rule 65 order consolidating the preliminary injunction hearing with the trial on the merits. The Court emailed: "Does either party wish to offer additional evidence at a trial on the merits? If so, I will set the case for trial. If not, I can proceed to enter a final judgment based on the record produced at the two hearings." The parties each responded that the Court could proceed to final judgment on the

record. Counsel for Defendant emailed "The Jackson Public School District is agreeable to Your Honor entering a final judgment based on the pleadings filed by the parties, and the record produced at the two hearings."[2]

3. The Court enjoins JPS. JPS defies the injunction for months, until a contempt citation is threatened.

The Court entered its final decision and order on May 10, 2022. C.P. 327-57. Thereafter, JPS filed a late motion to recuse Justice Dickinson. C.R. 376.[3] JPS also filed a motion to stay the injunction. C.R. 369. Both motions were denied. C.R. 373; 390.

JPS defied the Court's Order. It did not give notice to employees as required by the Order, and continued to state on its website that the unlawful policies remained in effect. JFT moved for contempt. C.R. 393. On the eve of the contempt hearing, months after the deadline in the Order, JPS belatedly complied. In light of this, civil contempt was denied. However, a trial on criminal contempt remains to be conducted. C.R. 557.

STATEMENT OF FACTS

At the bench trial before Justice Dickinson, the Court heard testimony from seven witnesses, along with a number of exhibits. The evidence is as follows.

1. Teacher Martha Taylor testifies concerning trainings forbidding free speech.

The Court heard first from Martha Taylor, the treasurer of JFT and a retired teacher who worked for JPS for many years until 2020. Ms. Taylor testified about how the district's policies are understood by teachers, and about trainings received on the policies. C.R. 564 et seq.

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[2] Because the Court elected to collect this information by email with counsel, it does not appear to be in the record on appeal.

[3] JPS claimed Justice Dickinson was somehow biased against the *prevailing party* because the undersigned attorney had previously sued him some years ago on behalf of another client for actions taken while head of the Mississippi Department of Child Protective Services. The motion was procedurally and substantively frivolous.

Ms. Taylor testified about at least yearly trainings and instructions she had been given by principals and other administrators over many years, telling her she is not allowed to talk about "anything at all for the District" outside the chain of command, and that "even if someone was at your window with a gun, you couldn't call the police you had to call the office [and] you couldn't talk to the media." C.R. at 566. These instructions were given at meetings with all staff. On cross examination, Ms. Taylor testified that she joined JFT while she was working at JPS, and that JFT was allowed by JPS to conduct routine site visits to her school to sign up employees as members, including herself. C.R. 570. The district did not offer any testimony or evidence to dispute the facts testified to by Ms. Taylor.

2. Teacher Anthony Gunter testifies to trainings forbidding free speech, and to retaliation for giving a media interview about a tuberculosis outbreak.

The Court heard testimony from Anthony Gunter, a former limited service teacher from August 2012 to February 11, 2019 at Provine High School in JPS. His supervisors were Dr. Kerry Gray and Dr. Lakethia Marshall Thomas, and Deborah Lawson. Like Ms. Taylor, Mr. Gunter testified that "in the beginning of the school year maybe a week or two before the kids came back to school we would have a professional development meeting and it was discussed that you shouldn't talk to the media." C.R. 575. No exceptions were permitted. *Id.*

He testified that on February 10, 2019, he spoke to the media in a televised interview, after the school day was over, about his personal opinions concerning a tuberculosis outbreak occurring at the school. A transcript of that interview was entered into evidence. He testified that in response to this interview he was called by three district administrators: his immediate supervisor, the principal of the school, and the assistant superintendent in central office. All told him that he had violated district policy by giving this media interview, and that he was not

allowed to do this. When he told the principal he was exercising his free speech rights, the principal reiterated that it was against policy, that "you're not supposed to be speaking to the media." Concerning Mr. Gunter's employment, the principal said "we're going to have to go in another direction." Mr. Gunter resigned shortly thereafter. C.R. 576-580. The district did not offer any testimony or evidence to dispute the facts testified to by Mr. Gunter.

3. JFT organizer Chris Radican testifies to district-wide trainings telling all new employees they are not allowed to talk to the media, and the chilling effect on JFT's work.

The Court heard testimony from Chris Radican, a JFT organizer. Mr. Radican testified that at a new teacher orientation in August 2018, Sherwin Johnson, JPS Executive Director of Public Engagement, discussed media and social media. Mr. Johnson told the employees that "anything that needed to go onto Facebook or Twitter had to be approved first by his department before educators were allowed to put this on their personal social media. It had to go through the department first." C.R. 589-90.

He further testified that JPS employees frequently told him they "were afraid to speak out on numerous issues" lest they face "termination or maybe demotion." He testified that part of JFT's work required getting employees to speak out about issues they were facing. He testified that JPS employees would decline to speak out because they said they were uncomfortable and feared JPS retaliation. "[W]e would have specific people like bus drivers, cafeteria workers, custodians who were afraid to even fill out a survey or afraid to appear before the Board, the School Board to discuss [issues due to] retaliation." C.R. 590-91; 597. The district did not offer any testimony or evidence to dispute the facts testified to by Mr. Radican.

4. Bus assistant Shannon Anderson testifies to being told not to talk to social media, and the administration's efforts to prevent free speech to JFT.

The Court heard testimony from Shannon Anderson. Ms. Anderson is a union member.

She worked as a bus attendant. She testified that she was told by her supervisors—Janey Knot, one Mr. Bowdry, and Derrick Williams—that she was not allowed to take pictures of the poor condition of the busses, or share information with the media about crowding or COVID policy violations, or about mistreatment or unsafe conditions for students. C.R. 605-607. The district lied to the parents about their COVID precautions and forced the bus workers to keep silent about it. *Id*. She testified she was suspended specifically for talking to a coworker about a sexual misconduct issue that had arisen at work. C.R. 602. As a result of this, she did not go to the police or CPS about the issue. C.R. 614; 619.

She testified that administrators told her JFT "was not designed for us, it was designed for the teachers and we was not a part of" JFT (which was false), and specifically told them not to tell JFT information about what was happening in the schools. C.R. 603. The administrators sought to determine who had talked to the union about pay in order to retaliate. C.R. 604-05. They reprimanded the entire group for talking to the union. *Id.* At first they did not allow the union on the bus yard, but later allowed it in order to spy on meetings, standing nearby with a notepad to write down who attended and what was said. C.R. 609

Concerning social media, the administrators "told us we cannot post nothing on Facebook." C.R. 608. They were specifically warned against contacting "The Cipher Voice," an independent journalist on social media named William Edwards who is frequently critical of JPS. Bus employees had told him about getting hurt at work and unsafe conditions such as when they came in contact with student urine. The administration told them the JPS policy and "work ethics" forbid them from talking to him: "you're not to discuss or disclose anything to that man about JPS unless has given you permission and JPS does not give us permission to do that. So he

told us that would be an automatic termination. He don't care if we are in the union or what or who is going to represent us because JPS have things in they handbook that we are not supposed to share pictures with outside entities or conversation with them or post on that page." C.R. 610-12. On cross-examination, Ms. Anderson admitted that she was terminated, that she had failed a drug test for marijuana, and that this was the reason JPS had stated for firing her.

5. JFT President Dr. Akemi Stout testifies to JFT recruiting JPS employees as members, and to JPS's response to free speech and its effect on JFT.

The Court heard testimony from Dr. Akemi Stout. Dr. Stout is a former teacher at JPS and the current president of JFT. She testified to recruiting current JPS employees to join JFT by going into the school and visiting with the employees. C.R. 633-34.

During her time as a teacher at JPS, Dr. Stout was also a member of JFT. During this time, Dr. Stout led JFT's student discipline and school safety campaign. In this effort, Dr. Stout put together a report and press releases about teacher concerns about safety in the schools. She gave a press conference which was reported on the news. C.E. 634-41.

