No. 21-2475

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M. KLUGE,

Plaintiff-Appellant

v.

BROWNSBURG COMMUNITY SCHOOL CORP.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
Case No. 1:19-cv-02462-JMS-DLP
The Honorable Judge Jane Magnus-Stinson

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND URGING AFFIRMANCE

INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns a public school's obligations to accommodate its employees' religious practices under Title VII of the Civil Rights Act of 1964, as the Attorney General enforces Title VII against public employers. 42 U.S.C. 2000e-5(f)(1).

This case also implicates the United States' interests under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* One question here is

whether a teacher's proposed accommodation could expose his school to potential liability under Title IX. The Department of Justice and the Department of Education, which oversee and enforce Title IX against their recipients of federal funding, have an interest in that question.

Finally, the United States has a strong interest in protecting the rights of lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender nonconforming individuals. The President has recognized that all people are entitled to "equal treatment under the law, no matter their gender identity." Exec. Order No. 13,988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021). The United States thus has filed briefs in cases involving policies that impose unique burdens on transgender individuals. See, *e.g.*, U.S. Brief as Amicus Curiae, *Corbitt* v. *Taylor*, No. 21-10486 (11th Cir. Aug. 2, 2021); U.S. Statement of Interest, *B.P.J.* v. *West Va. State Bd. of Educ.*, No. 2:21-cv-316, 2021 WL 3081883 (S.D. W. Va. July 21, 2021). This case implicates similar interests.

STATEMENT OF THE ISSUE

Title VII requires an employer to "reasonably accommodate" its employees' religious practices unless doing so would impose "undue hardship." 42 U.S.C. 2000e(j). The question presented is whether a public high school must accommodate a teacher's religious objection to referring to transgender students by names and pronouns that match their gender identities, by permitting him to

address all students by their last names only, where the record shows that the accommodation harmed students and undermined the school's policy of providing a supportive learning environment for all students.[1]

STATEMENT OF THE CASE

1. Factual Background

a. Brownsburg High School's Name-And-Pronoun Policy

Prior to the 2017-2018 school year, the community at Brownsburg High School started to become "more aware of the needs of transgender students." App. A6 (citation omitted).[2] Faculty and staff members requested guidance on "how to address transgender students," and faculty meetings featured presentations on gender dysphoria and how teachers can encourage and support transgender students. App. A6-A7.

In May 2017, the school adopted a policy regarding the names and pronouns teachers should use when referring to transgender students. The policy directed

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[1] The term "transgender" refers to a person whose gender identity differs from their sex assigned at birth, whereas the term "cisgender" refers to a person whose gender identity is the same as their sex assigned at birth. See *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir.), as amended (Aug. 28, 2020), cert. denied, 141 S. Ct. 2878 (2021).

[2] "App. A_" and "App. B_" refer, respectively, to Kluge's Short Appendix and Separate Appendix by page number. "Appellant Br. __" refers to Kluge's opening brief by page number. "Doc. __, at __" refers to documents on the district court's docket sheet and page number.

staff to address students using the names and pronouns listed in "PowerSchool," the school's official student-information database, and permitted transgender students to change their names and pronouns in PowerSchool with the approval of a parent and a healthcare professional. App. A7-A8. This decision recognized that "transgender students face significant challenges in the high school environment, including diminished self-esteem and heightened exposure to bullying," which can impair their "academic performance" and damage their "overall well-being." App. A8 (citation omitted).

The school's policy had two objectives. App. A8. First, it would offer "a straightforward rule [for] addressing students." App. A8 (citation omitted). This was important because "several transgender students [had] enrolled as high school freshman [sic] for [the upcoming] school year." App. A9 (citation omitted). Second, the policy would ensure that transgender students, just "like any other student," receive "respect and affirmation" of their identity "provided they go through the required and reasonable channels of receiving and providing proof of parental permission and a healthcare professional's approval." App. A8 (citation omitted).

Plaintiff-appellant John Kluge was the sole orchestra teacher at Brownsburg High School. App. A5. He identifies as a Christian whose faith "governs the way he thinks about human nature * * * [and] gender." App. A5-A6 (citation

omitted). Kluge believes that "God created mankind as either male or female," such that "gender is fixed in each person from the moment of conception." App. A6 (citation omitted). He further believes that "being transgender is a sin," and that it is sinful to "promote gender dysphoria." App. A6 (citations omitted).

