**IN THE SUPREME COURT OF MISSISSIPPI**
**NO. 2022-CA-00464**

**JACKSON PUBLIC SCHOOL DISTRICT** **APPELLANT**

**vs.**

**JACKSON FEDERATION OF TEACHERS AND PSRPS** **APPELLEE**

**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI**
**CIVIL ACTION NO. 25CI1:21-CV-00152**

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# BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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## CERTIFICATE OF INTERESTED PARTIES

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 this Court may evaluate possible disqualification or recusal.

1. Jackson Public School District, Defendant-Appellant;
2. LaToya C. Merritt, Nicholas F. Morisani, Mallory K. Bland, Phelps Dunbar LLP, Attorneys for Defendant-Appellant;
3. Larrissa Moore, General Counsel for Defendant-Appellant;
4. Jackson Federation of Teachers and PSRPS, Plaintiff-Appellee;
5. Joel F. Dillard and Dillard Law Firm, Attorney for Plaintiff-Appellee;
6. Honorable Tomie Green, Hinds County Circuit Court Judge; and
7. Honorable Judge Jess Dickinson, Special Circuit Court Judge.

SO CERTIFIED, this the 5th day of December, 2022.

*/s/ LaToya C. Merritt*
LaToya C. Merritt
Attorney for Appellant Jackson Public School District

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4. Whether Jackson Federation of Teachers satisfied its burden for obtaining a permanent injunction?

## STATEMENT OF ASSIGNMENT

The Mississippi Supreme Court should retain this case under Miss. R. App. P. 16(d)(2) and (3). This case involves "fundamental and urgent issues of broad public importance requiring . . . ultimate determination by the Supreme Court." These include issues regarding associational standing in general, and specifically of labor unions to challenge a public entity's employment policies. It also involves unresolved issues regarding when issues are mooted by a public entity's policy change. Finally, under Rule 16(d)(3), this case involves substantial constitutional issues regarding school district employment policies, one of which was recommended by the Mississippi School Boards Association and has been adopted by many other school districts. Jackson Public School District therefore requests assignment to the Mississippi Supreme Court.

## STATEMENT OF THE CASE

Jackson Federation of Teachers ("JFT") advertises itself as a teacher's union that "represents all member teachers, paraprofessionals, and school related personnel in the Jackson Public School District." C.P.9. JFT filed suit against the Jackson Public School District ("JPS" or "the District") on March 19, 2021, challenging six of JPS' employment policies both facially and as-applied. *See generally* C.P.9-81. JFT's complaint sought both injunctive relief and monetary damages. C.P.18-19.

On May 27, 2021, JPS filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6), asserting that JFT lacked standing for the claims it brought and the relief it sought. C.P.86-95. That motion was fully briefed on August 2, 2021. C.P.120. A hearing was set for August 17, 2021 on JPS' motion. C.P.129.

Four days before the hearing could take place and nearly five months after the complaint was filed, JFT filed a motion for preliminary injunction. C.P.132-223. The hearing was reset for August 26, 2021. C.P.225. But the hearing ultimately did not go forward in August or anytime in 2021.

On January 6, 2022, the trial court entered a notice of hearing setting the hearing on both pending motions for February 16, 2022. C.P.4 (Doc. No. 28). The notice provided that there was to be a maximum of two witnesses per party who could provide testimony, and that each side was limited to a maximum of 15

minutes per witness with five minutes cross examination. C.P.4. On February 8, 2022, the case was reassigned from Judge Tomie Green to Special Judge Jess Dickinson. C.P.257.

A hearing on the motions was held over two separate days: February 16, 2022 and March 23, 2022. C.P.563, 650. JFT presented five witnesses, while JPS, adhering to the initial order, presented two. C.P.560. At the close of the March 23, 2022 hearing, Judge Dickinson requested supplemental briefing on both pending motions. JPS filed its supplemental brief on April 5, 2022, C.P.260-75, and JFT submitted its supplemental brief by email. On April 29, 2022, without permission from the court, JFT filed what amounts to a sur-reply. C.P.309-16.

After the hearing on February 16, 2022, JPS began to revise its Confidential Information and Staff Ethics Policies. As a public entity, JPS has a process for revising policies which includes several steps, including a period for public comment, before the Board of Trustees ultimately votes on the revisions. *See* C.P.705-08, 735, 743-45. Judge Dickinson was made aware at the March 23, 2022 hearing that these policies were being revised and were waiting on final vote of the Board, although most of that conversation was off the record. C.P.777-78. On April 5, 2022, the Board voted to delete the Confidential Information Policy in its entirety and revised each of the enjoined portions of the Staff Ethics Policy, and JPS filed notice on the record of the changes. C.P.294-308.

On May 10, 2022, the trial court entered its declaratory judgment and permanent injunction, declaring the Confidential Information, Staff Ethics, and Social Networking Websites Policies unconstitutional and enjoining any enforcement of those policies.[1] C.P.327-57. The trial court further found that JFT did not prove its retaliation claim. C.P.354. The trial court did not address JFT's challenge to three other policies or the Media Guide. *See generally* C.P.327-57. JPS filed its notice of appeal the next day. C.P.358. JFT did not appeal.

