

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

STACI BARBER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No.: 4:24-cv-01004
	)	
KATY INDEPENDENT SCHOOL DISTRICT;	)	
BRYAN SCOTT ROUNDS, Principal of Cardiff	)	
Junior High, sued in his individual and official	)	
capacities,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS

Plaintiff Staci Barber opposes Defendants’ Motion to Dismiss. Defendants have categorically prohibited Barber from praying in places where students might be present and prohibited her from praying outside at the school flagpole, even before instructional time for students or her workday begins. By doing so, they have violated her rights under the United States Constitution and Texas law.

FACTUAL BACKGROUND

Staci Barber is a teacher at Cardiff Junior High School in Defendant Katy Independent School District (“Katy” or “Katy ISD”). In September 2023, Defendant Scott Rounds, Principal of Cardiff Junior High, allowed a school student group, the Fellowship of Christian Athletes (“FCA”), to meet at the school flagpole at 8:20 am on September 27 as a part of See You at the Pole (“SYATP”), an annual event where students, teachers, and members of the community pray outside public schools before the school day begins. Pl.’s Compl. ¶ 19. Barber has prayed at the school flagpole *every year* for SYATP for as long as she has been a teacher at Cardiff Junior High. Pl.’s

Compl. ¶ 17. The workday for teachers at Cardiff Junior High began at 8:20 am, but student classes did not start until 8:40 am. Pl.'s Exhibit A, at 21. Before Rounds allowed students to gather and pray for SYATP, Barber sent an email to other staff members, inviting them to gather and pray together at the pole at 8:00 am, before they were on the clock for the school and before the prayer time for the FCA students, as they had done in past years. Pl.'s Compl. ¶ 19. In other words, she specifically initiated this teacher-only prayer meeting before any official meeting of any student group and before the staff workday began.

In response to Barber's email, Rounds sent out the following email to all staff, accompanied by the school policy on prayer in place at that time:

See You At The Pole, a nationally recognized day of student initiated, student-led prayer, will be tomorrow, Wednesday, September 27th. For the school district, this student gathering is treated like a student-led, non-curricular club that might meet before or after school. If you have students asking about whether or not they can have a See You At The Pole event, please send them to me to complete the proper approval process. Student participation at SYATP is limited to non-instructional time, meaning prior to the start of instruction at 8:55 AM or after the end of the instructional day of 4:05 PM. Participation should not cause students to be tardy to class.

Per School Board policy FNAB(Local), district personnel shall not promote, lead, or participate in the meetings of non-curriculum-related student groups. Staff members are limited to serving as group monitors only for non-curricular groups. I also want to remind us that **Board Policy prohibits staff members from leading students in prayer or praying with or in the presence of students.** Our role would be to serve only as monitors of a student-led event. The information below can be found on page 24 of the KISD Employee Handbook. If you have any questions, please let me know. Thank you.

Defs.' Exhibit A (emphasis added). In addition to this staff-wide email prohibiting prayer, Rounds sent a message directly to Barber, specifically prohibiting her from praying:

Per the email that I sent earlier today (attached), **per district School Board policy, employees CANNOT pray with or in the presence of students.** You cannot have a student group AND staff group both praying at the pole as this would be a violation of Board policy. See You At The Pole is a student-initiated event (not staff

initiated) and student-led event (not staff led). **Even though it is before the school day, you are on campus visible to students in your role as an employee.**

You cannot “ask students to attend” SYATP as that would be initiating and promoting the event. A student met with me today. He provided the appropriate request, and I approved his request to hold a student-led SYATP tomorrow. Mr. Thomas will be the faculty monitor.

Pl.’s Compl. ¶ 21 (emphasis added). In response to this email, Barber explained that she was not intending to participate in any official student gathering or pray with students: “Mr. Rounds, I didn’t ask the students to attend. It is only for staff before students arrive just like we have done the past three years. . . . There will be no kids when we are out there.” Pl.’s Compl. ¶ 22.