Kluge opposed the school's name-and-pronoun policy. He informed the principal of his religious objection to the policy in July 2017. App. A9. Kluge later confirmed his unwillingness to follow the policy and was suspended. App. A9.

b. Kluge's Proposed "Last-Names-Only" Accommodation

The week after Kluge was suspended, he proposed that, instead of referring to transgender students by the names and pronouns in PowerSchool, he be allowed to address all students in his classes by their last names only, "similar to a sports coach." App. A10. The school agreed to try the accommodation. App. A10. The school's human-resources director annotated a memo that instructed Kluge to "recognize and treat students in a manner using the identity indicated in PowerSchool," writing that the school "agree[d] that [Kluge] may use last name[s] only to address students," and initialed the notation. App. A10 (citation omitted); see also App. B52. The school also agreed that another teacher would distribute sex-specific orchestra uniforms to students. App. A10.

Teachers and school officials received complaints about Kluge's accommodation soon after he put it into practice. Craig Lee—a teacher, member of the school's Faculty Advisory Committee, and faculty advisor for the school's Equality Alliance club[3]—heard from two transgender students in Kluge's classes who said that Kluge's use of their last names "made them feel isolated and targeted." App. A12 (citation omitted); see also Doc. 120-14, at 7. These students, Aidyn Sucec and Sam Willis, "felt strongly that they wanted others to acknowledge their corrected names, and * * * Kluge's refusal to do so hurt them." App. A12 (citation omitted). According to Lee, "the emotional distress and the harm that was being caused" for Aidyn and Sam "was very, very clear." App. A11 (citation omitted).

Declarations from Aidyn and Sam elaborate on this harm. Aidyn stated that Kluge's "behavior made [him] feel alienated, upset, and dehumanized." App. A14. He "absolutely loved orchestra" and had "played the violin for years." Doc. 22-2, at 3. But Aidyn began to "dread going to orchestra class each day" (App. A14) (citation omitted), because of "anxiety" caused by having "daily negative interactions" with Kluge (Doc. 22-2, at 3). By the end of that first semester, Aidyn

[3] Equality Alliance is "a student club that * * * discuss[es] issues that impact the LGBTQ community and provides a safe space for students who identify as LGBTQ." App. A11.

told his mother that he "did not want to continue taking orchestra during [his] sophomore year." App. A14 (citation omitted); see also Doc. 22-2, at 3.[4]

Sam expressed similar sentiments. Kluge's practice "upset [Sam] and his family." App. A15. Indeed, Sam stated that if everyone in his life had, like Kluge, "refused * * * to use [his] corrected name, [he] would not be here today." App. A15 (citation omitted). Kluge's approach also "exposed [Sam] and other transgender students to 'widespread public scrutiny'" because "[m]ost of the students knew why * * * Kluge had switched to using last names"—that is, students understood that Kluge was unwilling to use the appropriate first names, pronouns, and honorifics for transgender students. App. A15 (citation omitted). This contributed to the "sense that [Sam] was being targeted because of [his] transgender identity." App. A15 (citation omitted; second alteration in original).

Other students corroborated Sam's suspicions. One student told Lee that "Kluge's use of last names made him feel incredibly uncomfortable, even though he did not identify as LGBTQ." App. A12 (citation omitted). That student was "fairly certain" that "all the students" knew why Kluge used only students' last

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[4] After Kluge's resignation the following year, see p. 9, *infra*, "[s]everal students made negative and derogatory remarks * * * suggesting that [Aidyn] had been responsible for * * * Kluge leaving the school." Doc. 159, at 13. One student even called Aidyn "the fag that got Kluge fired." Doc. 22-3, at 5. Due to this "controversy," as well as Aidyn's own "health struggles," Aidyn transferred to another school in August 2018. Doc. 159, at 13; Doc. 22-3, at 4-5.

names, and said that the practice "made the transgender students in * * * Kluge's orchestra class stand out." App. A12 (citation omitted). The student "felt bad for his transgender classmates" and "mentioned that there were other students who felt this way." App. A12 (citation omitted); see also App. A13 (noting that the principal also "received complaints from students").

Additionally, at least five teachers expressed worries about the adverse effects of Kluge's accommodation on students and school operations. Three teachers approached Lee and raised "concerns that * * * Kluge's use of last names only was causing harm to students." App. A13. And two members of the performing arts department complained directly to the principal, saying that "Kluge was making students uncomfortable by calling students by only their last names and that the tension this was causing was affecting the overall functioning of the performing arts department." Doc. 120-2, at 4; see also App. A13. The school also heard from at least one parent of a transgender student, who called Kluge's practice "very disrespectful and hurtful"—even "border[ing] on bullying"—and said that it had caused her son "a lot of distress." Doc. 120-13, at 2.

c. Kluge's Resignation

The principal met with Kluge in December 2017 to discuss the complaints about Kluge's last-names-only accommodation. App. A16. Kluge was told that

his accommodation "was creating tension in the students and faculty," transgender students in his classes had "reported feeling 'dehumanized,'" and friends of those students "feel bad for [them]." App. A16-A17 (citation omitted). Kluge responded by saying he felt "encouraged" by the news and believed his use of students' last names "was being effective." App. A17 (citation omitted).