## SUMMARY OF THE ARGUMENT

Under state statute, school districts may "prescribe and enforce rules and regulations not inconsistent with law" and "adopt any orders, resolutions or ordinances with respect to school district affairs, property and finances which are not inconsistent with the Mississippi Constitution of 1890 . . . ." Miss. Code. §§ 37-7-301(l) and 37-7-301.1. Like all other school districts, JPS has adopted rules for both students and employees. These rules are important for maintaining a safe and conducive academic environment, and maintaining the privacy and rights of students, parents, and employees of the District.

JFT is a union with which JPS has no obligation to bargain. Although JPS owes no duty to JFT and though JFT is not bound by JPS' employment policies,

[1] The Confidential Information Policy was enjoined in its entirety. Three portions of the Staff Ethics Policy were enjoined, and the majority of the Social Networking Policy was enjoined. C.P.355-56.

still JFT filed suit to challenge several of those policies under the Mississippi Constitution. This is nothing more than a backdoor attempt to force JPS to bargain with the union.[2] Indeed, during the trial, the trial court encouraged and JFT requested a consent decree which would have allowed JFT the ability to help draft JPS' policies. It must be noted that the public is allowed to review and comment on existing and proposed policies at public Board meetings, though JFT has largely opted not to do so. But, JPS has no obligation to allow JFT greater rights than the general public.

Along that line, JPS argued that JFT lacked standing to challenge its employment policies. Among other things, JFT did not establish that any of its members were current employees of JPS, nor did it establish that it had a legally enforceable right in JPS' employment policies. The trial court disagreed and erroneously found that JFT had standing both in its own right and through associational standing. This decision should be reversed.

Additionally, the trial court erred in finding that three of JPS' policies, one of which was no longer in existence at the time of the trial court's order and one of which had been substantially revised, violated the Mississippi Constitution, and that the challenge to those two policies was not moot. To find that the policies were

[2] The National Labor Relation's Act does not apply to public employers. 29 U.S.C. § 152(2).

facially unconstitutional, JFT was required to show that JPS' policies, as written, "*could never* be constitutionally applied and valid." *Ward v. Colom*, 253 So. 3d 265, 267 (Miss. 2018) (emphasis in original). JFT failed to do so.

Finally, the trial court erred when it found that JFT had met its burden to obtain a permanent injunction as to these policies. JPS respectfully requests that the trial court's declaratory judgment and permanent injunction be reversed and rendered.

## STANDARD OF REVIEW

On appeal, "a circuit-court judge presiding in a bench trial" is given "the same deference with regard to his findings as a chancellor." *Carr v. Miss. Lottery Corp.*, --- So. 3d ---, 2022 WL 16846637, *3 (Miss. Nov. 10, 2022) (citation omitted). "[T]he circuit court's interpretation and application of the law [are reviewed] de novo, and its findings of fact will not be reversed if supported by substantial evidence." *Id.* (citation omitted). The issue of standing is reviewed de novo. *Hall v. City of Ridgeland*, 37 So. 3d 25, 33 (Miss. 2010).

## ARGUMENT

### 1. JFT did not have standing to challenge JPS' employment policies.

Standing is to be determined at the beginning of the suit, and plaintiffs must maintain standing throughout the suit. *See Clark Sand Co., Inc. v. Kelly*, 60 So. 3d

149, 161 (Miss. 2011). The trial court erroneously found that JFT had standing, both in its own right and through associational standing. Each will be taken in turn.

This Court has articulated the standard for standing. To establish standing in its own right, JFT must show that it "had a right to judicial enforcement of a legal duty of the defendant." *Initiative Measure No. 65*, 2021 WL 1940821, *4 (Miss. 2021).[3] Stated differently, JFT must "show in [itself] a present, existent actionable title or interest, and demonstrate that this right was complete at the time of the institution of the action." *Id*. JFT must also show that it "is likely to experience an adverse effect different from any adverse effect suffered by the general public." *Id.*

JFT failed to do so. It did not prove that it has a "present, existent actionable title or interest" in JPS' employment policies because it is not subject to them. JFT itself can never be subject to JPS' employment policies. It is not an employee; it is a union with which JPS is under no obligation to bargain.

It also cannot show "an adverse effect different from any adverse effect suffered by the general public." *Id.* The trial court held that "JFT is adversely impacted by any JPS policy that tends to prohibit or restrict its employees from providing information to JFT and others that would assist JFT in fulfilling its mission and purposes." C.P.333. But this is no different from the alleged harm to

[3] The former "colorable interest" standard has been abandoned. *See id*. ("It is worth reiterating that the Court recently abandoned the 'colorable interest' standard for establishing standing.").

the general public. Any policies that may restrict employees from providing information to JFT would also restrict employees from providing the same information to the general public: a fact relied on by the trial court later in its Order to hold that it is in the public interest that employees be allowed to relay information regarding general happenings in the school district to the public. C.P.354.