Both Dr. Stout's principal and the JPS discussed the press conference with Dr. Stout. Dr. Stout was terminated shortly thereafter. JPS did not give any specific reason for Dr. Stout's termination, but JPS's attorney had told her she should not have "spoke out against the school district." Dr. Stout understood that she was terminated because of her public role in criticizing JPS in the campaign. C.E. 641-42. She testified that many JPS employees were "afraid of retaliation for joining [JFT] or speaking out." C.E. 642. This was the final witness.

6. Policy GACC forbids all speech "that pertains to the district."

Policy GACC, titled "Confidential Information," was introduced in evidence at the trial. This policy explicitly defines "confidential information" as "[a]ll information that pertains to the

district, its employees, its students, its operations, and/or related matters." C.R. 21. This policy states that this information "constitutes proprietary information that belongs to JPS and is strictly confidential." The policy also explicitly provides a penalty for any employee disclosing any such "information that pertains to the district," stating that "any policy violation would result in termination." The reasons for this policy are explicitly stated and are tied to the government's desire to protect its own image from critical examination by the public. The policy states that it is designed to prevent disclosure that "seriously injures the Jackson Public School District's (JPS) reputation." *Id*. The policy requires prior approval from the superintendent or board of trustees before any employee can engage in any speech about any "information that pertains to the district." *Id*. It states that "[n]o employee shall disclose, divulge or otherwise compromise" such information "except as authorized by the superintendent and/or board of trustees." *Id*. The only arguable exception in the policy still requires prior approval. It states: "The district recognizes that within a human services organization as complex as a school district, it is necessary to share information on a 'need to know' basis." *Id*. But the policy goes on to state that any such "need to know" sharing is only possible "after obtaining the proper authorization and should only be shared or transmitted within the circle intended by the authorizing party." *Id*.

7. Policy GBA forbids "negative commentary to the media."

Policy GBA, titled "Staff Ethics," was entered into evidence. The policy lists "unacceptable behaviors that may subject an employee to disciplinary action, including termination or revocation of certification." C.R. 23. This policy forbids all staff from publicly criticizing the district. This "ethics" policy states that "the sharing of information . . . should never be downgraded to idle gossip or negative commentary to the media, or others within the

community." *Id*. at p. 3. This policy states that it is "the obligation of all employees of the school district" to not "divulge information" when "that revelation is not in the best interest of the district." *Id*. In addition to forbidding all public criticism, the policy actually specifies the one and only person to whom any criticism can be directed. The policy states that the district's employee "ethics" and "standards" require that "any criticism . . . of any department of the school system" must "be made directly to the particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary." *Id*. at p. 2. It incorporates and cross reference the JPS's internal grievance policy, discussed below. No other recourse is permitted. The policy gives no recourse when the superintendent fails at "improving the situation," or when the superintendent is himself the problem.

8. Policy GBAA forbids posting anything on social media "that might result in a disruption of classroom activity" and gives discretion to the Superintendent.

The policy titled "Social Networking Websites" and identified as policy GBAA was also introduced in evidence. This policy states that "[a]ll employees, faculty and staff of this school district who participate in social networking websites shall not post any data, documents, photos or inappropriate information on any website or application that might result in a disruption of classroom activity. This determination will be made by the Superintendent." C.R. 79. The policy gives unlimited discretion to the superintendent to determine what might be "inappropriate information" or what "might result in a disruption of classroom activity."

9. Under the Code of Ethics teachers can lose their license for violating District policies.

Finally, the Mississippi Teacher's Code of Ethics was introduced in evidence. Under the Mississippi Department of Education's state ethics rules, Standard 9, it is unethical for a teacher

to violate "local school board policies related to confidentiality" and "confidentiality agreements required by . . . local policy." C.R. 193-194. Violations of these rules can result in temporary or permanent loss of a license to teach. In addition to losing the job, a teacher can lose a license to teach if found to have violated the policies at issue in this case.

10. Dr. Tommy Nalls testifies concerning how often JPS employees are members of JFT.

The District's first witness was Dr. Nalls. He testified that he is an administrator in charge of recruiting, and that he formerly worked as a teacher in JPS and was a JFT member at that time. He testified that most new teachers join JFT: "It was kind of like a part of becoming a teacher in the building. You know, you get on board, you fill out your hiring paperwork, you join a professional organization." C.R. 700. He testified that they provided access to JFT to recruit members and did not interfere with these recruiting efforts.

11. Dr. Michael Cormack testifies that the social media policy could be used to discipline an employee for posting personal political opinions online.

Defendant next offered testimony from Dr. Michael Cormack, the former chief of staff and is current deputy superintendent of JPS. Dr. Cormack testified that he has reviewed and overseen review of JPS policies. Dr. Cormack testified that he is also responsible for coordinating with Dr. Stout about many of the issues that arise concerning JPS and its relationship with JFT. Concerning the relationship with JFT, Dr. Cormack stated that he frequently talks to Dr. Stout on his cell phone and that they have a strong and productive working relationship. He testified that there have been a number of incidents in which JFT was denied access for a school visit or orientation by a principal. Dr. Cormack explained that on each occasion he would respond to Dr. Stout's concerns and ensure that JFT was able to conduct the visit. He testified that this also happened on one occasion with another professional

organization—the Mississippi Association of Educators—and that he likewise helped MAE obtain a school visit.

Concerning the policy, Dr. Cormack testified that there was a policy review process which involved a policy review committee comprised of three Board members in consultation with staff in the relevant departments. He testified that there was a policy for submitting comments on Board policies and described the procedure for changing such policies. Defendants' Exhibit 4. He testified that the purpose of the policies was to "protect and observe the legal rights of students," among other things. Defendants' Exhibit 21. On cross-examination, he admitted that there was no similarly stated policy purpose to protect the rights of employees.

Dr. Cormack discussed the District's newly adopted "Whistleblower Protection Policy" (GAEC) and newly revised "Employee Grievance and Complaint Procedures" (GAE/CB). Defendant's Exhibit 16; Defendant's Exhibit 19. Copies of these policies were entered into the record. Dr. Cormack testified that GAEC was adopted at the prompting of the Mississippi Department of Education, which had stated that it needed to provide protection to whistleblowing employees in order to meet the state's standards. Both policies provide a mechanism for complaining about issues in the school and assert that retaliation for using these mechanisms will not be tolerated.

On cross examination, Dr. Cormack admitted that both policies are limited to complaints within the school hierarchy, either to the supervisor or to the Office of the General Counsel. Dr. Cormack testified that neither policy countenances going to the media, the public, or outside law enforcement. C.R. 764.

In fact, GAE/CB states: "All complaints or grievances as defined above must be

presented to the employee's immediate supervisor." C.R. 763. The policy defines complaint and grievance broadly to include any "expression of dissatisfaction/concern with an employment-related issue" and "a written claim by an employee of an alleged violation and/or inconsistent application of a written District policy/standardized practices or federal/state law."[4] *Id*. On cross examination, Dr. Cormack was asked about the scope of the information covered by the confidentiality policy. He agreed that it applied broadly to anything pertaining to the school or the district (including, for example, a coworker gambling on a work computer) and that the consequences of revealing any of this information could be termination as stated in the policy. CR 754-761.

Dr. Cormack was also asked about the social media policy, and he agreed that it gave absolute discretion to the superintendent to decide what could be posted by an employee. C.R. 768-769 He was specifically asked if the policy would allow the superintendent to terminate an employee for posting political opinions on social media. Dr. Comack said that such postings could be a violation of the social media policy. C.R. 772-773.

12. Post-trial policy changes

After argument with the Court - at both hearing dates in this case, the first of which occurred without a court reporter present - in which the Court articulated some serious reservations about the constitutionality of the policies, *see, e.g.,* C.R. 861 et seq. JPS made amendments to some of the language at issue in GBA and GACC. No changes were made to the social media policy, GBAA. Counsel for JPS was nonetheless clear in maintaining that JPS

[4] In addition, GAEC explicitly prohibits a supervisor that receives a whistleblower report from "discuss[ing] the case with attorneys, the media, or anyone other than the Superintendent/Designee of the Jackson Public School District" and "should not report the case to an authorized law enforcement officer without first discussion of the case with the OGC."

continues to take the position that nothing in its prior policies was unconstitutional. As such, under JPS's position, it still has power to reinstate its former policies.