In January 2018, the school notified Kluge that his accommodation would not continue past the end of the school year. At a faculty meeting, an assistant superintendent shared a document titled "Transgender Questions," which stated that "staff and faculty should address students by the names and genders listed in PowerSchool." App. A17-A18 (citation omitted). The document acknowledged that the school had permitted use of students' last names during the 2017-2018 school year, but stated that, "moving forward," teachers must use "the first name listed in PowerSchool." App. A18 (citation omitted).

After the meeting, school officials told Kluge that his accommodation was unreasonable and reiterated that he would have to abide by the school's policy starting the next school year. App. A18. The following month, the school's human-resources director met with Kluge again and explained that if he was not willing to either comply with the school's policy or resign, the school would begin the process of terminating his employment on May 1, 2018. App. A19.

The day before the termination process was set to begin, Kluge emailed the human-resources director, stating, "I'm writing you to formally resign from my position as a teacher, effective at the end of the 2017-2018 school year." App. A20 (citation omitted). Kluge asked her not to "process this letter nor notify anyone, including any administration, about its contents before May 29, 2018." App. A20 (citation omitted). The human-resources director agreed to honor his request. App. A20. Kluge later attempted to withdraw that resignation on the grounds that it had been "conditional." App. A21-A22 (citation omitted). The school did not permit him to do so and, in June 2018, the school board accepted his resignation, ending his employment. App. A22.

2. Procedural History

Kluge filed suit in the Southern District of Indiana against the Brownsburg Community School Corporation (BCSC) and four officials. His complaint asserted three Title VII claims, seven constitutional claims under 42 U.S.C. 1983, and three state-law claims. Doc. 15, at 17-31. In January 2020, the district court dismissed all of Kluge's claims save for two under Title VII: (1) a claim alleging that BCSC failed to accommodate Kluge's religious beliefs by requiring him to refer to transgender students using the names in PowerSchool; and (2) a claim that BCSC retaliated against Kluge by withdrawing the last-names-only accommodation. App. B23-B29, B50-B51.

The parties cross-moved for summary judgment on those remaining claims, and the district court ruled in favor of BCSC. App. A51-A53. Regarding the religious-accommodation claim, the court found that Kluge had established a prima facie case of discrimination by showing an objective conflict between the school's policy and his religious beliefs. App. A42. The court concluded, however, that BCSC had carried its burden of demonstrating that "it cannot provide a reasonable accommodation 'without undue hardship on the conduct of [its] business.'" App. A42 (brackets in original) (quoting 42 U.S.C. 2000e(j)), A48.

The district court's undue-hardship ruling rested on two grounds. First, the court held that Kluge's accommodation "burdened BCSC's ability to provide an education to all students and conflicted with its philosophy of creating a safe and supportive environment for all students." App. A44-A45. Second, the court held that maintaining an accommodation that left "transgender students fe[eling] targeted and dehumanized could potentially have subjected BCSC to a Title IX discrimination lawsuit brought by a transgender student." App. A47.

Regarding Kluge's retaliation claim, the district court found that he had waived any opposition to BCSC's motion for summary judgment because his briefing was "meager" and "merely reiterat[ed] his version of the facts he believes to be relevant without discussion of how those facts meet the requirements of a retaliation claim." App. A50-A51. In the alternative, the court noted that Kluge

had failed to identify any evidence from which a reasonable factfinder could infer that BCSC's asserted reason for his termination was pretextual. App. A51. The court thus entered summary judgment in BCSC's favor on both of Kluge's claims. App. A53.

SUMMARY OF ARGUMENT

The district court correctly held that BCSC would have suffered undue hardship by continuing to accommodate Kluge's desire not to use transgender students' first names and pronouns. The court's conclusion that Kluge's last-names-only accommodation harmed students and increased the school's risk of Title IX liability is amply supported by the record and applicable case law.

This Court and others recognize that undue hardship arises when an employee's accommodation causes emotional or psychological harm to coworkers, and when it results in a non-speculative risk of undermining customer relations. Given a school's educational and caretaking responsibilities, the principles underlying these cases support a finding of undue hardship in the educational context when a teacher's requested accommodation causes harm to his students. The district court thus correctly found undue hardship here based on undisputed evidence that Kluge's accommodation had caused transgender students in his classes significant distress and alienation.

That conclusion is further supported by case law holding that an accommodation causes undue hardship when it results in an increased risk of legal liability. Here, school officials reasonably were concerned that Kluge's accommodation conflicted with the school's obligations under Title IX due to the harm the accommodation inflicted on transgender students.