As to JFT's alleged inability to recruit, the evidence showed that JPS allows JFT on its campuses to recruit, and that JPS provides JFT with a complete list of district employees with contact information to aid in recruiting. C.P.570-71, 591-92, 595, 633-34, 661-66, 668-74, 688-89, 694-96. Simply put, JFT failed to show that it suffered any tangible adverse effect upon its membership due to JPS' policies.

Because JPS does not owe a legal duty to JFT, because JFT is not subject to the employment policies such that it has a "present, actionable interest," and because JFT has not suffered an adverse effect different from that of the general public, the trial court erred by holding that JFT had standing in its own right.

As to associational standing, JFT was required to show that "(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. Manufactured Housing Ass'n v. Bd. of Aldermen of the City of Canton, Miss.*, 870 So. 2d 1189, 1191 (Miss. 2004). JFT fails on all three prongs.

The first prong requires a showing of a legal duty, a present, actionable interest, or an adverse effect different from that general public. *Initiative 65*, 2021 WL 1940821, at *4. The trial court correctly noted that JFT had not submitted one witness who was among its then-current employees, but incorrectly found that "JFT nonetheless established through credible testimony that many of its members were current JPS employees and, as such, could individually pursue the claims asserted here." C.P.335. JPS is unable to point to one such cite, beyond JFT's counsel's unsupported arguments,[4] that would corroborate this finding. There simply was not any such testimony. *E.g.*, *City of Picayune v. S. Regional Corp.*, 916 So. 2d 510, 528 (Miss. 2005) (finding no standing where intervenors failed to evidence corporate membership).

Although JFT offered testimony that it had previously recruited and signed up members in JPS' schools, there was no testimony that any of these individuals

[4] At the March 22nd hearing, Plaintiff's counsel asserted that, of course, JFT had members who are currently employed by JPS, but that their names were strategically withheld due to fear of retaliation. C.P.803-04. But statements by counsel are not evidence. *E.g.*, *One 1970 Mercury Cougar v. Tunica Cty.*, 115 So. 3d 792, 796 (Miss. 2013) ("No citation of authority is necessary for the fundamental propositions that issues of fact are decided by the weighing of evidence, and that the arguments of counsel are not evidence."). JFT offered no actual evidence that any of its members are currently employed by JPS. *E.g.*, *Johnson & Johnson, Inc. v. Fortenberry*, 234 So. 3d 381, 406 (Miss. 2017) ("Counsel cannot . . . state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence.") (cleaned up) (quoted case omitted).

are still members of JFT and are still employed by JPS. Indeed, apparently many members of JFT are not current employees. C.P.565, 568, 582, 633. Without any evidence that its members are currently subject to JPS' policies, JFT has not shown that its members would have standing to sue. *E.g.*, *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 28 (Miss. 2015) ("Thus, under the instant facts, *Van Slyke II*'s general rule that uninvolved citizens should have the authority to challenge the constitutionality of governmental action does not hold much strength, and it does not generate a colorable interest for Hotboxxx to assert standing.").

The trial court also credited the testimony of JPS' witness Dr. Nalls as establishing standing. C.P.338. But Dr. Nalls testified only that it was routine for JFT to recruit on JPS campuses, and that JPS employees are encouraged to join a professional organization "such as JFT"—not necessarily JFT itself. C.P.694-96, 700. This testimony does not establish, and certainly not by substantial evidence, that JFT has members who are, and were at the time of the filing of the action, also employees of JPS. The trial court erred in crediting the absence of evidence as evidence of standing.[5]

[5] The trial court also noted that JFT was not required to disclose the names of its members. C.P.338. That may be so, but such disclosure was not necessary. It would have been easy for JFT to establish through witness testimony that there were current members who were also current JPS employees. It did not do so.

As to the second prong, JFT did not adequately plead that challenging JPS' employment policies was germane to its purpose. The lone statement in its complaint regarding its purpose states that it is a "local labor union" that "represents all member teachers, paraprofessionals, and school related personnel in the Jackson Public School District." C.P.9. The complaint fails to state in what matters JFT represents these members. *Id.*

The trial court confirmed that the complaint was deficient by looking outside of the complaint and taking judicial notice of JFT's website, which provides that JFT's purposes include: "achiev[ing] a spirit of cooperation among the school board, the administration[,] the professionals, the paraprofessionals, the parents, and the public that provides each group an opportunity to contribute their full potential to the improvement of the public education system for our children[;]" "becom[ing] the largest professional organization for teachers and non-certified personnel[;]" "educat[ing] our members in the rights and responsibilities of a majority professional organization[;]" "[continu[ing] [to improve] the working conditions for all school employees[;]" "improv[ing] the quality of education for all children[;]" and "continu[ing] to promote special screening and treatment programs for students who show symptoms of behavioral problems." C.P.333-36. Thus, the trial court found that "all of JFT's purposes" are germane to the interests it seeks in this lawsuit, including asserting the rights of students, parents, school

board members, and the general public who are not subject to the policies at issue. C.P.336.