According to Katy policy, the workday for teachers at Cardiff Junior High officially begins at 8:20 am. Pl.’s Exhibit A, at 21. Barber met with one other teacher to pray at 8:05 am at the school flagpole on September 27, 2023, before her workday began and before the student group was scheduled to meet. Pl.’s Compl. ¶¶ 24-25. Two more teachers joined her at the pole to pray at approximately 8:10 am, without any students joining them to pray at the flagpole. *Id.* Shortly thereafter, while they were praying, still before 8:20 am, Rounds called them to step into the conference room. *Id.* ¶ 26. Rounds told them that Katy ISD does not allow them to pray in the presence of students, because students could feel violated or offended by their conduct. *Id.* ¶ 28. Rounds publicly reprimanded them for their prayer and prohibited them from engaging in any prayer where students might be able to see the prayer occur, warning them that such a prayer violates Katy’s policy. *Id.* Rounds’ reprimand was not limited to the prayer of official student groups, but a warning that Barber could not pray anywhere where students might be present, even if, as here, the only potential student presence was a student walking by towards the door.

Not only does Katy’s policy prevent Staci from participating in the annual SYATP event, but it also prevents her from ever praying in the presence of students, praying at the flagpole, or

engaging in any other kind of religious activity where students may see her even when she is not acting in her official capacity. *Id.* ¶ 41-43. Defendants claim that Barber “has not alleged any subsequent specific events that she was prohibited from participating in.” Defs.’ Mot. Dismiss, ECF No. 10, at 1. On the contrary, Barber indicated explicitly in her verified complaint that she wishes to hold a specific event, a weekly Bible study with other teachers before the school day begins and has had to cancel that specific event because of her compliance with the reprimand of Rounds and his warning not to engage in religious activity where students might see her. Pl.’s Compl. ¶ 43. Barber, by the instructions and actions of Defendants, has been rendered unable to perform religious activity anywhere on Cardiff Junior High’s campus, including when not on the clock, as such religious activity inherently occurs where students might see her conduct.

ARGUMENT

A defendant bears the burden to support a motion to dismiss, as to succeed on such a motion the defendant “must show” that the plaintiff is unable to satisfy the applicable standard for stating a claim. *Tuchman v. DSC Commc’ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). To overcome a motion to dismiss, “a plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Crane v. City of Arlington*, 50 F.4th 453, 461 (5th Cir. 2023) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “When reviewing a motion to dismiss, we ‘must accept all facts as pleaded and construe them in the light most favorable to the plaintiff.’” *Id.* (quoting *Reed v. Goertz*, 995 F.3d 425, 429 (5th Cir. 2021)).

Although Defendants’ Motion to Dismiss is styled as a motion seeking to dismiss Plaintiff’s case in its entirety, it does not present arguments against the entirety of the Plaintiff’s complaint. Unsupported assertions cannot meet a defendant’s burden. *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, 2008 U.S. Dist. LEXIS 112651, *8 (S.D. Tex. Feb. 14, 2008); *see #1*

Fan Co., LLC v. Pepco Licensed Prods., Inc., No. SA-09-CA-1029-FB, 2011 U.S. Dist. LEXIS 166200, *2 (W.D. Tex. Mar. 16, 2011). And, when the movant presents “no argument or authority for the plaintiffs to refute or this Court to consider,” the movant has failed to carry its burden and cannot succeed in arguing that a claim should be dismissed. *Id.*; *Torgerson v. Henderson Cty.*, 2022 U.S. Dist. LEXIS 106169, *17 (E.D. Tex. Apr. 26, 2022) (“Defendants have not addressed the TTCA claim in their motion, thus, they have failed to meet their burden to resolve the TTCA claim.”). Here, Defendants address Plaintiff’s “vagueness” argument raised in Count III of the complaint without otherwise addressing the First Amendment claims in Counts I and II as to declaratory and injunctive relief based on her rights to Free Speech and Free Exercise, except to say, as discussed below, that Barber was not disciplined. But even that argument cites only to a case that relates at most to Free Speech, not Free Exercise, *Longoria v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 261 (5th Cir. 2019).