None of Kluge's arguments warrant a contrary conclusion on either of these points. Accordingly, the district court's ruling on Kluge's failure-to-accommodate claim should be affirmed.[5]

ARGUMENT

Title VII requires an employer to "reasonably accommodate" an employee's "religious observance and practice" unless it cannot do so "without undue hardship on the conduct of [its] business." 42 U.S.C. 2000e(j). In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977), the Supreme Court defined "undue hardship" to mean that an employer is not required to "bear more than a de minimis cost" when accommodating an employee's religious practice. Determining whether hardship is undue is a fact-specific inquiry. See, *e.g.*, *Rodriguez* v. *City of Chi.*, 156 F.3d 771, 776 n.7 (7th Cir. 1998); *EEOC* v. *Ilona of Hungary, Inc.*, 108 F.3d 1569, 1577 n.8 (7th Cir. 1997). The employer bears the

[5] The United States takes no position on Kluge's retaliation claim.

burden of demonstrating undue hardship. See *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 449 (7th Cir. 2013).

BCSC satisfied this burden here by proffering undisputed evidence that Kluge's accommodation had, in practice, affirmatively harmed transgender students in his classes—which is far more than a de minimis burden. BCSC also showed that school officials were reasonably concerned that the accommodation could have resulted in an increased risk of liability under Title IX, which further confirms the existence of an undue hardship. This Court should affirm.

I. THE DISTRICT COURT CORRECTLY RELIED ON UNREBUTTED EVIDENCE OF STUDENT HARM IN DETERMINING THAT KLUGE'S ACCOMMODATION HAD CAUSED UNDUE HARDSHIP

The district court correctly concluded that Kluge's last-names-only accommodation caused BCSC to suffer undue hardship based on unrebutted evidence that the accommodation affirmatively harmed students in Kluge's classes. As explained below, that evidence sufficed to carry BCSC's burden under Title VII.

A. Harm To Students Can Constitute Undue Hardship To School-Employers

The district court properly considered evidence of harm to transgender students in Kluge's classes. The court's conclusion that harm to students may constitute undue hardship to a school follows directly from the decisions of this

and other courts, which recognize that undue hardship results when an accommodation adversely affects a business's other employees and customers.

1. As this Court has emphasized, "Title VII does not place the burden of accommodation on fellow workers"; rather, that burden "is supposed to fall on the employer." *EEOC* v. *Walmart Stores E., L.P.*, 992 F.3d 656, 659-660 (7th Cir.), petition for cert. pending, No. 21-648 (filed Oct. 29, 2021). For example, permitting an employee to take unpaid leave to participate in a religious practice typically constitutes "a reasonable and generally satisfactory form of accommodation" because "the direct effect of unpaid leave is merely a loss of income for the period the employee is not at work" and coworkers generally do not experience disruption to their work activities and schedules. *Adeyeye*, 721 F.3d at 455 (quoting *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 70-71 (1986)). More "extended absences" may pose greater challenges depending on "the specific circumstances" of the requesting employee's job and "the leave schedule the employee believes is needed," including where it would require involuntary changes to other employees' schedules or leave requests. *Ibid.* The question in such a situation is whether the burden of accommodating a co-worker's religious practice has been improperly "thrust on other workers" instead of their employer "as Title VII contemplates." *Walmart Stores*, 992 F.3d at 659 (emphasis omitted). If it has, Title VII generally does not require the accommodation to be provided.

See *ibid.* ("Title VII does not require an employer to offer an 'accommodation' that comes at the expense of other workers.").

This principle applies equally when an accommodation would cause an employee's coworkers to suffer emotional or psychological distress. For example, *Peterson* v. *Hewlett-Packard Co.*, 358 F.3d 599, 601-602, 607 (9th Cir. 2004), involved a failure-to-accommodate claim by an employee who had posted in his work station Biblical scriptures intended to "condemn[] 'gay behavior'" and "demean and harass his co-workers." The Ninth Circuit found it "readily apparent" that permitting the employee to engage in such conduct would have resulted in undue hardship, concluding that an employer "need not accept the burdens that would result from allowing actions that demean or degrade * * * members of its workforce." *Id.* at 606-608; see also *Wilson* v. *United States W. Commc'ns*, 58 F.3d 1337, 1339-1341 (8th Cir. 1995) (finding undue hardship where an employee sought to wear a button communicating opposition to abortion and featuring "a color photograph of an eighteen to twenty-week old fetus," where co-workers found the image "offensive and disturbing" for reasons "unrelated to any stance on abortion or religion").

This and other cases make clear that while undue hardship will not be found simply because co-workers find an employee's accommodated "conduct irritating or unwelcome," *Peterson*, 358 F.3d at 607, by the same token, Title VII does not

permit an employee "to impose [their religious] beliefs as [they] choose[]," regardless of their conduct's impact on other employees, *Wilson*, 58 F.3d at 1341. See also EEOC Compliance Manual on Religious Discrimination § 12-III-D (Jan. 15, 2021) (EEOC Religious Guidance).