Such broad policy statements cannot possibly create an interest in JPS' employment policies. This prong of associational standing does not stand alone; it must be considered in conjunction with the general rules of standing, which requires a showing of a legal duty or an adverse effect different from that of the general public. *Initiative 65*, 2021 WL 1940821 at *4. But, if JFT's stated purposes are taken at face value, then JFT represents everyone, which obviously is not the case. For example, by looking only to JFT's mission statement, the interests of students would be germane to JFT's purpose. But as a labor union, would have no standing to assert the rights of students. Similarly, JFT has no real interest in JPS' employment policies, and if it did, it could assert its interests at public board meetings the same as every other member of the public. JFT should not be allowed to backdoor its way into forcing a public entity to seek its permission and, in effect, bargain with it in creating employment policies through the use of such an expansive mission statement.

The third prong requires JFT to show that the participation of individual members was not necessary. In an attempt to get around this prong, JFT abandoned its as-applied challenge to the policies in its response to the motion to dismiss, since such a challenge would necessarily require the participation of individual

members.[6] C.P.113. But it continued to seek monetary damages, including nominal and punitive damages, attorneys' fees, costs, and [a]ny other relief available under any applicable principle in law or equity." *See* C.P.18-19. Seeking monetary damages requires the participation of individual members, which precluded JFT's assertion of associational standing. *E.g.*, *City of Jackson v. Allen*, 242 So. 3d 8, 28 (Miss. 2018) ("[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[.]"). The trial court disregarded this fact entirely, focusing only on the prospective relief and facial challenge.

Accordingly, the trial court erred in finding that JFT had standing, either in its own right or through associational standing.

**2. The facial challenge to the Confidential Information and Staff Ethics Policies was moot at the time the trial court entered its declaratory judgment and permanent injunction.**

The trial court applied the wrong standard for mootness. The trial court found that Mississippi recognizes a more relaxed standard of mootness than that under the "cases and controversies" requirement of the United States Constitution. C.P.409-10. But this Court has repeatedly held that, where no actual controversy exists, courts have "no authority to decide the substantive merits of the issues

[6] This requirement reinforces the argument that JFT does not have standing in its own right. If it did, it would be able to raise an as-applied challenge.

presented." *Fails v. Jefferson Davis Cty. Pub. Sch. Bd.*, 95 So. 3d 1223, 125-26 (Miss. 2012) (citing *Allred v. Webb*, 641 So. 2d 1218, 1220 (Miss. 1994).[7]

This Court has recognized two exceptions to the general mootness doctrine: (1) if the "question concerns a matter of such a 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" or (2) if the matter is "capable of repetition yet evading review." *See Barrett v. City of Gulfport*, 196 So. 3d 905, 912 (Miss. 2016).[8] It appears that neither of these exceptions has ever been applied by this Court in a case where a government legislative entity, such as the legislature or a public board, has amended or repealed the alleged unconstitutional provision at issue.

In fact, in the two comparable cases on the issue, this Court held that the issue was moot. In *Barrett*, this Court held that the issue was moot and neither exception applied where the City changed the zoning ordinances in issue during litigation. *See id.* at 911-12. Similarly, in *Ladner v. Fisher*, 269 So. 2d 633 (Miss.

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[7] In *Fails*, the majority rejected then-Justice Dickinson's dissenting opinion that the case was not moot. *Compare id. with id.* at 1227-28 (Dickinson, J., dissenting).

[8] Although later cases such as *Barrett* frame the exceptions as two different exceptions, it is not clear that was the original intent when adopted. In *Strong v. Bostick*, 420 So. 2d 1356 (Miss. 1982), this Court adopted the "capable of repetition yet evading review." In the context of the opinion, it seems that the "capable of repetition yet evading review" was meant to be the standard for determining whether a matter is "of such a 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." *Strong*, 420 So. 2d at 1358-59; *see also Sartin v. Barlow ex rel. Smith*, 16 So. 2d 372, 376-77 (Miss. 1944).

1972), this Court held that the Legislature's repeal of the statute in issue mooted the case.

Federal courts also recognize a difference when a government entity not only voluntarily ceases its actions, but amends or repeals legislation. *See Hous. Chronicle Pub. Co. v. City of League City, Tex*., 488 F.3d 613, 619 (5th Cir. 2007) ("It goes without saying that disputes concerning repealed legislation are generally moot." (cited cases omitted)). Although the general rule is that voluntary cessation does not moot an issue, courts are "justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude." *Yarls v. Bunton*, 905 F.3d 905, 910 (5th Cir. 2018). "Absent evidence to the contrary, we are to presume public-spiritedness, says the Supreme Court. Government officials 'in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties.'" *Id.* at 910-11 (quoted case omitted). "So, 'without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.'" *Id.* at 911 (quoted case omitted).

The trial court relied on *Yarls* in its assertion that a defendant "cannot moot a case simply by ending its unlawful conduct once sued." C.P.339. But, in *Yarls*, the Fifth Circuit held that an intervening change in law mooted the case. *See*

*generally id.* That is because a legislative change is different from a mere declaration that a defendant will stop unlawful conduct.