Barber cannot respond to an argument Defendants have not made; Defendants have simply failed to identify any argument or cite *any* authority for the dismissal of Barber’s Free Exercise claim for declaratory and injunctive relief, and accordingly Count II of her complaint is not subject to dismissal insofar as the count seeks that relief. Most importantly, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), is *the* dispositive case relied upon by Barber for the relief sought. According to *Kennedy*, teachers have a constitutional right to engage in prayer, *even if students may witness that religious activity*. Defendants make no attempt to distinguish *Kennedy*, which concerned a policy largely identical to the one at issue here and dispositively resolves the issues presented in this case. In fact, they essentially ignore it.

I. Defendants Fail to Show that Plaintiff’s First Amendment Claims in Count I and II Should Be Dismissed, as Barber Was Subjected to the Adverse Employment Action of a Reprimand.

By attacking Plaintiff’s First Amendment claims in Counts I and II of her complaint for

lack of evidence of a “property interest,” Defendants fail to recognize the actual standard applicable to the First Amendment claims of government employees. Instead, Defendants routinely rely on cases involving the rights of students as against school officials – a wholly different jurisprudential framework inapplicable here. For example, citing *Longoria v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 261 (5th Cir. 2019), a case involving the free speech rights of a student dismissed from an extracurricular activity, and *McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996 (5th Cir. 2023), a case that likewise involved the off-campus rights of students, Defendants argue that “Barber does not allege any facts suggesting that the Handbook deprived her of a protected property or liberty interest, because she was never disciplined for anything.” (Defs.’ Mot. Dismiss, ECF No. 10, at 1). Neither cited case addressed the First Amendment rights of government employees or by any means suggested that a government employee must meet a pleading burden of a “property interest” before challenging a policy that imposes a condition governing her employment. Such a standard simply does not apply to the First Amendment claims of government employees. Defendants fail to grasp and apply the correct legal standard and framework. This error makes sense, though, because the correct standard and framework is fatal to Defendants’ motion.

Rather, the “discipline” requirement for a First Amendment claim brought by a government employee is instead simply that a plaintiff must show that he or she experienced an adverse employment decision. *Howell v. Town of Ball*, 827 F.3d 515, 522 (5th Cir. 2016). The First Amendment protects public employees from even “trivial” adverse actions against them. *Rutan v. Republican Party*, 497 U.S. 62, 75 n.8 (1990) (using as an example of impermissible retaliation and an adverse action the refusal to hold a birthday party for a public employee). An employee that has been disciplined is able to bring a First Amendment claim based on that injury, *i.e.*,

whenever an adverse action is taken against them. The Fifth Circuit is clear: “[a]dverse employment actions can include discharges, demotions, refusals to hire, refusals to promote, and *reprimands*.” *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999) (emphasis added); *Caldwell v. Lozano*, 689 Fed. Appx. 315, 319 (5th Cir. 2017) (reiterating the same principles, including the sufficiency of a “reprimand” to support a showing of an adverse action under the First Amendment).

Barber documented in her complaint how Defendants’ religion policy was imposed upon her. She also specifically alleged that she received a reprimand for engaging in her religious activity. She alleged that Rounds had her stop her prayer to meet with him and ordered her to cease her religious activity, Pl.’s Compl. ¶ 26, told her that Katy ISD does not allow her to pray in front of students because students could feel violated or offended by her conduct, Pl.’s Compl. ¶ 27, *and explicitly reprimanded her for engaging in her religious activity*. Pl.’s Compl. ¶ 28-29. Rounds prohibited her from engaging in such conduct and made it very clear that Barber would be disciplined if she prayed publicly again — a reprimand she has complied with. This is an adverse action, a “reprimand” according to the terms of *Sharp*, 164 F.3d at 933. Defendants ignore the governing standard here, instead purporting to apply an inapplicable standard related to student cases. Under the correct standard, a reprimand suffices to proceed with a First Amendment claim.

