APPEAL NO. 21-2475

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M. KLUGE,

Plaintiff-Appellant,

v.

BROWNSBURG COMMUNITY SCHOOL CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Honorable Jane Magnus-Stinson
Case No. 1:19-cv-02462-JMS-DLP

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Congress found that hostility based on certain, irrelevant characteristics deprived employees of their livelihoods and passed Title VII to prevent employment discrimination based on race, sex, and religion. 42 U.S.C. § 2000e-2(a)(1). But intolerance looks different for religion than other suspect classes because faith necessarily involves behavior, *i.e.*, "religious observance and practice." 42 U.S.C. § 2000e(j). So Congress required that employers "reasonably accommodate" their employees' religious behavior unless it would result in "undue hardship." *Id.* In other words, Congress decided that employees' faith should not cost them their jobs unless an accommodation is unreasonable or would impose a disproportionate burden on employers.

Mr. Kluge is living proof that although the object of popular hostility may have changed, *e.g.*, United States Br.2, 31, the need for Title VII has not. All agree that Mr. Kluge was an excellent teacher who requested the meager accommodation of calling *all* students by their last names because his Christian faith would not allow him to tell a lie about human sexuality. The only question is whether the district could constructively discharge him anyway because third parties insisted that Mr. Kluge violate his beliefs and affirm theirs. But this sort of religious hostility is the *problem* not the solution. Adopting the district's complaint-based theory of undue hardship would demolish Congress's religious-accommodation requirement and undercut Title VII. This Court should follow the Sixth and Ninth Circuits and reverse the district court.

ARGUMENT

I. Mr. Kluge's prima facie case is undisputed.

The school district concedes that Mr. Kluge established a prima facie case of religious discrimination, ditching its contrary arguments below. Appellee's Br.27 ("For purposes of this appeal only, . . . Brownsburg does not challenge the District Court's conclusion that Kluge established a prima facie case for failure to accommodate."). Both parties to this case, and the district court, are now on the same page: (1) Mr. Kluge demonstrated a sincere religious practice, (2) the school district was aware of that practice, and (3) Mr. Kluge's religious practice is why the district forced him to resign. Appellant's Br.27–32; Appellee's Br.26–27; Required Short Appendix ("RSA") at 039–042. Because Mr. Kluge's prima facie case is undisputed, the Court no longer needs to resolve that issue on appeal. The school district accepts that it bears the burden of "show[ing] that [Mr. Kluge's] reasonable accommodation would have caused undue hardship." Appellee's Br.26.

II. The school district has not shown undue hardship.

The district gives several justifications for constructively firing Mr. Kluge. But none show undue hardship. And many would spell the end of public schools' Title VII religious-accommodation duty. This Court should reverse and direct the entry of summary judgment in Mr. Kluge's favor on his religious-discrimination claim.

A. *Adeyeye* rejects the district's notion of undue hardship.

The school district tries to distinguish *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444 (7th Cir. 2013), and its guidance in applying *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), because in *Adeyeye*, the employer argued "'that *any* inconvenience or disruption, no matter how small, excuse[d] its failure to accommodate.'" Appellee's Br.30 (quoting *Adeyeye*, 721 F.3d at 455). But the district

makes the same argument here. The district's extension of *EEOC v. Walmart Stores East, L.P.*, 992 F.3d 656 (7th Cir. 2021), *petition for cert. filed*, No. 21-648 (U.S. Nov. 3, 2021), would allow *any* employer to deny *any* religious accommodation that imposes a "slight burden" on *anyone*. Appellee's Br.30 (quoting *Walmart Stores*, 992 F.3d at 695). In the district's view, even the weakest burden vetoes an accommodation, nullifying Title VII's religious-accommodation command. Appellee's Br.23. That stance is diametrically opposed to *Adeyeye*, which rejected the notion that "*any* inconvenience or disruption, no matter how small," will excuse an employer's "failure to accommodate" an employee's religious beliefs. 721 F.3d at 455. *Adeyeye* teaches that "Title VII requires proof not of minor inconveniences but of hardship, and 'undue' hardship at that." *Id.* (quoting 42 U.S.C. § 2000e(j)).

Nothing in *Walmart Stores* is to the contrary. The Supreme Court in *Hardison* answered a single question: "the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs *prohibit him from working on Saturdays*." *Hardison*, 432 U.S. at 66 (emphasis added). Because the employee in *Walmart Stores* desired Saturdays off for religious reasons, just as in *Hardison*, this Court applied *Hardison*'s holding that requiring an employer "to bear more than a *de minimis* cost in order to give [an employee] Saturdays off is an undue hardship," *Walmart Stores*, 992 F.3d at 658 (quoting *Hardison*, 432 U.S. at 84). The Court did not apply or interpret *Hardison* outside the Sabbatarian-accommodation context, as the district claims. Appellee's Br.30–31.