Similarly, in *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (5th Cir. 2010), the Fifth Circuit held that a facial challenge to the college's regulations was mooted when the college revised these policies. *See also Roberts v. Haragan*, 346 F. Supp. 2d 853, 858 n.5 (N.D. Tex. 2004) (concluding that student's facial challenge to university's regulations on speech were mooted because university adopted new policy and there was no indication the university intended to revert to the previous, allegedly unconstitutional policy). In *National Black Police Association v. District of Columbia*, 108 F.3d 346, 350-52 (D.C. Cir. 1997), the D.C. Circuit vacated a judgment as moot when the challenged campaign-contribution limits were removed *before* the district court enjoined them. Finally, in 2020, the United States Supreme Court dismissed a second amendment challenge to a New York City gun regulation as moot after the State of New York amended its firearm licensing statute and the City amended the regulation at issue after certiorari was granted. *New York State Rifle & Pistol Assoc., Inc. v. City of New York, New York*, 140 S. Ct. 1525, 1526 (2020).

The trial court criticized JPS for not providing an affidavit "or other 'absolutely clear' proof necessary to satisfy the 'heavy burden of persua[ding]' the Court that JPS will not repeat its unconstitutional actions" and for defending itself

in the litigation. C.P.339. But the United States Supreme Court case relied on by the trial court for this standard is distinguishable. In that case, the "voluntary cessation" was merely an announcement by the Missouri governor that he had directed the Department to discontinue its practice – not an intervening change in law or written policy. *Trinity Lutheran Church of Columbia, Inc. v. Come*r, 137 S. Ct. 2012, 2019 n.1 (2017). What's more is that both parties agreed that the issue was not moot because the challenged practice was based on the Missouri Supreme Court's interpretation of the Missouri Constitution. *Id.* This case, on the other hand, is one where "subsequent events" have made it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur." *E.g.*, *id.* JPS has formally changed its policies and cannot undo that action on a whim – it takes time and is done in the public eye.[9]

Additionally, a finding of mootness is even more warranted here, where there is no evidence that JFT or any employee "*ever* suffered any demonstrable harm" from the policies. *E.g.*, *Lafayette Cty. Bd. of Sup'rs v. Third Circuit Drug Ct.*, 80 So. 3d 785, 788 (Miss. 2012). There is no evidence that any employee has ever been disciplined for violating these policies. C.P.589-90, 596, 728, 779.

[9] The trial court also misleadingly stated that JPS waited until after the trial to change its policies. C.P.339. The process was started right after the first hearing, but because changes in policy have to be voted on by the Board and submitted for public review and comment, they were not finally adopted until after the second hearing. The trial court was made aware of JPS' efforts. *See* C.P.777-78.

As noted above, JPS voluntarily deleted one policy and amended another prior to the entry of the injunction. The trial court erred when it held that the challenge to those policies was not moot.

### 3. Jackson Public School District's Confidential Information, Staff Ethics, and Social Networking Policies did not violate the free speech clause of the Mississippi Constitution.

JFT sought a declaration that the Confidential Information, Staff Ethics, and Social Networking policies were unconstitutional. It also sought to enjoin these policies from being enforced. It has already been explained why the trial court erred by ruling on the constitutionality of these policies due to JFT's lack of standing, and on the Confidential Information and Staff Ethics policies due to mootness. But even if the challenge to those policies was not moot and even if JFT had standing, the trial court erred in finding that all three policies were unconstitutional.

The starting point is that JFT advances a facial challenge to the policies. Facial challenges are highly disfavored. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (listing reasons that facial challenges are disfavored, including that such challenges "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution").

To succeed on a facial challenge, JFT was required to prove that the policies "as currently written, *could never* be constitutionally applied and valid." *Ward*, 253 So. 3d at 267 (emphasis in original) (quoting *Crook v. City of Madison*, 168 So. 3d 930, 942 (Miss. 2015) (Coleman, J., dissenting)). JFT failed to meet its burden. *E.g.*, *Wilcher v. State*, 227 So. 3d 890, 895-96 (Miss. 2017) ("This Court will not strike down a statute on constitutional grounds unless it appears beyond all reasonable doubt the statute violates the Constitution. The party challenging the statute's constitutionality bears the burden of proving its unconstitutionality.").

*Social Networking Websites Policy.* JFT challenged the portion of the Social Networking Websites Policy that provides that "[a]ll employees, faculty and staff of this school district who participate in social networking websites shall not post any data, document, 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.P.14. JFT complained that the phrase "might result in disruption" gives unbridled discretion to the Superintendent. C.P.14.

As explained by JPS during the March 22nd hearing, this policy is copied from the Mississippi School Boards Association's sample policy. C.P.731-37, 780-84. There is a reason that the School Boards Association has recommended such a policy to school districts across the State: it is grounded in precedent. In *Garcetti*

*v. Ceballos*, the Supreme Court explained that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that *has some potential to affect the entity's operations*." 547 U.S. 410, 418 (2006) (emphasis added). Speech does not actually have to affect the entity's operations, as long as it has the potential to disrupt. *E.g.*, *id.*

This is especially true in the school environment. Courts have long recognized that "First Amendment rights [must be] applied in light of the special characteristics of the school environment." *Tinker v. Des Moines Indep. Comm. Sch. Dist.,* 393 U.S. 503, 506 (1969); *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (teachers work in schools where students "are impressionable and their attendance is involuntary"). Though teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]" that does not mean that "the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (June 27, 2022).