Defendants fail to address the basis for Barber’s First Amendment Claim, *Kennedy v. Bremerton School District*. In *Kennedy*, the Supreme Court dealt with a clearly analogous situation, a teacher who prayed publicly where visible by students, and rejected as unconstitutional the very reasoning of Defendants:

[T]he District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression. . . . If the argument sounds familiar, it should. Really, it is just another way of repackaging the District’s earlier submission that government may

script everything a teacher or coach says in the workplace. See Part III-B, *supra*. The only added twist here is the District’s suggestion not only that it *may* prohibit teachers from engaging in any demonstrative religious activity, but that it *must* do so in order to conform to the Constitution.

Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment’s double protection for religious expression, it would have us preference secular activity.

Kennedy, 142 S. Ct. at 2431.

The Court rejected that school district’s argument for curtailing the public religious expression by schoolteachers as absurd, pointing out that under such an argument, “[n]ot only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District’s rule, a school would be required to do so.” *Id.* at 2431. The Court ruled that the prayer of Coach Kennedy, regardless of the fact that it occurred where students were present and could see him pray, was protected under the First Amendment. The Court rejected the school district’s claim that the First Amendment does not permit “an employee, while still on duty, to engage in religious conduct.” *Id.* at 2424. Coach Kennedy’s conduct did not “involve leading prayers with the team or before any other captive audience,” *id.* at 2422, yet the school district still sought to regulate his private religious conduct as if it were a violation of the Establishment Clause.

The Court concluded, “Mr. Kennedy has demonstrated that his speech was private speech, not government speech” because when he prayed, “he was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach.” *Id.* The Court held that the “timing and circumstances of Mr. Kennedy’s prayers confirm the point.” *Id.* at 2425. As the Court explained further,

During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr.

Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment—here, on the field of play. *Garcetti*, 547 U.S., at 421. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

Id. The Court explained that the mere fact that an employee is on duty at the time of his or her speech does not categorically eliminate the First Amendment's protections. *Id.* Importantly, this ruling was not novel or an unexpected deviation from past precedent; rather it was based on a recognition that "[t]o hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* (citing *Tinker v. Des Moines Indep. Cty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

The policy in *Kennedy* that the school announced in that case is on all fours with the policy applied by the Defendants here. It ordered Coach Kennedy not to engage in any "demonstrative" religious activity in front of students, in order to avoid any possibility that students might participate or perceive that the prayer constituted state action. *Id.* at 2417. There is no meaningful distinction between the situation in *Kennedy* and the situation here that could justify the Defendants' policy. Coach Kennedy would have been reprimanded under the policy here, just as much and for the same reasons that Barber was reprimanded.

Kennedy is the on-point case, clearly indicating that teachers have a right to engage in public prayer, a right that Rounds and the school policy articulated to Barber have expressly violated. Defendants present *no* argument against the application of *Kennedy* to the case here, beyond mere conclusory assertion. *Kennedy* held that it violated the Free Speech and Free Exercise

rights of a teacher to prohibit that teacher from engaging in prayer, even if that prayer occurred where students may be present. Defendants' failure to distinguish *Kennedy* from this case speaks volumes. Applying *Kennedy* dooms the Defendants' motion.

II. Count III Should Not Be Dismissed, As It Appropriately Pleads a Claim for Vagueness and Overbreadth Based on the Broad Scope of the Defendants' Policy.

Plaintiff's Count III is sufficient to properly allege a due process violation based on the vagueness and overbreadth of the Defendants' religion policy. The policy has a far broader effect than the concerns it is designed to address, as it goes well beyond official conduct to apply to the private religious activity of employees, and is vague as to the extent to which it does so. The government cannot regulate speech based on overbroad and unconstitutionally vague standards that leave its employees stuck with guessing what conduct is permitted and what is prohibited. A regulation is void for vagueness when it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Defendants cite several cases involving the high standard necessary to bring facial challenges to general laws, such as economic regulations, as void for vagueness, *e.g.*, *Home Depot, Inc. v. Guste*, 773 F.2d 616, 627 (5th Cir. 1985). In such a context, the law imposes a weighty burden on plaintiffs to prove vagueness.