Unlike *Walmart Stores*, this case has nothing to do with taking Saturdays off. Mr. Kluge's lawsuit is factually more akin to *Adeyeye*, which dealt with an employee's request for several weeks of unpaid leave. 721 F.3d at 455. What's more, *Adeyeye* preceded *Walmart Stores* by eight years and "[o]ne panel of this [C]ourt cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e)." *Brooks v.*

Walls, 279 F.3d 518, 522 (7th Cir. 2002); *accord United States v. Trotter*, 270 F.3d 1150, 1154 (7th Cir. 2001) ("Unreasoned statements in our decisions should not be taken to overrule opinions of prior panels . . . ."). So *Walmart Stores* could not tacitly overrule *Adeyeye*, as the district suggests. Appellee's Br.30–31. Factually and legally, *Adeyeye*'s clarification of the "undue hardship" standard applies here.

B. Ideological complaints do not show undue hardship.

The school district underscores that undue hardship is case specific. Appellee's Br.28. Yet its undue hardship defense is comprised of hyperboles that are unrelated to the record. No one could seriously argue that transgender students did not "receive an education" at Brownsburg High School. Appellee's Br.36. If Mr. Kluge's use of last names for *all* students in the classroom was really "directly at odds with [the school district's] mission," or shattered the district's basic ability to "educate all students," Appellee's Br.32–33, the district would never have agreed to that accommodation. Yet the district "agreed to [Mr.] Kluge's proposal as an accommodation," Appellee's Br.10, which means it (rightly) considered that "middle ground" to be reasonable. RSA-044.

So what changed? "[T]he accommodation made members of the high school community *complain*, including [some of Mr.] Kluge's students . . . .," Appellee's Br.2 (emphasis added); *accord* Appellee's Br.11, 14–15, who "were *offended* by being called by their last names only." Appellee's Br.18 (emphasis added). The school district's undue hardship defense boils down to the claim that "*complaints* from the high school community are a legitimate, nondiscriminatory reason for withdrawing [Mr. Kluge's religious] accommodation." Appellee's Br.24 (emphasis added).

The district is wrong. The record shows that no transgender students at Brownsburg High School were discriminated against. Instead, the administration took the extraordinary step of requiring all staff members to use the preferred first

names and pronouns listed in PowerSchool to "*affirm*[ ] . . . their preferred identity." Appellee's Br.8. Mr. Kluge—one teacher of dozens—requested a religious accommodation of using last names in the classroom to remain neutral on transgenderism.[1] Not once did he criticize or mention transgender students' life choices. The complaints and offense the district relies on were based on Mr. Kluge passively declining to *affirm* behavior that violates his faith.

What the district wants is a holding that Title VII relief may be "denied merely because the majority [or those with majority support], who have not suffered discrimination, will be unhappy about it." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 775 (1976) (quotation omitted). But that would leave "little hope of correcting the wrongs to which the Act is directed," *id.*, for the same reasons the Supreme Court bans heckler's vetoes. *E.g.*, *Feiner v. New York*, 340 U.S. 315, 320 (1951) (refusing to allow "the ordinary murmurings and objections of a hostile audience . . . to silence a speaker"); *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949) (rejecting the "standardization of ideas either by legislatures, courts, or *dominant political or community groups*") (emphasis added).

All too often, public schools "define[ ] their educational missions as including the inculcation of whatever political and social views are held by" school boards, administrators, or faculty, *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring). That is exactly what happened here. The district's theory of undue hardship would allow school officials to fire *anyone* they view as politically incorrect

[1] Amicus makes a similar error by devoting almost an entire brief to defending the district's transgender-affirmation policy. Nat'l Ass'n of Social Workers Br.11–19. Mr. Kluge has never sought to invalidate that policy. He modestly seeks a religious exemption for himself. Accommodating one teacher in the entire high school would not detriment the district's transgender-affirmation goals.

on *any* issue, no matter how tacit the employee's objection or slight the burden a religious accommodation may pose. That would effectively rewrite Title VII.[2]

This Court should decline this invitation and follow the Sixth and Ninth Circuits. "'[G]rumbling' among" coworkers or the "'complaints of fellow employees, in and of themselves, *do not constitute undue hardship* . . . If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, . . . such grumbling must yield to the single employee's right to practice his religion.'" *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (emphasis added, quotation omitted)).