Given schools' "special characteristics," the government has greater leeway to restrict conduct and speech which may disrupt the learning environment. *E.g.*, *id*.; *Garcetti*, 547 U.S. at 418; *Munroe v. Central Bucks, Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015) ("The government need not show the existence of actual disruption if it establishes that disruption is likely to occur because of the speech.").[10]

The Third Circuit explained that, "[w]hile the inquiry varies given the nature of the speech at issue, courts typically consider whether the speech impairs discipline or employee harmony, has a detrimental impact on close working relationships requiring personal loyalty and confidence, impedes the performance of the speaker's duties, or interferes with the enterprise's regular operations." *Munroe*, 805 F.3d at 472. In *Pickering v. Bd. of Ed.*, the Court indicated that it was appropriate to consider whether a teacher's expression "either impeded the teacher's proper performance of his daily duties in the classroom" or "interfered with the regular operations of the schools generally." 391 U.S. 563, 572-73 (1968). In *Munroe*, the court held that the teacher's speech in her personal blog posts, which the court reluctantly characterized as speech of public concern, was "sufficiently

[10] In the context of student speech, the Supreme Court has held that "[c]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker,* 393 U.S. at 513.

disruptive so as to diminish any legitimate interest in its expression, and thus her expression was not protected." *Id.* at 473. Although *Munroe* concerned actual disruption, the court noted that, given the slight interest in the teacher's speech, the school was "not required to make an especially vigorous showing of actual or potential disruption." *Id.* (emphasis added); *see also id.* at 474 (collecting examples of potential disruption).

The District Court of Nevada rejected a facial challenge to a police department's similar social media policy. *Sabatini v. Las Vegas Metro. Police Dept*., 369 F. Supp. 3d 1066, 1095-98 (D. Nev. 2019) *reversed on other grounds by Moser v. Las Vegas Metro. Police Dept*., 984 F.3d 900 (9th Cir. 2021). The police department's policy provided that department members were "free to express themselves as private citizens in matters of public concern to the degree that their speech does not" "[i]mpair working relationships of the department," "[i]mpede the performance of duties," "[i]mpair discipline and harmony among co-workers" or "[n]egatively impact or tend to negatively impact the department's ability to serve the public." *Id*. at 1072. The district court found that the challenged policy "formulaically prohibits only the types of speech that would tilt the *Pickering* balance in Metro's favor." *Id.* at 1096. Similarly, JPS' policy prohibits only that speech which would disrupt the learning environment and "tilt the balancing test" in JPS' favor. That there is some discretion in determining whether

speech may "disrupt" or "negatively impact" does not tip the scale in the opposite direction.

The trial court also found that the policy was vague and a prior restraint. C.P.345. To be unconstitutionally vague, JFT must show that "the standard of conduct [the policy] specifies is dependent upon the individualized sensitivity of each complainant." *Nichols v. City of Gulfport*, 589 So. 2d 1280, 1284 (Miss. 1991). In its briefing, JFT did not challenge the Social Networking Policy on vagueness grounds, so it certainly did not meet its burden of showing vagueness. *See generally* C.P.195-222.[11] A simple disagreement with the wording of the policy, which tracks federal law, is not enough. And, a prior restraint is not unconstitutional where it is justified under the *Pickering* balancing test. *E.g.*, *Graziosi v. City of Greenville, Miss*., 775 F.3d 731, 736 (5th Cir. 2015). It has already been explained why the policy easily passes the *Pickering* test.

*Staff Ethics Policy.* As to the Staff Ethics Policy, JFT challenged two provisions: Section II(6) and Section III(7). C.P.11-12.[12] Section II(6) provides that: Employee standards include "[d]irecting any criticism of other staff members or of any department of the school system toward the improvement of the school system.

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[11] In fact, in its briefing, JFT addressed only the Confidential Information and Staff Ethics Policies. C.P.195-222.

[12] Each challenged and enjoined section was revised prior to entry of the Order. C.P.294-308.

Such constructive criticism is to be made directly to the particular school administrator who has the administrative responsibility for improving the situation and then to the superintendent, if necessary." C.P.23-24. Likewise, the challenged portion of Section III(7) provides that "the sharing of information should only serve to assist, rectify, or resolve a situation and should never be downgraded to idle gossip or negative commentary to the media, or others within the community." C.P.25. These provisions do not constitute an improper restriction on speech for several reasons.

First, this policy simply provides guidance for how employees are to submit constructive criticism to the District. It is not a blanket prohibition on criticism and, in fact, encourages constructive criticism to better the school environment in the most efficient way possible: by directing the constructive criticism directly to the person with the authority to make changes.