But those cases are inapplicable. The Supreme Court has made clear that those cases do not apply in the context of First Amendment rights, such as the Free Exercise and Free Speech claims at issue here. "In the First Amendment context, however, this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008) (internal quotation marks

omitted)). Contrary to Defendants' assertion, there is no requirement that every application be vague for a vagueness challenge based on violations of First Amendment rights. In other words, the standard cited by Defendants is simply inapplicable here. And Defendants do not even purport to address the actual governing standard articulated by *Stevens*. Under that standard, a substantial number of the applications of Katy's policy are unconstitutional, as the policy is applied to prohibit religious activity where students may witness it. The number of situations where this overbreadth could occur substantially outweighs those circumstances where Katy ISD may legitimately limit the acts of its employees, as discussed below.

Additionally, Defendants argue that more deference is due to Katy ISD to support its policy against a vagueness challenge because it is a school, tasked with serious pedagogical responsibilities. But to support that assertion, Defendants continue to rely on cases involving policies challenged insofar as they apply to students: *Murray v. W. Baton Rouge Parish Sch. Bd.*, 472 F.2d 438 (5th Cir. 1973), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 686 (1986) ("need for flexibility in school disciplinary procedures"). None of these cases discuss the rights of government employees when challenging the policies of their employer or suggest that deference can be given to create vague regulations for government employees.

Courts have never suggested that additional deference is due to schools as they set regulations for their employees. Defendants fail to point to a such a case because it does not exist. On the contrary, in the context of government employees, the Supreme Court has regularly emphasized that public employees may not be subjected to employment requirements that are so "vague and broad as to make men of common intelligence speculate at their peril on its meaning." *Whitehill v. Elkins*, 389 U.S. 54, 59 (1967). The Government may not impose on its employees requirements "lacking in 'terms susceptible of objective measurement.'" *Keyishian v. Bd. Of*

Regents, 385 U.S. 589, 604 (1967). Specifically protecting the rights of teachers, the Supreme Court emphasized,

When one must guess what conduct or utterance may lose him his position, one necessarily will ‘steer far wider of the unlawful zone,’ . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

Id. (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1967)). An overbroad regulation that impugns the First Amendment rights of government employees, whether in the educational context or not, is inherently improper. The Supreme Court has made clear that teachers may not be subject to regulations that vaguely infringe upon their First Amendment rights.

When the proper standard is applied, it is clear that Barber has sufficiently pled a vagueness and overbreadth claim. The policy is now ambiguous as to when teachers are barred simply from praying in the presence of students and still prohibits Barber from engaging in religious activity, such as prayer, if she does so when students may be present. Regardless of whether she is on the clock or not, acting in her official role or not, or even on campus or not, Barber is restricted in her ability to engage in prayer or religious activity. Most importantly, the policy makes no distinction between employees acting in their official capacity and their conduct in their personal capacity, leaving employees uncertain as to what conduct is prohibited. Defendants contend “Barber does not allege any facts suggesting that the Employee Handbook is impermissibly vague in *all* of its applications.” (Defs.’ Mot. Dismiss, ECF No. 10, at 5). That argument is irrelevant, as the First Amendment imposes a higher standard: “[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). *See also id.* at 432-433 (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”). Under *Stevens*, 559 U.S. at 473, all Barber needs to ultimately prove to succeed on her overbreadth claim is that ‘a

substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* (citation omitted). As Defendants have not even purported to address this governing standard, they have failed to meet their burden to dismiss Barber's overbreadth and vagueness claim.

III. Barber has Alleged Sufficient Facts to Show that her Right to Equal Protection was Violated.

Defendants argue that Equal Protection claims require proof to the ultimate finder of fact that disparate treatment of a plaintiff was motivated by discriminatory intent. They are wrong. A plaintiff in an Equal Protection case "typically alleges that he 'received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.'" *Club Retro, LLC v. Hilton*, 568 F.3d 181, 212 (5th Cir. 2009) (quoting *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001)). But when a statute *on its face* discriminates on the basis of a protected class like religion, discriminatory intent need not be proven directly, as such a rule "is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). The religion policy at issue here on its face discriminates on the basis of religion and there is no need to prove discriminatory intent.