These amendments merged policy GACC ("Confidential information") into policy GBA ("Staff Ethics") and made some linguistic changes. The policy as amended eliminates explicit mention of "gossip," "the media," and speech not in "the best interest of the district," but the language continues to apply broadly. C.R. 443 et seq.

The policy instructs employees that any "criticism related to colleagues or the teaching environment should be made directly to the particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary." The policy still gives no recourse when the superintendent fails at "improving the situation," or when the superintendent is himself the problem.

Concerning the definition of confidential information, the definition is amended but remains broad: "Confidential information includes all private information related to District employees, scholars, and their families that an employee has gained access to through their employment. Also, all documents and/or information related to proprietary and/or pecuniary information or strategic plans of the District are strictly confidential." The amended policy also excludes from the definition of "confidential information" any "matters of non-exempt public records as defined by state law." The policy continues to require prior authorization by the superintendent or board of trustees for any thing that might "compromise" confidential information. It continues to state that "[T]he sharing of information should only serve to assist, rectify, or resolve a situation."

SUMMARY OF THE ARGUMENT

Trainings, instructions and policies which "direct[] teachers not [to] discuss school matters with anyone" are unconstitutional.[5] Requiring issues to be brought only to the principal, and forbidding "tak[ing] any school problems other places, or discuss[ing] it with others" is unconstitutional.[6] Requiring communications to "be expressly forwarded for approval to your chain-of-command" is unconstitutional.[7] Forbidding "making unfavorable comments on the operations and policies of the Department" is unconstitutional.[8]

In this case, the District has done all of the above. The administrators did this at new employee orientations, at yearly meetings in individual schools, in regular interactions in the bus yards, in direct phone calls from upper level administrators to front-line workers, in disciplinary meetings, and in explicitly written policies. None of JPS's witnesses disputed this. The consequences were also clear. A teacher could lose, not only her job, but also her license to teach if found in violation by the District.

The U.S. Supreme Court has held that such instructions and policies deterring speech are subject to heightened scrutiny because they pose "far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action." *US v. NTEU*, 513 U.S. 454 (1995).

JPS claims that JFT lacks standing. In so doing, JPS asks this Court to reverse the factual

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[5] *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1181-1184 (10th Cir. 2010).
[6] *Luethje v. Peavine School District of Adair County*, 872 F.2d 352 (10th Cir. 1989).
[7] *Moonin v. Tice*, 868 F. 3d 853 (9th Cir. 2017).
[8] *Liverman v. City of Petersburg*, 844 F. 3d 400, 407, 408 (4th Cir. 2016).

findings made at a bench trial by the judge - a high bar to clear. It cannot be done here, as there is testimony showing that the chilling effects of these unconstitutional actions directly harmed JFT specifically. They hamstrung what JFT could do to advocate for its members. And, of course, they also harmed the members themselves, since the JFT members were also JPS employees.

Finally, as a partial defense, JPS claims that part of the case was moot because some of the unconstitutional policies had been changed, and that it should be entitled to a presumption of "good faith" in doing so. But here, not only has JPS continued to claim its original policies were constitutional, it actually defied the trial court's injunction for months, risking a criminal contempt citation in order to continue its unlawful actions. In addition, the revisions fail to cure the issue fully, as they leave unconstitutional language in place and fail to address the continuing chilling effect caused by the many years of repeated unlawful trainings and instructions. The public interest would also be disserved by a finding of mootness.

Justice Dickinson heard the evidence and wrote a thoughtful and well-researched opinion finding that the Jackson Public School District had violated the free speech rights of JFT and its members, the employees of the District. This decision should be affirmed.

ARGUMENT

A. The facts found by Justice Dickinson are reviewed with deference.

The standard of review of a judgment from a bench trial is highly deferential. "'A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor,' and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. This Court will not disturb those findings unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *City of Jackson v. Perry*,

764 So. 2d 373, 376 ¶ 9 (Miss. 2000) (citations omitted). Questions of law are reviewed *de novo*.

B. JPS has violated the Mississippi Constitution, and the injunction was appropriate.

Constitutional injunctions are governed by a four-part test: 1) whether the law was violated, 2) whether irreparable harm will be suffered, 3) whether the threatened harm outweighs harm caused by the injunction, and 4) the public interest. *Sec'y of State of Miss. v. Gunn*, 75 So. 3d 1015, 1020 ¶ 14 (Miss. 2011).

1. JPS has violated the Mississippi Constitution.

The Mississippi Constitution states that "[t]he freedom of speech shall be held sacred." Miss. Const. art. 3, § 11. As this Court Court has repeatedly noted, the Mississippi Constitution "appears to be more protective of the individual's right to freedom of speech than does the First Amendment since [the Mississippi Constitution] makes it worthy of religious veneration." *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123, 127 (Miss. 1976); *see also Beavers v. City of Jackson*, 439 F.Supp.3d 824, 829 (Miss. 2020); *Gulf Pub. Co. Inc. v. Lee*, 434 So.2d 687, 696 (Miss. 1983). For this reason, although the First Amendment is useful for describing the "floor" of constitutional protections, it is improper to simply import all the federal limitations on that protection into the Mississippi Constitution.

Thus, for example, JPS's brief assumes that the Mississippi Constitution would empower this Court to engage in *Pickering* balancing. It assumes that *Garcetti*'s federal limitation on speech as a "private citizen" or on a matter of "public concern" is automatically imported into the Mississippi Constitution. These are unwarranted and dangerous assumptions, and this Court should not be drawn into treating this matter as though the Mississippi Constitution and First Amendment are coextensive. Where it is not necessary to reach the question, this Court should not assume or suggest that any of these limits apply under the Mississippi Constitution.

It is not necessary to do so here, because, as just noted, the "floor" of the First Amendment caselaw makes clear that - whether or not the Mississippi Constitution is more protective - it is at the very least apparent that these policies and practices are unconstitutional. This Court should explicitly note that it is not deciding whether any of these limits apply under the Mississippi Constitution, but is holding that, even assuming they did, JPS would still be in violation of the law.

For example, in *Barrett v. Thomas*, the Fifth Circuit examined policies that silenced speech by the employees of a Texas sheriff's department. *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981). In relevant part, those policies read as follows:

> Gossiping about affairs of the department, or the members of it, making unauthorized public statements, or the unauthorized revealing of confidential information of any kind, is prohibited. . . .
>
> No employee of this department will address any statement or remark to any member of the news media that is or could be of a controversial nature. All requests will be referred to the Sheriff even during my absence. . . .
>
> No member of this department will discuss any matters pertaining to policy or procedure of this department with any elected official or department head.

The Fifth Circuit held that these policies were unconstitutional because they "[swept] unnecessarily broadly and thereby invade[d] the area of protected freedom." *Id*. at 1198 (quoting *NAACP v. Alabama*, 377 U.S. 288 (1964)). The court further stated that the policies "explicitly [forbade] acts that departmental employees have a clear constitutional right to do." *Id*. at 1199.

Beyond the particular policies as well, the court noted that the department's actions in telling employees about the policies and in enforcing them also chilled free speech. *Id.* Similarly, in another case a school principal "told [employees] at a mandatory faculty meeting, in a very

serious and angry tone, they were not to speak to anyone about school matters and she would prefer for them not to meet together socially at all." This instruction was a violation of the free speech rights of the employees. *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1181-1184 (10th Cir. 2010).

JPS's policies and practices here are not meaningfully different from those taken by the sheriff's department in *Barrett* and the principal in *Brammer-Hoelter*. The policies JPS has adopted - and the trainings undertaken to enforce those policies - are universally recognized by the courts as violations of free speech.