For similar reasons, Title VII also does not require employers to tolerate employee conduct that results in a non-speculative risk of undermining customer relations. This Court considered such a situation in *Anderson* v. *U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 473 (2001), which involved an employee who "often used the phrase, 'Have a Blessed Day'" with customers as "part of her religious practice." The company's liaison at Microsoft, its "largest customer," found the phrase "unacceptable." *Ibid.* The employee thus was told to "refrain from using the 'Blessed Day' phrase in her daily business interactions with Microsoft," but she continued to do so and was reprimanded. *Id.* at 473-474. Because the employee's practice threatened to "damage" the company's relationship with Microsoft, this Court held that the company had reasonably accommodated the employee by allowing her to "use the phrase with some people but not with everyone"—specifically, not with Microsoft. *Id.* at 476-477. See also *Bruff* v. *North Miss. Health Servs., Inc.*, 244 F.3d 495, 501 n.15 (5th Cir. 2001) (where a counselor requested an exemption from providing relationship counseling to same-sex couples, the "potential negative impact" on patients from being treated by

"substitut[e] counselors" "add[ed] weight" to the court's finding of undue hardship).

2. If adverse effects on a business's employees and customers can constitute undue hardship, then harm to students—including the high school students here, who are legally required to attend school—presents an even stronger basis for finding undue hardship. Schools assume a "custodial and tutelary responsibility" over their students, *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 830 (2002) (citation omitted), and "the well-being of students * * * must be the primary concern of school administrators," *Schroeder* v. *Hamilton Sch. Dist.*, 282 F.3d 946, 952 (7th Cir. 2002); see also Ind. Code §§ 20-33-2-4, 20-33-2-6 (2019) (making school attendance compulsory for minors); Ind. Code §§ 20-33-1-1(1), 20-33-2-1 (2008) (seeking to provide students with a "proper education" and "nondiscriminatory * * * educational opportunities").

To properly discharge these responsibilities, a school must be allowed to consider potential harm to students when assessing a teacher's accommodation request. This is especially true given the power dynamics of the classroom, where the teacher occupies a position of authority—able to discipline students, lower grades, and withhold recommendations—relative to students. Moreover, where, as here, a school grants a teacher an accommodation that turns out to harm students, those students might reasonably believe that the teacher's conduct has been

endorsed by the school or carries its imprimatur. See EEOC Religious Guidance, § 12-IV-C-6-b (undue hardship may be found "where the expression could be mistaken as the employer's message"). These considerations support permitting (and indeed requiring) schools to weigh possible harms to students when assessing requests for accommodation.[6]

B. Kluge Fails To Demonstrate Any Error In The District Court's Finding That The Harm To Students Caused By His Accommodation Constituted Undue Hardship

In his opening brief, Kluge does not dispute that harm to students can constitute undue hardship under Title VII. Nor does he deny that the record contains evidence of such harm. Rather, Kluge argues for two reasons that the

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[6] Case law also recognizes the unique concern of public-service employers, like police and fire departments, when an employee seeks to be exempted from protecting, investigating, or caring for particular individuals or businesses for religious reasons. Where an employee seeks to be exempted from performing a central function of their job—like defending members of the community from violence—the employer may have a legitimate ground for denying the request if it would prevent the employer from treating all members of the public equally or undermine public confidence that it will do so. See, *e.g.*, *Endres* v. *Indiana State Police*, 349 F.3d 922, 924 (7th Cir. 2003); *Shelton* v. *University of Med. & Dentistry of N.J.*, 223 F.3d 220, 222-223 (3d Cir. 2000); *Rodriguez*, 156 F.3d at 773-774; *Ryan* v. *United States Dep't of Just.*, 950 F.2d 458, 459-460 (7th Cir. 1991). These and other decisions highlight the obligations of persons in public-service roles to serve the entire public. See, *e.g.*, *Endres*, 349 F.3d at 927 ("Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police."); *Rodriguez*, 156 F.3d at 779-780 (Posner, J., concurring) (concluding that "erosion" of public confidence in the neutrality of a city's protectors "by recognition of a right of recusal" would "constitute an undue hardship within the meaning of the statute"). The same general principle also should apply to public school teachers.

evidence here does not rise to the level of undue hardship. First, he suggests that the reports of harm by students and teachers constituted mere "grumbling" that falls short of undue hardship. Appellant Br. 33-35. Second, Kluge argues that the district court erred in considering declarations from his students because they were written *after* school administrators already had decided not to maintain his accommodation. Appellant Br. 37-38. These arguments misconstrue the record, misapprehend the relevant inquiry, and should be rejected.