Just as the record in *Draper* failed to prove that a religious accommodation "would produce chaotic personnel problems," *id.* at 521, the record here shows that Mr. Kluge's accommodation resulted in no chaotic disruption at the school. Negative comments that did arise stemmed either from (1) ideological disagreement or (2) "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *accord* Appellee's Br.13–15. In other words, some members of the school community found Mr. Kluge's religious accommodation "irritating or unwelcome." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004). But employers "must tolerate some degree of . . . discomfort" in accommodating religion. *Id.* at 607. "Complete harmony in the workplace is not" Title VII's goal. *Id.* Otherwise, hostile

[2] Amicus takes a different path to the same result. It would preclude teachers from obtaining *any* religious accommodation under Title VII because, it says, their "conduct within the classroom is attributable to the school system." Secular Student Alliance Br.2. But if the district cannot explain to students that "tolerance is a two-way street," *Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) (cleaned up), and that Title VII requires accommodations of religion so that teachers may keep their jobs, "one wonders whether the [district] can teach anything at all." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1300 (7th Cir. 1993).

members of the community could drum people of the "wrong" color, sex, or faith from their livelihoods—exactly what Congress designed Title VII to prevent.

Importantly, this Court's undue-hardship holding will not be limited to Mr. Kluge, nor will all student grumblings be confined to transgender issues. Allowing the district to expel Mr. Kluge from his profession will open the door for public schools to drive out employees of all religious persuasions for no genuine reason. Muslim students may find a Jewish teachers' beliefs and practices "offensive." Sikh students may feel "uncomfortable" in a Hindu teacher's class. That does not mean public schools can force devout teachers from their jobs. Congress implemented Title VII to "adjust the requirements of the job so that the employee can remain employed *without* giving up the practice of his religion . . . ." *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) (emphasis added).

None of amici's opposing authorities hold weight. They involve (1) religious plaintiffs leveraging the employment relationship to *impose* their religious beliefs on unwilling third parties, (2) against the wishes of employers instructing them to *refrain* from such behavior on the job. *E.g.*, United States Br.16–17. Mr. Kluge's case is the total opposite. Mr. Kluge taught at Brownsburg High School for four years without imposing his religious beliefs on anyone. All Mr. Kluge wanted was (a) to *avoid* the school district's transgender-affirmation mandate based on his faith, (b) in the face of the district's *demand* that he affirm transgenderism on the job. When employers *affirmatively command* that employees violate their religious beliefs on divisive issues, they will have a difficult time showing that any hardship caused by a reasonable accommodation is *undue*.

C. Students have no right to affirmation, and one teacher's failure to encourage their life choices is not a cognizable harm.

The school district says that this case is not about mandatory transgender affirmation. Appellee's Br.33. But the record proves otherwise, Appellant's Br.29, as

does the district's brief. The only reason the district gives for its transgender-affirmation policy is "respect and *affirmation* of [students'] preferred identity." Appellee's Br.8 (emphasis added); *accord id.* at 7–8 ("[T]he practice afforded dignity and showed empathy toward transgender students . . . ."); *id.* at 32 (citing the district's "policy of respect for transgender students" (quotation omitted)). Some transgender students considered Mr. Kluge insensitive because he could not *affirm* their chosen identities by "us[ing] their preferred first names" in class. *Id.* at 13. This failure to *affirm* transgenderism is what the school district considers "detrimental" to students or "at odds with [its] mission." Appellee's Br.18, 32.

One teacher's failure to affirm or encourage transgenderism is not a cognizable harm. Appellant's Br.36. The undue-hardship analysis is fact specific. *Adeyeye*, 721 F.3d at 455. Here, Mr. Kluge's former employer is a public school. The district cannot claim only the *benefits* associated with public schools defining and assessing their own educational missions. Appellee's Br.32–33, 36. It must also grapple with the *burdens* the First Amendment imposes on government employers like public schools.

For three reasons the district's claim that the First Amendment is irrelevant to Title VII's undue-hardship analysis is wrong. Appellee's Br.39. First, as a textual matter, if the First Amendment *already* invalidates the district's affirmational interest, Mr. Kluge's religious accommodation imposes no additional "hardship," let alone one that is "undue." 42 U.S.C. § 2000e(j). Second, if employees cannot demand a religious accommodation that violates the law, *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999), the converse is also true: employers cannot deny accommodations necessitated by their own facially invalid commands. Last, when the First Amendment's scope is unclear, courts often turn to Title VII precedent for guidance. *Genas v. N.Y. Dep't of Corr. Servs.*, 75 F.3d 825, 832 (2d Cir. 1996) ("Courts have often looked to Title VII law for help in delineating plaintiffs'

rights under § 1983."). So it is natural to consult deep-rooted First Amendment principles when Title VII's boundaries are ill defined.