"[The] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). The District's policy is unconstitutional under five doctrines, which will be discussed as follows: (A) it is government censorship of disfavored viewpoints subject to strict scrutiny; (B) it is a rule deterring public employee speech subject to exacting scrutiny; (C) it is overbroad and vague; (D) it is an unconstitutional restriction of the license to teach; and (E) it is a prior restraint.

(A) The government cannot ban "negative commentary to the media" as this is censorship of disfavored viewpoints.

In the present case, the policies forbid "negative commentary to the media, or others within the community." This is explicit censorship of disfavored viewpoints by the government. Such censorship violates perhaps the most fundamental free speech principle in our jurisprudence:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the

> government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828-89 (1995). This includes otherwise "unprotected" speech. The government still may not engage in viewpoint discrimination even within traditionally unprotected categories of speech such as "fighting words." *RAV v. St. Paul*, 505 U.S. 377, 381-86 (1992).[9] In *Schacht v. United States*, 398 U. S. 58 (1970), for example, the Court struck down a statute permitting actors to wear a military uniform in a theater or motion picture production only "if the portrayal does not tend to discredit that armed force." The Court noted that although a total prohibition would be valid, a prohibition sensitive to the viewpoint of speech could not stand. As another example, consider *Morgan v. Swanson*, 659 F. 3d 359 (5th Cir. 2011), in which the en banc Fifth Circuit held that it was viewpoint discrimination to prohibit elementary students from distributing religious literature. *Id*. at 401-404 (Elrod, J., speaking for the majority of the en banc court on this question).

In this case, the policy censors a particular viewpoint, forbidding "*negative* commentary to the media, or others within the community." The policy states that "any *criticism* . . . of any

[9] The District may attempt to justify its viewpoint discrimination by citing to *Pickering* and its progeny for the proposition that it has broader authority to restrict speech, *e.g.* on matters of private concern, because such speech by government employees is not protected. But as *RAV* and *Schact* make clear, viewpoint discrimination is different. Even otherwise entirely unprotected speech cannot be censored based on viewpoint. Thus, under this doctrine, there is no need to analyze whether the policies regulate speech of "public concern" or speech as a "private citizen." This is because the *Pickering* cases involved *ex post* retaliation by particular administrators, while this case involves explicit and systematic censorship of viewpoints by policy, more akin to *RAV* than *Pickering*. Thus, no balancing is required, and the policies "are presumptively invalid." *RAV v. St. Paul*, 505 U.S. 377, 382 (1992). To rule otherwise would give greater rights to prisoners than to teachers. *See Procunier v. Martinez*, 416 U. S. 396, 416 (1974) (striking down rule that allowed censorship of outgoing prison mail that "unduly complain" or "magnify grievances").

department of the school system" must "be made directly to the particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary." The clear implication is that the teachers are permitted to express their opinions publicly if they are not critical of the District.[10] This viewpoint discrimination is unconstitutional.

(B) The total ban on speech about "all information that pertains to the district" is unconstitutional under "exacting scrutiny."

Alternatively, the courts routinely apply "exacting scrutiny" to strike down even neutral rules which limit public employee speech.

i) The relevant standard is "exacting scrutiny."

JPS claims that these facial challenges are "disfavored," but they do not address the substantial caselaw that actually deals with free speech challenges to these kinds of actions. The Supreme Court has recently held that rules infringing government employee speech are subject to heightened or "exacting scrutiny" when facially attacked under the First Amendment. *Janus v. AFSCME*, 138 S. Ct. 2448, 2472 (2018).

The seminal case in this area is *US v. NTEU*, 513 U.S. 454 (1995). In *NTEU*, a union brought a facial challenge seeking to enjoin a rule that prohibited its government employee members from accepting honoraria. The rule did not ban speech; it only forbade compensation. Still, the Court struck down the rule. The Court made it clear that the government's burden in

[10] It should also be noted that this viewpoint discriminatory intent is evident in the other policies at issue as well. They state that it is "the obligation of all employees of the school district" to not "divulge information" when "that revelation is not in the best interest of the district." In its "confidentiality" policy, the government states that the policy is designed to prevent disclosure that "seriously injures the Jackson Public School District's (JPS) reputation."

justifying this kind of blanket rule impacting government employee speech was far higher than in a garden variety retaliation case.

> Unlike *Pickering* and its progeny, this case does not involve a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities. Rather, the Government asks us to apply *Pickering* to Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers. . . . The widespread impact of the honoraria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action.

NTEU, 513 U.S. at 466-68 (citations, quotations, and footnotes omitted, emphasis added). Thus, although a balancing of interests applies here, it is a far more exacting balancing than under *Pickering*, and "the Government's burden is greater." *Id.* The courts correctly read *NTEU* as substantially modifying the *Pickering* framework for analyzing these kinds of claims against broad rules.[11]

In *Schwartzwelder v. McNeilly*, 297 F.3d 228, 231-32, 235-36 (3rd Cir.2002), for example, then-Judge Alito held that *NTEU* was the correct framework for analyzing a police

[11] *Latino Officers Ass'n, N.Y., Inc. v. The City of New York*, 196 F.3d 458, 461 (2nd Cir.1999). *See also Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 749-50 (7th Cir.1999) (applying *NTEU* to police department policy barring discussion of intra-Departmental complaints); *Tucker v. State of Cal. Dep't of Educ*, 97 F.3d 1204, 1211 (9th Cir. 1996) (applying *NTEU* to workplace restrictions on religious advocacy); *Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir.1998) (applying *NTEU* test in employee challenge to agency policy which forbid employees from speaking to the media regarding agency activities without first obtaining permission from the agency's media relations department); *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1439 (D.C.Cir.1996) (*NTEU* test applicable to where a restraint on government employee's speech is accomplished through a generally applicable regulation); *Wolfe v. Barnhart*, 446 F. 3d 1096, 1105 (10th Cir. 2006) (noting that "the NTEU analysis applies to restrictions on employee speech that are imposed through such a generally applicable policy, rather than a post hoc case-by-case disciplinary process"); *Crue v. Aiken*, 370 F.3d 668, 678 (7th Cir.2004) (applying NTEU to university directive requiring faculty and students to obtain advance permission to contact prospective student athletes regarding school mascot).

department rule which required pre-clearance with the Chief of Police before giving opinion testimony in court on behalf of a criminal defendant: "The present case differs from the typical *Pickering/Connick* case in that Order 53-7 restricts employee speech before it occurs, rather than penalizing employee speech after the fact." For this reason the Court applied *NTEU* instead of *Pickering* balancing. Judge Alito upheld a preliminary injunction against the policies, finding them likely to be unconstitutional on their face. In so doing, he rejected an argument that the policies could be justified to "prevent the disclosure of confidential information" because the policies "are ill-suited to serve this end. The Order and Memo do not simply permit the Bureau to prohibit an employee from giving testimony that would reveal confidential information but rather sweep much more broadly." *Id.* at 239.

If there were any remaining doubts, in 2018 the Supreme Court laid them to rest in *Janus v. AFSCME*, 138 S. Ct. 2448, 2472 (2018). The *Janus* case rearticulated the *NTEU* test, and held that *Pickering* is inapplicable to "general rules" limiting employee speech:

> While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights.

(citations omitted). As the Court held, "[t]he end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis." *Id.*

ii. Government rules limiting employee speech are routinely held unconstitutional under this standard.

"Exacting scrutiny" is a high burden, and the courts routinely strike down rules which

limit government employee speech. For example, in the recent case of *Liverman v. City of Petersburg*, a police department had a social media policy which forbid "the dissemination of any information on social media 'that would tend to discredit or reflect unfavorably upon the [Department]' [including] '[n]egative comments on the internal operations of the Bureau' . . . or on the 'specific conduct of supervisors or peers.'" 844 F. 3d 400, 408 (4th Cir. 2016). The court correctly noted that this was "a virtual blanket prohibition on all speech critical of the government employer" and noted "the astonishing breadth of the social networking policy's language." *Id.* The policy was clearly unconstitutional.