This leads to the second point: Employee speech that "owes its existence" to the employment, which includes that speech made in connection with the employee's job duties, is not protected. *Garcetti*, 547 U.S. at 421-22; *see also Haverda v. Hays Cty.*, 723 F.3d 586, 598 (5th Cir. 2013) ("An employee is not speaking as a citizen—but rather in his role as an employee—when he makes statements pursuant to his official duties.") (internal quotations and citation omitted). "Even if the speech at issue is not required by the employee's job, the

speech may not be protected if it was made while performing the job or to fulfill the job's responsibilities." *Brown v. N. Panola Sch. Dist.*, 2010 WL 3001914, *4 (N.D. Miss. 2010) (citing *Williams v. Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007)); *see also Rushing v. Miss. Dep't of Child Protection Servs.*, ---- F.4th ----, No. 20-60105 at p.6 (5th Cir. Mar. 24, 2022) ("Other factors include whether the speech resulted from knowledge acquired as an employee and the relationship between the speech and the employee's job."); *id.* at pp.7-8 ("[T]he listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (quoting *Garcetti*, 547 U.S. at 425)). It is undeniable that the District's purpose is to provide a professional and safe academic environment. C.P.741-42. The goal is to provide the best learning experience for students the District can provide. It is part of an employees' duties to help meet this goal. Any speech made in pursuance of that goal would be unprotected.

Finally, mere employment grievances are not protected speech. *E.g.*, *Connick v. Myers*, 461 U.S. 138, 154 (1983); *see also Sharpe v. Long*, 842 F. Supp. 197, 200-01 (D.S.C. 1992) ("[P]ersonal grievances about working conditions do not qualify as matters of public concern."); *Gibson v. Kilpatrick*, 838 F.3d 476, 485 (5th Cir. 2016) ("[M]anagement policies that [are] only interesting to the public by

virtue of the manager's status as an arm of the government are not a matter of public concern as that legal term of art is properly understood. . . . Internal personnel disputes and management decisions are rarely a matter of public concern."). Speech that "provid[es] little informational value to anyone outside of the organization" is not speech on a matter of public concern and is unprotected. *Rushing*, No. 20-60105 at pp.11-12 (collecting cases). And speech is not protected if the speech "tend[s] to unduly harm the efficient operations of the governmental defendant." *Samsel v. Desoto Cty. Sch. Dist.*, 242 F. Supp. 3d 49, 515 (N.D. Miss. 2017).

*Samsel* is instructive. In that case, the court held that a head football coach's statements regarding management of the football team were made in his position as a head coach and were not protected. *Id.* at 516-18; *see also Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (1989) (teacher's disagreement with school curriculum was not protected); *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (teacher's dispute with colleagues and superiors about course content not a matter of public concern). As in these cases, criticism of the District's operations, management, or employees is not automatically protected. Additionally, in *Samsel*, the court held that "agitating [on social media] against a more senior school official . . . constitutes simple insubordination, and recovery for any conduct is barred." *Id.* at 520-22. Here, the Staff Ethics Policy supports speech that is meant to better the

District but seeks to discourage (not outright prohibit) any acts that could undermine or disrupt school operations or that rise to the level of insubordination.

The trial court also erroneously found that the Staff Ethics Policy evidences viewpoint discrimination and is vague. C.P.344. But a finding of impermissible viewpoint discrimination requires a showing that the District acted with a viewpoint-discriminatory purpose. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). There was no evidence that JPS acted with discriminatory purpose. Nor is the policy unconstitutionally vague as it is not "dependent upon the individualized sensitivity of each complainant." *Nichols*, 589 So. 2d at 1284. The policy clearly provides that employees should work to better the District and bring criticism to those in the best position to rectify the situation.

*Confidential Information Policy*. The Confidential Information policy, which is no longer in effect, served the legitimate and important interest of protecting confidential information related to the District's employees, students, and operations, and the policy provides an efficient means of vetting the disclosure of such information through the District's management. Furthermore, the policy must be judged in context. Phrases cannot be cherry-picked from the whole policy. The policy provides that "[a]ny information discussed by school employees should be done in accordance with the Family Education Rights and Privacy Act (FERPA), Public Law 93-380 of 1974, the Individuals With Disabilities Education Act

(IDEIA), other applicable federal privacy laws and regulations and the limitations of this policy." C.P.21. The invocation of FERPA, IDEA, and other federal privacy laws and regulations give context to what the District considers to be "confidential information." And, the policy plainly contemplates that disclosure of information is not covered by a blanket prohibition, as it provides that disclosure should be in accordance with these federal privacy laws and the other provisions of the policy.[13]

**4. JFT did not meet its burden to obtain a permanent injunction.**

The injunction should not have issued because JFT did not prove that the policies in issue violate the free speech clause. But the injunction was also inappropriately issued because JFT did not prove the other requirements for obtaining an injunction.