Even if intent were required, here the complaint sufficiently alleges such invidious intent. Defendants claim that Barber fails to allege either element. Not so. Her complaint specifically alleges that she was subjected to disparate treatment. Pl.'s Compl. ¶ 75. Moreover, the allegations in Barber's complaint show Defendants' religious animus and disparate treatment, including allegations that Rounds lied to Barber and "told her that Katy does not have religious clubs and that Cardiff was not allowed to have any religious clubs per Katy ISD." Pl.'s Compl. ¶ 11. He explicitly targeted the Christian club for unique, unnecessary questioning, trying to talk them out of starting the Christian club. Pl.'s Compl. ¶ 13. He stopped Barber from praying before she was

on the clock and called her into a meeting, claiming her conduct was against school policy. *Id.* at ¶¶ 26-30. Katy ISD, through Rounds, singled out Barber with specific negative consequences for her prayer. These specific facts serve as evidence of discriminatory intent that supports drawing an inference of that intent, along with an inference of disparate impact based on religion.

IV. Defendant Katy Fails to Show Why It Should Not be Responsible for Damages Liability under 42 U.S.C. § 1983.

Defendants argue that Barber has failed to allege sufficient facts to show that Katy ISD is liable for compensatory damages for the violation of her constitutional rights. Certainly, school districts cannot be held liable under 42 U.S.C. § 1983 for an injury inflicted by its employees based on a theory of vicarious liability. *Board of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 402 (1997). But Barber's claim is not based on vicarious liability, but on a claim that Katy ISD's policy is itself unconstitutional. As policymaker, Katy ISD is liable if an official policy is unconstitutional or if a policy was adopted "with 'deliberate indifference' to its known or obvious consequences." *Johnson v. Dep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) (quoting *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407 (1997)). An official policy may take "various forms," including "a widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009) (citation omitted).

A claim that a school district's policy is unconstitutional is a challenge against a government's policy under *Monell v. City of New York*, 436 U.S. 658, 660 (1978). Plaintiff's complaint expressly contains such a claim; it seeks declaratory and injunctive relief holding the Katy ISD's religion policy unconstitutional and prohibiting its application as to Barber's religious activity. Defendants' argument boils down to an argument that the Katy ISD's Employee Handbook, containing an official statement for the rule on Religion in the Schools, is not the actual policy of

Katy ISD. That handbook is attached as an exhibit to this response. It states that “it is a guide to and a brief explanation of District policies and procedures related to employment.” Pl.’s Exhibit A at 9. It also clearly identifies itself as being part of Board Policy, with the statement, “[t]he District is committed to the constitutional principle of separation of church and state. Board Policy makes it clear that employees will neither advance nor inhibit religion.” *Id.*

The policy, in other words, contained in the handbook is expressly identified through this language as a part of that official Board Policy and the obligations applied to its employees by Katy ISD.¹ Defendants require employees to confirm they have read the handbook and agree to abide by the standards set forth within. Pl.’s Exhibit A at 9. Courts in comparable circumstances likewise have considered employee policies to constitute “policies” under *Monell. J.T. v. Uplift Educ., No. 3:20-CV-3443-D*, 2023 U.S. Dist. LEXIS 110330, 2023 WL 4207462, at *16 (N.D. Tex. June 27, 2023) (School employee handbook constituted a “policy” where employee was required to agree to comply with the handbook as a condition of employment.); *see also Doe v. Kerrville Indep. Sch. Dist.*, 2023 U.S. Dist. LEXIS 213863, *40 (W.D. Tex. Nov. 30, 2023).

This case contrasts markedly with *McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 348 (2023), which determined that Katy’s Athletic Code of Conduct did not constitute board policy for purposes of *Monell*. There, “McClelland did not allege facts demonstrating that the KISD Board had ratified the ACC, and the ACC itself does not indicate that it was ratified by the Board. In fact, the ACC appears to distinguish itself from ‘the board-approved Discipline Management Plan and Student Code of Conduct.’” *Id.* at 1012. Here, in contrast,

¹ This argument is surprising. Although the motion to dismiss is filed on behalf of all Defendants, to the extent this argument that this policy is not actually the official policy of Katy ISD could decrease that particular Defendant’s liability, it would support an argument that Defendant Rounds was acting *ultra vires* and is thereby more, not less, subject to individual liability for his conduct.