Likewise, in *Moonin v. Tice*, the K9 chief sent an email stating that "all communication" by "line employees" with outside persons about the work to "be expressly forwarded for approval to your chain-of-command. Communication will be accomplished by the appropriate manager/commander if deemed appropriate. Any violation of this edict will be considered insubordination and will be dealt with appropriately." 868 F. 3d 853, 859 (9th Cir. 2017). The rule was unconstitutional because "[t]he troopers' freedom to offer their informed opinions about the direction of the K9 program on their own time, as concerned citizens, is a prerogative that the First Amendment protects but that Tice's edict forbids." *Id.* at 864.

The same concerns apply to public schools. In *Brammer-Hoelter v. Twin Peaks Charter Academy*, the principal of the school "directed teachers not [to] discuss school matters with anyone." 602 F.3d 1175, 1181-1184 (10th Cir. 2010). This instruction was held unconstitutional. Likewise, in *Luethje v. Peavine School District of Adair County*, the School Board made a policy that instructed cafeteria workers "[i]f you have any problems, consult [the principal]. Don't take any school problems other places, or discuss it [sic] with others." 872 F.2d 352 (10th Cir. 1989).

This policy was also held unconstitutional.

As these examples show, "exacting scrutiny" is a high burden in practice, and the government cannot maintain these kinds of broad rules restricting employee speech.

iii. The District's rules ban protected speech

Under this standard, the District's rules clearly ban protected speech. By its plain terms, it bans speech by employees about "[a]ll information that pertains to the district, its employees, its students, its operations, and/or related matters." It prohibits "negative commentary to the media, or others within the community." The policy states that it is "the obligation of all employees of the school district" to not "divulge information" when "that revelation is not in the best interest of the district." It states that the district's employee "ethics" and "standards" require that "any criticism . . . of any department of the school system" must "be made directly to the particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary." Dr. Cormick admitted very plainly that the social media policy would impact political speech on social media.

These policies therefore forbid, for example: "sending a letter to a local newspaper . . . that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools;" *Pickering*, 391 U.S. at 564, or "testify[ing] before committees of the . . . legislature . . . [having] public disagreements with the policies of the [Board] . . . [making] a newspaper advertisement . . . highly critical of the [Board]." *Perry v. Sindermann,* 408 U.S. 593 (1972). These are matters of public concern.

It should also be noted that this case involves union speech, and the Supreme Court held in 2018 that "[w]hen a large number of employees speak through their union, the category of

speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk." *Janus v. AFSCME*, *supra* at 2473.

And as noted in *NTEU*, this total ban not only infringes on the rights of employees, it also "imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne." 466 U.S. at 470. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill,* 511 U.S. 661, 674 (1994) (plurality opinion). This burden must also be considered.

In an effort to find some supportive caselaw, the District is forced to rely on *Sabatini v. Las Vegas Metro Police Dept.*, 369 F. Supp. 3d 1066, 1095-98 (D. Nev. 2019), a district court decision which was later reversed by the Ninth Circuit as adopting too conservative an approach to *Pickering* as applied. *Reversed sub nom Moser v. Las Vegas Metro. Police Dept.*, 984 F.3d 900 (9th Cir. 2021) (the facial challenge was not raised on appeal, but is also suspect). The *Sabatini* case distinguished *Liverman* on the basis that the social media policy in *Sabatini* outlined the protected rights to free speech that employees had, and explicitly excluded them from the application of the policy, while *Liverman* did not.

This case is far more like *Liverman* than *Sabatini*. Here, there is absolutely no indication that any social media post is protected. There is nothing - nothing anywhere - in JPS policy which states that employees are "free to express themselves as private citizens on matters of public concern" as in the *Sabatini* policy. Here there are no explicit standards like in *Sabatini*

concerning what, exactly, would impair relations with the public or within the department. JPS claims that the language "might result in a disruption in the classroom" in the policy somehow "tracks federal law," but this phrase appears nowhere in the cases cited by JPS.

In short, the caselaw is quite clear that policies and practices like those here are routinely struck down by the Courts as infringing on protected speech.

iv. The District lacks a compelling justification

Concerning the government's justification, the *NTEU* "exacting scrutiny" test is demanding. It requires "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.* (emphasis added, citations omitted). The government "must do more than simply posit the existence of the disease sought to be cured. . . . It 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.* at 475 (internal quotation marks omitted). The trial record is absolutely devoid of any testimony which could meet this standard. And the reality is that the primary impact of the speech banned by the District would be positive. Critical speech would enlighten public debate, prevent corruption, deter harmful misconduct, and generate support for much needed reforms that would improve the schools.

For these reasons, the rules are unconstitutional under "exacting scrutiny."

(C) The policies are unconstitutionally overbroad and vague.

In addition and alternatively, the policies are unconstitutionally vague and overbroad. The overbreadth doctrine is used to invalidate rules which encompass both protected and unprotected

speech, where they ”[encompass] a substantial number of unconstitutional applications judged in relation to the statute's plainly legitimate sweep.” *Seals v. McBee*, 898 F. 3d 587, 593 (5th Cir. 2018) (quotations and citations omitted); *US v. Stevens*, 559 U.S. 460 (2010). In *Seals*, for example, a statute prohibiting “threats” to a police officer was found unconstitutionally overbroad. Although “true threats” of bodily harm were not constitutionally protected, the statutory terms also encompassed protected threats such as the threat to engage in litigation or boycotts, and was therefore unconstitutionally overbroad.

In this case, likewise, it is clear that the policies ”encompasses a substantial number of unconstitutional applications judged in relation to the statute's plainly legitimate sweep.” *Id.* It appears likely that the District will defend its “Confidentiality Policy” by referring to federal laws such as FERPA which validly protect student privacy in their grades and other personal student information. They may also refer to the protection of information under the attorney-client privilege. But it would be a simple matter to craft a policy explicitly limited to these legitimate interests.[12] The policy here is far broader. The District policy by its plain terms bans speech by employees about “[a]ll information that pertains to the district, its employees, its students, its operations, and/or related matters.” It is hard to be broader than “all information.” As already noted, this would encompass every kind of speech ever found protected by any court of law. Likewise, the social media policy would encompass anything which the Superintentent - in his discretion - thinks “might” disrupt the classroom. As Dr. Cormack admitted in testimony,

[12] The District may attempt to articulate a very limited interpretation of these policies and ask this Court to defer. But the Supreme Court has been quite clear that these efforts must be rejected: “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *U.S. v. Stevens*, *supra*. And “a limiting construction” can be used “only if it is readily susceptible to such a construction.” *Id.* Otherwise, there would be no “incentive to draft a narrowly tailored law in the first place.” *Id.*

this likely includes core political opinions protected by the Constitution. The prohibition could also include, for example, the prayers shared on social media that might offend the religious sensibilities of atheist students. *See Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022).

In passing, JPS offers a remarkably twisted reading of *Garcetti v. Ceballos* which would interpret it to mean that "any speech made in pursuance of that goal [of improving the schools] would be unprotected" because employees have a "duty" to do it. Suffice to say this is directly contrary to the facts of virtually every free speech case, including *Pickering* itself, in which the employee's speech was specifically to improve the administration of the schools.

In sum, these policies encompass "a substantial number of unconstitutional applications judged in relation to the statute's plainly legitimate sweep." *Id.* Thus, the policy is unconstitutionally vague and overbroad.

(D) The policies are unconstitutional restrictions on licensure.

Alternatively and in addition, the Court must consider the First Amendment implications of professional licensure systems that restrict speech. Under the Mississippi Department of Education's state ethics rules, Standard 9, it is unethical for a teacher to violate "local school board policies related to confidentiality" and "confidentiality agreements required by . . . local policy." Exhibit 7. Violations of these rules can result in temporary or permanent loss of a license to teach. *See* Miss. Code Sec. 37-3-2 (4) & (11).