1. Kluge attempts to recast the robust evidence of harm as mere "grumbling" by students and faculty that cannot, "as a matter of law," establish undue hardship. Appellant Br. 34. While it is true that "grumbling" falls short of showing undue hardship, see *Brown* v. *Polk Cnty.*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc), this principle is inapposite because the evidence here far exceeds "grumbling." Rather, it shows that Kluge's last-names-only policy hurt and isolated transgender students in his classes—specifically, Aidyn and Sam. In so doing, the policy directly undermined the school's policy of seeking to ensure that transgender students, "like any other student," receive "respect and affirmation" of their identity. App. A8 (citation omitted).

As another teacher explained, the "emotional distress and * * * harm" that Aidyn and Sam experienced as a result of Kluge's accommodation was "was very, very clear * * * for everyone to see." App. A11 (citation omitted). It made

Aidyn feel "alienated, upset, and dehumanized"—to the point that he decided not to re-enroll in Kluge's orchestra class. App. A14 (citation omitted). And it made Sam extremely "upset"—so much so that if everyone in Sam's life had, like Kluge, refused to recognize his gender identity, "[he] would not be here today." App. A15 (citation omitted). Kluge's accommodation also "exposed [Sam] and other transgender students to 'widespread public scrutiny,'" drawing attention to the fact that, as their classmates understood, Kluge was unwilling to use names and pronouns that matched transgender students' gender identities when interacting with them. App. A15 (citation omitted). Indeed, Kluge's opposition to doing so likely was obvious given that he was the only teacher who exclusively used students' last names. See App. A13.

Kluge attempts to impugn the reasonableness of Aidyn and Sam's responses, emphasizing that he applied his last-names-only policy to both transgender and cisgender students. See Appellant Br. 35. But he does not dispute that students understood that he had adopted that policy only because he refused to refer to transgender students in a manner consistent with their gender identity. And Kluge cites no evidence to contest the district court's conclusion that, despite its facial neutrality, his accommodation in fact caused Aidyn and Sam real emotional and psychological distress, thus impeding their ability to participate in and benefit from their school experience on terms equal to their cisgender classmates. This

undisputed evidence distinguishes this case from those cited by Kluge for the proposition that mere grumbling cannot demonstrate undue hardship.

For instance, Kluge references *Anderson* v. *General Dynamics Convair Aerospace Division*, 589 F.2d 397 (9th Cir. 1978). Appellant Br. 34. But unlike here, the employer in *Anderson* cited no evidence of employee complaints, relying instead on a purported "general sentiment" among its workforce without "offer[ing] any evidence" to substantiate that sentiment or show how it would cause undue hardship. 589 F.2d at 402. Kluge also invokes *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978). Appellant Br. 34. But *Burns* simply clarifies that employee "unhappiness" with a co-worker's accommodation does not constitute undue hardship absent a showing of "actual imposition on [them] or disruption of the work routine." 589 F.2d at 407; accord *Peterson*, 358 F.3d at 607 (suggesting that undue hardship will not be found where co-workers simply find an accommodated employee's conduct "irritating or unwelcome"). As explained, the school made precisely such a showing here. See pp. 20-21, *supra*; see also App. A11-A16; Doc. 120-2, at 4. Indeed, *Burns* bolsters the district court's summary-judgment ruling, recognizing that undue hardship is more likely to be found where, as here, an employer provided an accommodation

and "can point to hardships that actually resulted." 589 F.2d at 406 (quoting *Draper* v. *United States Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)).[7]

For similar reasons, Kluge errs in asserting that finding undue hardship based on the undisputed emotional and psychological harms to Aidyn and Sam is equivalent to allowing a "heckler's veto." Appellant Br. 4. Kluge is quite correct that expressions of antireligious bias by coworkers, customers, or students would not constitute a cognizable undue hardship: complaints from "anti-Semites," for example, would not be grounds for denying an accommodation allowing Jewish employees to "wear yarmulkes." Appellant Br. 36; cf. *Chaney* v. *Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("[A] company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race."). But this case is entirely different. BCSC relied not on mere complaints, but on undisputed emotional and psychological harms to Aidyn and Sam. And those harms were not rooted in any anti-Christian bias or opposition to the religious character of Kluge's beliefs: Aidyn and Sam were harmed by Kluge's refusal to refer to them in a manner consistent with their gender identity, and they would have suffered that harm had his opposition to doing so been rooted in secular rather than religious beliefs.

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[7] Kluge also cites *Cummins* v. *Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975) (see Appellant Br. 33-34), but the Supreme Court vacated that opinion, see *Parker Seal Co.* v. *Cummins*, 433 U.S. 903 (1977).

2. Kluge also suggests that the district court committed "legal error" in relying on Aidyn and Sam's declarations because they were drafted after school officials declined to maintain Kluge's accommodation. Appellant Br. 37-38. He argues that, in assessing undue hardship, only evidence of an employer's "contemporaneous reason[s]" for rejecting an accommodation may be considered. Appellant Br. 37.