the employee handbook is expressly put forward by Katy ISD as a summary of the official policies governing the school's employees. There is no suggestion whatsoever that it does not bind those employees, but it clearly indicates that District policies and procedures "have been summarized" by its terms. Pl.'s Exhibit A at 9. Moreover, Defendants themselves treated the Handbook as a policy: Rounds clearly indicated in his application of this religion policy to Barber that it was, in fact, a "policy," stating, "Board Policy prohibits staff members from leading students in prayer or praying with or in the presence of students." Defs' Exhibit A. In Rounds' email to Barber, he likewise said that, "per district School Board policy, employees CANNOT pray with or in the presence of students." Pl.'s Compl. ¶ 17. Rounds repeatedly indicated that Barber was being reprimanded for praying in the presence of students, and that that reprimand was a result of official "Board policy."

Moreover, at most this *Monell* "policy" argument applies only to Barber's compensatory claims, not to her claims for prospective relief. *Familias Unidas v. Briscoe*, 619 F.2d 391, 402-05 (5th Cir. 1980) (holding that a county could not be held liable for damages under *Monell* but granting declaratory relief because the contested statute was "facially defective in pursuing its aim more broadly than First Amendment jurisprudence will allow" and "the implementation of this constitutionally infirm statute against [plaintiffs] was, of course, impermissible"); *Chaloux v. Killeen*, 886 F.2d 247, 249-51 (9th Cir. 1989) (finding that *Monell*'s "justification for limiting an action for damages is notably absent when the relief sought is an injunction halting the enforcement of an unconstitutional statutory scheme" and concluding that the trial court erred in applying *Monell* to a claim for prospective relief) (citing *Wood v. Strickland*, 420 U.S. 308, 315 n.6 (1975), for recognizing that "immunity from damages does not ordinarily bar equitable relief as well"). Even if Defendants' *Monell* argument actually applied here, at most it could only allow Defendants to challenge Barber's right to compensatory relief without affecting her requests for declaratory and injunctive relief.

V. Barber Has Pled Sufficient Facts to Show that Principal Scott Rounds Should be Individually Liable for His Violation of Her Clearly Established Rights.

The bulk of Defendants’ arguments as to the First Amendment counts of the complaint concern whether Rounds can be held individually liable for his conduct. Defendants’ arguments for qualified immunity *address the availability of damages in this case only*. They do not provide an argument against declaratory and injunctive relief. Hence, even if they were successful, it would not result in the dismissal of the entire complaint, as qualified immunity does *not* preserve officials from claims for injunctive relief. *See Williams v. Ballard*, 466 F.3d 330, 334 n.7 (5th Cir. 2006). But Defendants also fail to support dismissal as to the individual capacity damages claim.

Public officials are immune from damages for claims brought against them in their individual capacity so long as their “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, (1982). The test is undoubtedly a rigorous one: “existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741. “[P]re-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like situated reasonable government agent.” *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) (citations omitted).

Although a high standard, it is amply satisfied here. Rounds told Barber that Katy ISD does not allow her to pray where students might see her because students could feel violated or offended by her conduct. Pl.’s Compl. ¶¶ 24-28. Rounds forbade her from praying where students might witness the prayer and stated that she could not pray in any location where students would be present, regardless of whether the workday had started and regardless of whether she had any other responsibilities at the time. The law regarding the unconstitutionality of such a policy statement is not in doubt. *Rounds categorically prohibited Barber from praying in the presence of students.*

Kennedy clearly indicates that a public-school teacher may not be prohibited from such personal conduct. The law imputes knowledge of *Kennedy* to Principal Rounds. *See Harlow*, 457 U.S. at 819 (“[A] reasonably competent public official should know the law governing his conduct.”).