Thus, in addition to losing her job, a teacher can lose her license to teach if she is found to have violated the policies at issue in this case. For this reason, the policies cannot be analyzed solely as government employment rules, but must also be analyzed according to a separate body of First Amendment jurisprudence applying heightened scrutiny to professional licensure rules

that restrict free speech. *See, e.g.*, *MS Com'n on Judicial Perf. v. Wilkerson*, 876 So. 2d 1006 (Miss. 2004) (canon censoring Judge on pain of removal is a prior restraint subject to heightened scrutiny under the US Constitution); *see also Edenfield v. Fane*, 507 U.S. 761, 775 (1993) (striking down a no-solicitation ethics rule concerning accountants).

Under this standard, as discussed *supra*, the policies at issue here are not narrowly tailored to serve a compelling government interest, and as such are unconstitutional as a restriction on the speech of licensed professionals.

(E) The policy requiring prior approval is an unconstitutional prior restraint on speech.

Finally and alternatively, the rules requiring pre-approval of speech are also an unconstitutional prior restraint. "[T]he classic type of prior restraint is where the government requires a license or permit in order for speech to occur." Chemerinsky*, infra*, at 932 (discussing *Lovell v. City of Griffin*, 303 U.S. 444 (1938)). Such a rule is "invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Lovell*, 303 U.S. at 451.[13] That is precisely what we have here: a rule that teacher speech must be licensed *i.e.* pre-approved by government. *See, e.g.*, *Brooks v. Auburn Univ.*, 412 F. 2d 1171, 1172-73 (5th Cir. 1969). In *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273 (5th Cir.2003), the Fifth Circuit held it was

[13] To outlaw such schemes - where an administrative rule requires speech to be submitted to government censors before publication - was a core purpose for the First Amendment. *See generally* Chemerinsky, "Constitutional Law: Principles & Policies", at 892-93, 918 (2d Ed. 2002) (discussing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) and 4 William Blackstone, Commentaries on the Law of England, 151-152 (1769)). "Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights . . . the Supreme Court has routinely held that prior restraints on protected speech are presumed to be constitutionally invalid." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556, 559 (1976).

unconstitutional to require pre-approval from school officials before a petition could be circulated. To be clear, in *Chiu* this was not an injunction or court order. This was merely a local school board policy enforced by the principal telling someone that he was "not allowed" to distribute his material. The Fifth Circuit held that this was a prior restraint, because the key point was still present: prior approval of speech was required by the government. As in *Chiu*, the present case involves a prior restraint and should be subject to strict scrutiny.

The policy here grants unfettered discretion to district employees to "approve" speech from favored viewpoints. A "facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 US 750, 759 (1988). Here, the policy at issue requires that all requests by employees to engage in speech be pre-cleared with the central office of the District. This creates a clear danger of viewpoint discrimination.

2. JFT will suffer irreparable harm without injunctive relief.

"'When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Opulent Life Church v. City of Holly Springs*, 697 F. 3d 279, 295 (5th Cir. 2021) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995))). *See also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Speech-restricting actions like this cause irreparable harm in light of the "chilling effect" they have on the exercise of speech rights. *E.g. Cuivello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) ("An ordinance need not

be enforced against a speaker to pose a threat to his free speech rights. [Plaintiff] continues to restrain his own speech under the threat that Chapter 8.56 will be enforced against him. This chill on his free speech rights . . . constitutes irreparable harm." (citations omitted)).

JPS argues JFT was not irreparably harmed. But as discussed below concerning standing, the testimony and facts found by the Judge establish that JFT's very *raison d'etre* was threatened by these rules. A professional association is nothing if the professionals that comprise the organization are forbidden to talk about their work. Employees refused to join JFT - employees refused even to fill out surveys for JFT - because of these policies.

There is no adequate remedy at law. After all, the point of a "chilling effect" is that it stops people from speaking up and participating with JFT. If an employee is too scared of these unconstitutional policies to speak out, he will certainly be too scared to bring an "as applied" lawsuit. The same argument made by JPS would prevent churches from suing when a law bans membership in the church - until that law is actually enforced. This is not how things work: the chilling effect caused by the existence of the unconstitutional law is itself a cognizable irreparable harm.

3. JPS will suffer no harm from an injunction.

JPS will suffer no harm at all if this motion is granted. In the policies, JPS lists concerns such as reputational injury, "idle gossip," "negative commentary to the media," and "revelation [that] is not in the best interest of the district." These are not cognizable harms under the Constitution: the government is supposed to be subject to criticism, and this is not a legitimate basis to avoid an injunction. The injunction granted by the Court specifically permits the district to continue to comply with and enforce FERPA and other privacy statutes, and so no harm to

students or the district is contemplated.

3. The public interest is served by an injunction.

Perhaps most importantly, JPS's policies substantially harm the public interest. It should go without saying that free speech is an important public interest. As one court has explained, "free speech rights are included among those recognized as important rights affecting the public interest." *Family Planning Specialists Medical Group, Inc. v. Powers*, 39 Cal. App. 4th 1561, 1568 (Cal. Ct. App. 1995). *See also Walsh v. Ward*, 991 F.2d 1344, 1346 (7th Cir. 1993); *New Era Publs. Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 582 (2d Cir. 1989); *Thomas v. Varnado,* No. 20-2425, 2020 U.S. Dist. LEXIS 187818 at *14 (E.D. La. Oct. 9, 2020)*; State v. Jackson*, 224 Ore. 337 (Ore. 1960). Moreover, beyond this general interest in free speech, the public also has a specific interest in public education. *E.g. Moore v. Tangipahoa Parish Sch. Bd.*, 507 Fed.Appx. 389, 412 (5th Cir. 2013); *Crosson v. Carrollton City Sch. Dist.*, 478 F.Supp.3d 1255, 1266 (N.D. Ga. May 28, 2020). As such, there is a great public interest in free speech around public education issues.

It is worth restating that, in *NTEU*, the Supreme Court of the United States stated that policies like JPS's "impose[] a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *NTEU*, 466 U.S. at 470. This harm to the public interest is especially profound in the realm of public education. "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how [schools should be operated]. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering v. Board of Education*, 391 U.S. 563, 572 (1968). Recently, teachers have used this special knowledge and insight to call public

attention to issues from teacher pay to COVID-19 protections. Alexandra Melnick, *My husband and I are Mississippi teachers: Pay so low we can't afford to start a family*, CLARION-LEDGER, Feb. 25, 2021; Rebecca Martinson, *I Won't Return to the Classroom, and You Shouldn't Ask Me To*, N.Y. TIMES, July 18, 2020. These vital perspectives are exactly those that JPS silences and denies to the public.

As such, the public interest is gravely threatened by JPS's policies. By closing the mouths of Jackson's teachers and their organizational advocate, JPS prevents the people of Jackson from having the information they need to fully understand their public education system or meaningfully call for its improvement. Striking down these policies would remedy this situation and substantially further the public interest in freedom of speech.

B. JFT has standing

The court correctly found facts demonstrating that JFT has standing in this case, both on its own behalf and on behalf of its members. This Court must defer to the factual findings which underlie this conclusion. As a membership organization composed largely of JPS employees and specifically formed to speak out about issues at JPS, when those employees are silenced the threat to JFT is existential.

1. The legal test for standing in this case is quite liberal

This Court's standing jurisprudence has recently become somewhat unsettled.[14] JFT's position is that the courts of this state can and should continue to hear constitutional challenges

[14] On May 6, 2021, this Court applied the "colorable interest" test of standing. *Liberty Mut. Ins. v. Miss. Transp. Comm'n*, 317 So. 3d 937, 941 ¶8 n.3 (Miss. 2021). Then on May 14, 2021, the Court suggested that it had abandoned that test in 2020 - at least as applied to legislator standing to challenge executive action. *Butler v. Watson* 338 So. 3d 599, 605 ¶ 13 (Miss. 2021)(citing *Reeves v. Gunn*, 307 So. 3d 436 at 438-439 ¶ 11 (Miss. 2020)). Adding to this confusion, "different standing requirements are accorded to different areas of the law." *Id.*

brought by associations that have a "colorable interest in the subject matter." Although legislator standing may pose separation of powers problems as discussed in *Reeves v. Gunn*, no such problems have been created by the longstanding "colorable interest" test as applied to, for example pro-life groups, industry associations, or professional associations like JFT.