Kluge's argument misunderstands the law. The cases he cites involve disparate-treatment claims, not claims of a failure to accommodate. See Appellant Br. 37. In the cases Kluge cites, the relevant issue was whether the employer had relied on a protected characteristic in its decision-making. See *Cullen* v. *Olin Corp.*, 195 F.3d 317, 322-323 (7th Cir. 1999); *Venters* v. *City of Delphi*, 123 F.3d 956, 971-974 (7th Cir. 1997). Accordingly, those courts properly limited their consideration to evidence pertaining to the employer's reasoning when it took the challenged action. See *Cullen*, 195 F.3d at 324; *Venters*, 123 F.3d at 974.

Here, however, the question is not whether school officials harbored an impermissible motive or intent, but rather, whether Kluge's requested accommodation resulted in "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). Aidyn and Sam's declarations relate directly to that question, expounding on harms caused by Kluge's accommodation. Although those declarations were drafted after school officials made the decision not to

maintain Kluge's accommodation past the end of the school year, the harms discussed in those declarations had been reported to teachers and were known by school officials before their decision was made. See pp. 6-8, *supra*.

Accordingly, Kluge errs in arguing that the district court should have disregarded Aidyn and Sam's declarations. Those declarations were pertinent to the specific legal issue before the court. And even assuming that school officials' subjective understandings at the time they decided not to extend Kluge's accommodation bears any relevance, Aidyn and Sam's declarations simply address adverse consequences of that accommodation of which officials already were aware.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SCHOOL OFFICIALS REASONABLY FEARED THAT KLUGE'S ACCOMMODATION COULD HAVE EXPOSED THE SCHOOL TO AN INCREASED RISK OF TITLE IX LIABILITY

Because the undisputed harm to Aidyn and Sam was sufficient to support the district court's undue-hardship holding, this Court need not consider the district court's separate conclusion regarding Title IX liability. But to the extent the Court reaches the issue, the district court also correctly concluded that maintaining Kluge's accommodation would have resulted in an "increased risk" of Title IX liability for the school, thus further confirming the court's finding of undue hardship. App. A48.

A. An Increased Risk Of Civil Liability Can Constitute Undue Hardship

"[C]ourts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law." *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999). Even a sufficiently increased risk of liability can establish undue hardship. For example, in *Matthews* v. *Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011), this Court recognized that an accommodation that "could place [an employer] on the 'razor's edge' of liability by exposing it to claims of permitting workplace harassment" would cause undue hardship. So, too, in *Lizalek* v. *Invivo Corp.*, 314 F. App'x 881, 881-883 (7th Cir. 2009), where this Court held that an employer would suffer undue hardship if it accommodated an employee's religious beliefs about taxes in part because the accommodation presented a potential "risk[] [of] conflict with the Internal Revenue Service."

Other courts of appeals likewise have rejected religious accommodations that could sufficiently increase an employer's risk of liability. See, *e.g.*, *Peterson*, 358 F.3d at 607 (noting that "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights"); *Chalmers* v. *Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996) (finding that an employer was not required to provide an accommodation that would cause the company to "subject

itself to possible suits" from other employees). EEOC's Religious Guidance accords with these cases. See § 12-IV-B-4 (explaining that "it would be an undue hardship for an employer to accommodate religious expression that is unwelcome potential harassment").

B. School Officials Reasonably Were Concerned That Maintaining Kluge's Accommodation Would Have Resulted In An Increased Risk Of Title IX Liability

Here, school officials reasonably were concerned that maintaining Kluge's accommodation conflicted with the school's Title IX obligations—especially as the school was on notice of the accommodation's harmful impact on students. Title IX provides that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). This Circuit already has held that Title IX protects transgender students from discrimination. See *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-1050 (7th Cir. 2017);[8] see also *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) ("[I]t is impossible to discriminate against a person for being * * * transgender without discriminating

[8] Part of *Whitaker*'s analysis of the standard for obtaining preliminary injunctive relief has been abrogated. See *Illinois Republican Party* v. *Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020), cert. denied, 141 S. Ct. 1754 (2021). However, its analysis of Title IX remains good law.

against that individual based on sex."). Accordingly, if a student is "excluded from participation in," "denied the benefits of," or "subjected to discrimination" because of his gender identity in a covered program or activity, a defendant may be found to have violated Title IX. See also 86 Fed. Reg. 32,638 (June 22, 2021).

Federal agencies have the authority to remedy Title IX violations "through 'any . . . means authorized by law,' including ultimately the termination of federal funding." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280-281 (1998) (quoting 20 U.S.C. 1682) (alteration in original). Where a school official with the authority to institute corrective measures has "actual notice of, and is deliberately indifferent to" the fact that a violation has occurred, Title IX also provides a private right of action for damages and injunctive relief. *Hansen* v. *Board of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 605 (7th Cir. 2008) (quoting *Gebser*, 524 U.S. at 277) (emphasis omitted).