Defendants cite various cases relating to *student* speech and providing qualified immunity to government regulators relating to that student speech, particularly *Longoria v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019). Such cases are irrelevant. It is *Kennedy* which is the on-point case about the prayer activity of teachers that governs this case. And *Kennedy* clearly establishes that teachers cannot be barred from praying where students are present. Defendants assert in a conclusory fashion without any support that the cases they cite survive *Kennedy*, but that assertion is as false as it is irrelevant; *Kennedy* itself clearly established that teachers cannot be prohibited from engaging in prayer in the presence of students. Moreover, pre-*Kennedy* cases involving school employees participating in prayer directly during the meeting of students are likewise irrelevant as such conduct is not at issue here. Here, Barber is not asking to participate in student events in her official capacity, as occurred in *Doe v. Duncanville ISD*, 70 F.3d 402 (5th Cir. 1995), but simply to pray in public without fear of reprisal because a student might see her pray. *Kennedy* is an on-point decision, clearly establishing Plaintiff’s Free Exercise and Free Speech rights; rights that the Defendants have clearly violated. It establishes that Principal Rounds violated Barber’s clearly established rights.

VI. Barber’s Count V Does Not Bring a Claim *For Damages* Under the Texas Constitution.

Defendants’ arguments against Barber’s supplemental claim brought pursuant to the Texas Constitution consists, in full, of an argument that damages are not available for claims brought directly pursuant to the Texas Constitution, citing *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). Barber recognizes and agrees with that proposition entirely. The claims under the

Texas Constitution are not brought for damages at all but, instead, solely for declaratory and injunctive relief. Plaintiff's claim for damages is based on other counts in the complaint. As the Texas Supreme Court made clear in the very case cited by the Defendants, "[s]uits for equitable remedies for violation of constitutional rights are not prohibited." *Id.* Defendants advance no argument otherwise for dismissing Barber's Count V.

VII. As to Count VI, Barber Has Pled Sufficient Facts to Show That Her Free Exercise Rights Protected by the Texas Religious Freedom Restoration Act Have Been Substantially Burdened.

Finally, in Count VI, Barber has sufficiently alleged her claim under Texas's Religious Freedom Restoration Act. The Texas Religious Freedom Restoration Act prohibits governmental actions that substantially burden religious practice unless they satisfy strict scrutiny. Tex. Civ. Prac. & Rem. Code § 110.003. To support their motion to dismiss, Defendants do *not* argue that their conduct would satisfy strict scrutiny, but instead argue only that their conduct did not substantially burden Barber's religious practice. This inquiry is a fact-specific one. Yet, Defendants cite no cases addressing facts comparable to the facts at issue here or suggest that the allegation of those facts are insufficient to support a claim. Instead, Defendants make the factual assertion that Rounds told Barber that she could pray "away from where the students were already approved to engage in non-curricular student activities." Defs.' Mot. Dismiss, ECF No. 10, at 17.

On the contrary, Rounds told Barber more than once that she could not engage in any prayer "in any location where students would be present." Pl.'s Compl. at ¶¶ 21, 29. This statement was in no way limited merely to the meeting of specific student groups. It was instead a categorical order that she could not engage in religious activity where students might possibly be present. Pl.'s Compl. at ¶¶ 20, 21, 28-30. As students might be present anywhere on school grounds, Barber has accordingly, as a result of this policy-based reprimand, followed this instruction and refrained from engaging in her scheduled pre-work Bible study with other teachers. Pl.'s Compl. at ¶ 43. She has

further refrained from engaging in prayer anywhere on campus as a result of this policy (given she had already been reprimanded). In short, Barber's religious activity has been substantially burdened as she has been rendered unable to engage in religious activity in her workplace. Defendants' arguments against Count VI also fail.

CONCLUSION

For these reasons, Plaintiff Staci Barber respectfully requests that the Court deny Defendants' partial motion to dismiss her complaint.

Dated: May 9, 2024.

Respectfully submitted,

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COUNSEL FOR PLAINTIFF

*Admitted Pro Hac Vice

**Not admitted in this jurisdiction; application for pro hac vice admission forthcoming

CERTIFICATE OF SERVICE

I hereby affirm that a true and correct copy of the foregoing document was served upon all counsel of record through the Court's e-filing system on May 9, 2024.

/s/ Nathan J. Moelker
NATHAN J. MOELKER