In addition, this Court has continued to recognize that standing varies based on "different areas of law" *Butler*, *infra* and that it is "more permissive in granting standing to parties who seek review of governmental actions." *City of Jackson v. Greene*, 869 So. 2d 1020, 1023 (¶11) (Miss. 2004). In this area, the test is "quite liberal." *Id.* It is also liberal in free speech cases because speech injuries and chilling effects are inchoate and difficult to detect. There is "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). *See also Eisenstadt v. Baird*, 405 U.S. 438, 445 n. 5 (1972) ("Indeed, in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech."); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 300-01 (1979) (finding standing because the threshold issue, whether the challengers' activity was protected as free speech, was justiciable).

However, even assuming a more restricted test like the "adverse effect" test advocated by JPS here, the facts found by the trial court leave no room to doubt that JFT has standing.

2. JFT has standing on its own behalf

Free speech standing cases recognize that both the right to speak and the right to gather

information for speech can create standing. Thus, media organizations have standing when their informants are silenced because this also silences the media. *Miss. Pub. Corp. v. Coleman*, 515 So. 2d 1163, 1175 (Miss. 1987). It works the same way for government employee unions, but with a still more heightened interest: "When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk." *Janus v. AFSCME*, *supra* at 2473.

As the testimony established - and as the trial court correctly found - JFT is organized specifically for the purpose of engaging in free speech activities advocating for improvements at JPS. As an advocacy organization deeply concerned with JPS, policies prohibiting JPS employees from providing information to JFT harm JFT in a special way.

The testimony of Ms. Anderson, Mr. Radican and Dr. Stout all show this harm. Ms. Anderson testified that part of JPS's purpose in silencing employees was to prevent them from talking to JFT, and that JPS engaged in surveillance and retaliation specifically to harm JFT. Dr. Stout and Mr. Radican both testified to their first hand observations of employees frightened to even fill out a JFT survey for fear of JPS, let alone join.

JPS argues that, because the public is also harmed when JPS silences its employees, there cannot be any different effect on JFT. There are three problems with this. First, it is analytically wrong. Anyone who can demonstrate that they were deprived of specific information because of this policy, information they wanted or needed, can establish a constitutional harm and standing.

Second, it neglects that JFT acts through its members, and restrictions on these members speaking out on issues in the school thus directly impact JFT. This was illustrated by the testimony of Dr. Stout, where she discussed her role as a spokesperson on the JFT school safety

campaign while she was working for JPS. Actions and policies which chill this kind of speech harm JFT itself. Thus, by both restricting what speech JFT can hear from JPS employees, and by restricting what speech JFT can make through its member JPS employees, JPS has harmed JFT. To be clear, this is not "associational" standing, this is a direct restriction on what JFT's agents can do on JFT's behalf, and thus what JFT itself can do.

Third, general members of the public have many purposes in life, only one of which may be to advocate for better schools. The harm to JFT is different. It strikes at the very fundamental *raison d'etre* of JFT.

3. JFT also has associational standing on behalf of its members

JFT also has associational standing on behalf of its members who are employed by JPS. For associational standing in Mississippi, there are three elements: "(1) its members would otherwise have standing to sue in their own right, (2) the interest it seeks are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Miss. Man. Housing Ass'n v. Bd. of Alderman of City of Canton*, 870 So.2d 1189, 1192 (Miss. 2004).

The members here are clearly suffering a constitutional harm which grants them standing. Speech-restricting actions like this cause irreparable harm in light of the "chilling effect" they have on the exercise of speech rights. *E.g. Cuivello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019) ("An ordinance need not be enforced against a speaker to pose a threat to his free speech rights."). And the evidence at trial demonstrates that JPS has in fact chilled protected speech. Mr. Gunter, Ms. Anderson and Dr. Stout all testified to the chilling effect of JPS's policies, trainings, and disciplinary actions in response to their speech.

On the second element, this is germane to JFT's core purpose as a public employee labor union, which is to facilitate "a large number of employees [to] speak through their union" about issues in the workplace. *Cf. Janus v. AFSCME*, 138 S. Ct. 2448, 2473 (2018). To be clear, the Court found as a matter of established fact on the record that this was JFT's purpose.

As for the third element, the key question is whether there is some reason the individuals would need to participate as parties themselves. They do not. The policies, trainings and other actions of the district can be challenged without bringing individual employees into the case as party plaintiffs. "[W]hen an association seeks only prospective relief and raises only issues of law, it need not prove the individual circumstances of its members to obtain relief." *City of Jackson v. Allen*, 242 So.3d 8, 29 (Miss. 2018). JPS challenges this statement, noting that damages were also sought. But those were nominal damages - i.e., $1 - and do not require any evidence as to the amount sought or owing.[15] Thus, this does not change the analysis for standing purposes.

JPS contends that there is no evidence that any current JPS employee is a member of JFT, and points out that there was no testimony by a current employee, and that no current employee members were named by name. JPS ignores the role of circumstantial evidence in proving facts. Here there is ample evidence that, in fact, most JFT members are employees of JPS.

The testimony of Dr. Akemi Stout was clear that JFT does have current employees as members of JPS. Indeed, JPS's own witness, Dr. Nalls, testified that it was expected and routine for a new JPS employee to sign up with JFT, and that JFT had made numerous school visits and new employee orientation visits specifically to sign up current employees. By itself, Dr. Nalls'

[15] Punitive damages were mentioned in passing in the complaint but were not sought because they are not available.

testimony would be sufficient circumstantial evidence that JFT represents current JPS employees to establish it by a preponderance of the evidence. Likewise, Mr. Radican testified to his school visits in which he signed up JPS employees to join JFT, and Dr. Cormack testified to his ongoing relationship with Dr. Stout whereby they resolved particular JFT members' grievances with JPS as employees.

It also bears noting that in this case JPS has policies threatening to fire employees for speaking in public about anything happening in the school. By the plain terms of these policies, even testifying in the case is a fireable offense. JFT's members have a right to anonymous free association, including not revealing their identity in this litigation. See, e.g., *Hastings v. North East Ind. School Dist.*, 615 F. 2d 628 (5th Cir. 1980) (holding that union cannot be forced to disclose the identity of members, even in a suit brought by the union); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (civil rights organization cannot be compelled to disclose membership to a hostile state). Specific names are not required to proceed to prove that JPS employees are members of JFT.

Given this record - and the great deference owed to the finder of fact - there is more than adequate evidence that JFT is harmed in a special way when JPS employees are silenced. JFT has standing.

C. The case was not moot.

Finally, the District claims that part of the case was moot because it made partial changes to some of its policies. As Professor Jackson put it in his eminent treatise on the topic, "[t]he Court has recognized that Mississippi's mootness doctrine is more relaxed than that enforced in the federal courts. As before, one reason for this is that Mississippi does not have a Cases or

Controversies clause, as does the Federal Constitution." Jeffrey Jackson, 1 Mississippi Civil Procedure, § 1:26 (West 2009) (discussing *Activities Ass'n, Inc. v. Coleman*, 631 So.2d 768 (Miss. 1994) and related cases).

JPS's mootness argument is mistaken for many reasons. First, partial compliance never moots a case, and the changes made here still leave grave constitutional violations unremedied. Second, the District's actions in this case do not entitle it to any assumption of "good faith" in its changes, and they could (and likely will) be changed again if the threat of injunction is removed. Third, the public interest requires a decision in this matter.