The "issuance of an injunction is an extraordinary relief[.]" *Gaffney v. City of Richland, Miss.*, 202 So. 3d 238, 242 (Miss. Ct. App. 2016). "In determining the propriety of issuing an injunction, [the trial court] must balance four factors: (1) there exists a substantial likelihood that plaintiff will prevail on the merits; (2) the injunction is necessary to prevent irreparable harm; (3) the threatened harm to the applicant outweighs the harm the injunction might do to the respondents; and (4)

[13] Although it is JPS' position that this policy is moot and does not intend to re-enact this policy, so that any ruling would be nothing more than an advisory opinion, the trial court ruled it unconstitutional, so JPS is responding to that ruling. It is also important as a much more detailed definition of "confidential information" remains in JPS' recently enacted Staff Ethics Policy, which could be subject to challenge in the future.

the entry of the injunction is consistent with the public interest." *Secretary of State v. Gunn*, 75 So. 3d 1015, 1020 (Miss. 2011). "[F]or a permanent injunction to issue, [these factors] are weighed in light of all proffered evidence and following a full hearing on the merits of the claim." *A-1 Pallet Co. v. City of Jackson*, 40 So. 3d 563, 569 (Miss. 2010). JFT was required to show "an imminent threat of irreparable harm for which there is no adequate remedy at law." *Varnell v. Rogers*, 198 So. 3d 1278, 1282 (Miss. Ct. App. 2016).

*Irreparable Harm to JFT.* JFT did not show that the injunction was necessary to prevent irreparable harm. This is especially true as to the Confidential Information Policy which is no longer in existence, and the Staff Ethics policy, in which each enjoined provision has been amended. There is no threat that any employee is going to be subjected to these policies which are no longer on JPS' books.

And, for the same reason JFT lacks standing, JFT did not show a threat of irreparable harm to it through the enforcement of any of these three policies, because it is not bound by the policies. Importantly, JFT presented no evidence that it has ever been harmed by the Social Networking Website Policy's ban on potentially disruptive social media posts by employees.

Additionally, JFT did not show that it was without an adequate remedy at law. "[W]hether an adequate remedy at law is available is a part of determining

whether 'irreparable harm' will occur if an injunction does not issue." *Gunn*, 75 So. 3d at 1020-21. "[I]f an adequate remedy at law existed, the harm would be 'reparable' rather than 'irreparable.'" *Id.* at 1021. "When a statutory scheme exists concerning review of an agency or board's decision, an adequate remedy at law exists, precluding the issuance of injunctive relief." *Gaffney*, 198 So. 3d at 1282.

An adequate remedy at law exists. If JFT is ever adversely harmed by the policies, it may file an as-applied challenge to the policies. It may also contest the application of the policies to it at school board meetings. The school board has the final say (absent any court challenge) on how the policies are applied. *See Fratesi v. City of Indianola*, 972 So. 2d 38, 42 (Miss. Ct. App. 2008) (adequate remedy at law existed where constitutional takings action could be instituted).

*Balancing of Harm to JFT against Harm to JPS.* The interests of JPS in its policies are great. JPS' polices ensure the safety and well-being of its students and employees and ensure a conducive and professional learning and work environment, among other things. C.P.725-26, 741-42. The policies also ensure that employees and students maintain their privacy and due process rights, and they are important for advising employees of their duties under both federal and state law in regards to students' privacy rights. C.P.706, 711, 713, 728-34.

*Public Interest.* The Mississippi State Legislature has declared the education of the State's children is a matter of critically important public policy. *See, e.g.*,

Miss. Code § 37-1-11(1) (providing that the "school day shall be preserved for the purpose of teaching" and that the legislature's intent is "that every effort be made by . . . local school boards to protect the instructional time in the classroom"). To achieve this public policy, the legislature charges the school boards of all school districts with responsibility for "organiz[ing] and operat[ing] the schools of th[ose] district[s] . . . ." *See* Miss. Code § 37-7-301(a). To carry out this legislative charge, the District may "prescribe and enforce rules and regulations not inconsistent with law" and "adopt any orders, resolutions or ordinances with respect to school district affairs, property and finances which are not inconsistent with the Mississippi Constitution of 1890 . . . ." Miss. Code. §§ 37-7-301(l) and 37-7-301.1. Here, the District, pursuant to the authority and duties conferred on it by the State Legislature, has created and promulgated employment policies for the efficient operation of the District as it carries out its legislative charge to educate the State's children. It was not in the public interest for these policies to be enjoined.

## CONCLUSION

For the reasons explained herein, the trial court erred in finding that: (1) JFT had standing to challenge JPS' employment policies; (2) JFT's challenge to the Confidential Information and Staff Ethics Policies was not moot; (3) JFT met its burden of showing that the three policies were unconstitutional on their face; and

(4) JFT met its burden for injunctive relief. The trial court's order granting the declaratory and injunctive relief should be reversed and judgment rendered for JPS.

RESPECTFULLY SUBMITTED, this the 5th day of December. 2022.

**JACKSON PUBLIC SCHOOL DISTRICT**

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## CERTIFICATE OF SERVICE

I, LaToya C. Merritt, one of the attorneys for Appellant, do hereby certify that I electronically filed the above and foregoing ***Appellant's Brief*** using the Court's ECF system which sent notification of such filing to all counsel of record.

I also certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing ***Appellant's Brief*** to the following:

Honorable Jess H. Dickinson
Special Circuit Judge
407 East Pascagoula St.
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THIS the 5th day of December, 2022.

*/s/ LaToya C. Merritt*
LaToya C. Merritt