The evidence in this case, which illustrates the continued harms that would have resulted if BCSC had retained Kluge's accommodation, could have provided the factual basis for a Title IX claim—especially as to Aidyn, where the exclusionary effects were patent. Kluge's unwillingness to use Aidyn's first name made him feel "alienated, upset, and dehumanized," leading him to "dread going to orchestra class each day." App. A14 (citation omitted). Ultimately, even though Aidyn "absolutely loved orchestra," he decided not to continue in the class the next

year because Kluge's "refus[al] to acknowledge his personhood and identity" made him "miserable" and caused him "anxiety." Doc. 22-2, at 3. This evidence, if proven, could potentially support a claim that Aidyn effectively was "excluded from participation in," "denied the benefits of," and "subjected to discrimination under" an education program or activity under Title IX. 20 U.S.C. 1681(a).

Moreover, the evidence suggests that any discrimination Aidyn suffered would not have occurred if he were cisgender. To avoid referring to transgender students using the names and pronouns in PowerSchool, Kluge changed his behavior in obvious ways, no longer using honorifics like "Mr." and "Ms." (Doc. 52-1, at 3), and not assisting in distributing "sex-specific" orchestra uniforms to students (Appellant Br. 32). Although those changes applied to all students and thus were ostensibly neutral, Aidyn understood that Kluge made them specifically to avoid using a name or providing an orchestra uniform that accorded with Aidyn's gender identity. App. A14 ("[M]y stand partner asked me why Mr. Kluge wouldn't just say my name. I felt forced to tell him that it was because I'm transgender."). Aidyn's classmates understood this, too. See App. A12 (one student was "fairly certain that all the students" knew why Kluge used last names only); App. A14 ("Mr. Kluge's behavior was noticeable to other students in the class."). Kluge's actions thus emphasized for students in his classes their teacher's opposition to using names and honorifics that accorded with the gender identities

of their transgender classmates, thus serving to "isolate[]" and "alienate[]" those students. App. A12, A14 (citations omitted).

Finally, school officials were aware that Kluge's accommodation was causing these harms. See pp. 6-8, *supra.* Consequently, officials were reasonably concerned that if they took no action to address the situation, they could have risked a private damages suit or a federal civil rights investigation under Title IX.

C. Kluge Cannot Rebut The Increased Risk Of Title IX Liability Caused By His Accommodation

Kluge does not dispute that a sufficiently increased risk of legal liability can constitute undue hardship. Rather, he argues for two reasons that no such risk existed here. Appellant Br. 38. His arguments lack merit.

First, Kluge suggests that school officials "never cited litigation concerns" when they declined to maintain his accommodation. Appellant Br. 38. That does not matter. Regardless of whether school officials "cited" such concerns in communication with Kluge, the record evinces their recognition that his accommodation had potentially put the school at odds with its Title IX obligations. At a faculty meeting in January 2018, a school-district official presented a document titled "Transgender Questions," which stated that recognizing students' gender identities was necessary to "follow the law"—an apparent reference to Title IX. App. A17-A18 (citation omitted).

Second, Kluge contends that any Title IX claim would have been "frivolous" because he did not harass or discriminate against students or engage in sex stereotyping. Appellant Br. 38-39. Instead, he allegedly afforded "equal treatment" by "calling all students (of either sex) by their last names." Appellant Br. 39. But practices adopted for discriminatory reasons—even facially neutral practices—can constitute unlawful intentional discrimination. See *Bloch* v. *Frischholz*, 587 F.3d 771, 783 (7th Cir. 2009) (en banc) (noting the viability of a Fair Housing Act claim where the "reinterpretation" of a facially neutral rule allegedly was motivated by religious animus). Here, Kluge's students correctly recognized that his facially neutral approach was motivated by an aversion to referring to transgender students by names and pronouns that accorded with their gender identity, as Kluge previously had done (and apparently was still willing to do) with cisgender students. Moreover, when school officials confronted Kluge about the distress his actions had caused, he responded by saying that he felt "encouraged" and he was "being effective." App. A17 (citation omitted). It is thus hardly surprising that transgender students in Kluge's classes were uniquely harmed by his accommodation. Accordingly, the fact that Kluge allegedly referred

to all students by their last names does not diminish the reasonableness of school officials' concern that his conduct could have created a risk of Title IX liability.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND URGING AFFIRMANCE:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), as modified by Circuit Rule 29, because it contains 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Jason Lee
JASON LEE
Attorney

Date: November 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that fifteen paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court.

s/ Jason Lee
JASON LEE
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