1. The partial changes did not moot the case

The changes made here were insufficient to moot the case. This is so for two reasons. First, where even a "partial remedy" is available, the case is not moot. *Church of Scientology of Cal. v. United States*, 506 US 9, 13 (1992). Here, it is not just policy but also practice which must be enjoined and cured. JPS had given countless unconstitutional trainings to its employees, including trainings that went beyond the policies to forbid additional protected speech. Merely changing the policies would not undo that. For this reason, JFT sought - and the Court ordered - that JPS be required to give notice to all employees that the policies were no longer in effect. JFT also sought - and the Court ordered - an injunction prohibiting JPS from conducting additional trainings or instructions like those described by Ms. Taylor, Mr. Gunter, Mr. Radican and Ms. Anderson. Thus, regardless of the changes made, the constitutional question was not moot since some relief remained to be obtained.

Second, the changes did not, in fact, cure the constitutional defects with the policies. JPS failed to take any action to repair its Social Networking Websites or Professional Organizations

policies. The amendments to the Staff Ethics Policy do not make that document constitutional. Using almost unchanged language, the amended policy still states that "[c]onstructive criticism related to colleagues or the teaching environment should be made directly to the school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary." Like the old policy, this policy discriminates based on viewpoint by implicitly requiring that all criticism be "constructive." This policy also still threatens employees who might seek to speak to their fellow citizens, the media, or their public officials about issues "related to colleagues" or the "teaching environment"—overbroad and/or vague terms which encompass a broad swath of protected speech about everything from civil rights violations to public health and safety concerns. The revisions to the ethics policy do not fix the key problem here. Defendant also did not actually eliminate the confidentiality policy. It has instead simply moved the confidentiality policy (in amended form) into the Staff Ethics policy; Section III(8) of the revised policy incorporates much of the former Confidential Information Policy. Like the former Confidential Information Policy, the new Staff Ethics Policy prohibits sharing "confidential" information without express approval by Defendant. Like the former policy, this policy uses an overbroad and/or vague definition of "confidential." Specifically, Defendant now says:

> Confidential information includes all private information related to District employees, scholars, and their families that an employee has gained access to through their employment, including, but not limited to, scholar academic and disciplinary records; health, medical, and personnel information; family status/income, and assessment/testing results. Also, all documents and/or information related to proprietary and/or pecuniary information or strategic plans of the District are strictly confidential.

This is similar to the former language in the relevant respects. Like the former language, this

definition encompasses a number of matters of public concern. A bus driver's story of sexual harassment by her supervisor could be said to contain "private information related to [a] District employee." Information about public safety concerns could be said to be "private information related to District . . . scholars." Concerns about school closings or curriculum changes could easily be characterized as violating the "confidentiality" of Defendant's "strategic plans." Moreover, like the former policy, the new policy calls for prior authorization with its edict that employees are not to "divulge confidential information . . . except as otherwise allowed under the Employee Handbook or required by law." Apparently, Defendant's employees are still not permitted to engage in voluntary free speech activities. And, like the former policy, the new policy engages in viewpoint discrimination by insisting that "[t]he sharing of information should only serve to assist, rectify, or resolve a situation." The policy does not allow employees to use their knowledge and insight to criticize leadership in public.

2. JPS's actions do not meet the requirements of "voluntary cessation" doctrine.

Justice Dickinson held that the case was not moot because JPS introduced no evidence that its changes would be reliable and permanent. Under the "voluntary cessation" doctrine, "[i]t is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendant[] would be free to return to [its] old ways." *Allee v. Medrano*, 416 U.S. 802, 811 (1974) (internal quotations and citations omitted) (emphasis added). This presumption that the case is not moot can only be overcome if the Defendant provides "absolutely clear" proof to satisfy the "heavy burden of persua[ding]" the Court that Defendant will not repeat its unconstitutional actions. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012,

2019 n.1 (2017). It is undisputed that JPS introduced absolutely no evidence whatsoever to meet this burden. There was not even an affidavit promising not to change the policies back.

JPS claims this doctrine does not apply for two reasons. First, it claims that it is inapplicable to "legislative" changes. The problem is that the case which created the "voluntary cessation" doctrine did, in fact, apply it to legislative changes. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). In that case, the unconstitutional rule was enshrined in a city ordinance. In that case, as in this one, the defendant government entity legislatively changed its unconstitutional ordinance after it was sued and while it was awaiting a court ruling. *Id*. In light of this change, the Court had to decide whether the case was moot. *Id*. The Court unanimously decided that the case was not moot. *Id*. In its opinion, the Court wrote that it was "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id*. at 289. In addition, this is not really a "legislative" issue. Employment policies are executive in nature and are frequently changed. Regardless, the case involves not just the policies but the practices as well, including the constant and pervasive unconstitutional trainings and instructions given to employees.

Second, JPS wraps itself in the mantle of governmental propriety, claiming that its "public spiritedness" should be presumed absent evidence otherwise. This may be appropriate for cases where an official inadvertently violated the constitution and corrected it as soon as it came to his attention. No so here. The District was aware of the overwhelming caselaw against it no later than August 2021, and did not make changes for over six months.[16] There is ample

[16] Mr. Gunter testified that he told JPS this was unconstitutional and filed a lawsuit about it some years ago. Although the suit was dismissed without prejudice for procedural reasons, the issue of these unconstitutional policies was brought to JPS's attention and it did not stop.

evidence that JPS should not simply be trusted to have changed its ways. Most damningly, the record demonstrates that JPS had its motion for stay denied and still openly defied the injunction entered here, committing contempt of court for months and not ceasing until a Rule 81 summons for contempt was issued.

That alone should be enough to dampen any presumption of "public spiritedness" here.

3. Public interest doctrine.

Unlike federal courts, the Mississippi courts "will review an otherwise moot issue if the question concerns a matter of such nature that it would be distinctly detrimental to the public interest that there should be a failure by the dismissal to declare and enforce a rule for future conduct." *Hyundai Motor America v. Hutton*, No. 2015-CA-01013-SCT (Miss. Sept. 16, 2021).

While the question of whether a case is substantial to the public interest is an unclear one, the Mississippi Supreme Court has offered guidance through its application of this rule. In *Strong v. Bostick*, 420 So.2d 1356 (Miss. 1982), the Court considered the public-interest exception in the case of a regulation concerning deer hunting with dogs. Deciding to apply the exception, the Court found the idea "[t]hat the questions involved in [that] case [were] of great public interest [could not] be disputed." *Id*. at 1358. Identifying the "great public interest," the *Strong* Court explained that "[t]he parties and the public [were] entitled to know whether or not the [defendant had] the authority to promulgate and enforce regulations such as the ones [then] before the Court." *Id*. The cases holding that there was no public interest typically involved cases impacting only narrow individual interests, such as "whether or not an interim conservator illegally revoked valid student transfers" in a school district. *Fails v. Jefferson Davis Cnty. Pub. Sch.*, 95 So. 3d 1223 (Miss. 2012). In *Fails,* the plaintiffs were individuals—not an organization with ongoing

dealings with the district—and the plaintiffs admitted that their constitutional problems had been cured. In *Fails*, fundamental, broadly applicable constitutional questions of government power were not so directly implicated. That is not the case here.

Like *Strong*, this case concerns, in part, whether the government can promulgate and enforce policies. Here, as in *Strong*, citizens of Mississippi are seeking to learn the bounds of governmental authority. In *Strong*, those citizens were those who provided "petitions and letters for or against hunting deer with dogs." *Strong*, 420 So.2d at 1358. Here, those citizens are some of the thousands of Mississippians whose speech is restricted by Defendant. And, here, as in *Strong*, the parties and the public are "entitled to know" whether Defendant can use policies and practices like those at issue to silence speech. Under *Strong*, this Court retains its authority to protect the public interest and to "declare and enforce a rule for future conduct." *Id*. at 1359. Again, this motion is not even technically moot; but, even if it was, the public-interest exception would still allow this Court to rule on the policies and practices at issue.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date signed above the foregoing was electronically filed and served on all counsel of record. I also served a copy by mail to:

Justice Jess Dickinson
P.O. Box 327
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/s/Joel Dillard