Under the First Amendment, the district's claim that it may force Mr. Kluge to affirm students' ideology or lifestyle choices runs headlong into established law. "[S]tate-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. Public schools are tasked with training students "through wide exposure to [a] robust exchange of ideas," *id.* at 512 (quotation omitted), not with creating echo chambers designed to affirm students' beliefs. No one in our society—student or adult—has a right to demand affirmation "of their beliefs or even their way of life." *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011). *Contra* Appellee's Br.8.

The district's contrary logic would allow public school officials to "prescribe what [is] orthodox in politics, nationalism, religion, or other matters of opinion or force [Mr. Kluge] to confess by word or act [his] faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Morse*, 551 U.S. at 423 (Alito, J., concurring) (a similar "'educational mission' argument" allows viewpoint discrimination and "strikes at the very heart of the First Amendment."). But our nation abandoned that failed experiment nearly 80 years ago and for good reason. "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance." *Tinker*, 393 U.S. at 508. But to fire an outstanding teacher like Mr. Kluge, Title VII require the district to show "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Dodging ideological tension is the district's only true interest here. Appellee's Br.12.

Consider the consequences of the district's complaint-based rationale. Appellee's Br.11–15, 24. Public schools, which are "organs of the State," *Morse*, 551 U.S. at 424 (Alito, J., concurring), could purge all manner of religious employees from their ranks. The Catholic language arts teacher who declined to fly a rainbow flag in his classroom during mandatory Pride Month could be fired because LGBTQ+ students claim to feel "unwelcome." *Accord* Appellee's Br.34. The Rastafarian math teacher, who wears dreadlocks, could be terminated for "offend[ing]" students and parents in a district that requires support of D.A.R.E. or Moms Against Drugs. *Accord id.* at 18, 34. And the art teacher who is a practitioner of Santería could be sacked for "disrespecting" a district's student-initiated efforts to oppose animal cruelty. *Id.* at 8, 32–33. Schools may label just about anything "actively harming students or disrupting the learning environment." *Id.* at 40. The district asks this Court to write school officials a blank check to discriminate.

None of the district's contrary arguments hold water. It is counterfactual to suggest that Mr. Kluge offered his "personal views" on transgenderism to students or subjected them to any "idiosyncratic perspective[ ]." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479–80 (7th Cir. 2007); *accord* Appellee's Br.38–39. Mr. Kluge requested a religious accommodation so that he could focus on *teaching the district's music curriculum*, not his own views.[3] Doc. 120-3 at 17. And his religious accommodation was targeted so that he could abide by his beliefs, remain neutral on transgenderism, and keep his religious "opinions to [himself]." *Mayer*, 474 F.3d at 480; *accord* Appellant's Br.11, 13, 38.

[3] Nothing in the record supports Amicus's claim that Mr. Kluge sought "to eschew [his] duties." ACLU Found. Br.7. Moreover, Amicus's suggestion that teaching *all* students, while referring to *all* students in *all* classes by their last name, is akin to denying *some* citizens police or fire protection, *id.* at 7–9, "fails the laugh test." *Am. Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1460 (7th Cir. 1996).

What's more, it is not just wrong but offensive for the district to liken Mr. Kluge to the instructor in *Smiley v. Columbia College Chicago*, 714 F.3d 998, 1002 (7th Cir. 2013), who harassed a student for being Jewish and was terminated for unprofessional conduct that "distress[ed] students." *Accord* Appellee's Br.37, 45–46. There is nothing unprofessional about holding Mr. Kluge's beliefs about sex and gender, beliefs shared by Jews, Christians, and Muslims worldwide for millennia.[4] *Cf. Obergefell v. Hodges*, 576 U.S. 644, 657, 672 (2015). The district's argument smacks of religious animus, which Congress designed Title VII to forbid.

Significantly, the district never considered Mr. Kluge a "harasser" and the record precludes any such claim: Mr. Kluge treated all students the same—with respect—and the orchestra program flourished under his leadership. Appellant's Br.11. Comparing Mr. Kluge to an instructor who made fun of students, "did not observe professional decorum," or "understand the boundaries between faculty and student" simply underscores the weakness in the district's legal position. *Smiley*, 714 F.3d at 1001.

D. The district cites no evidence that potential Title IX litigation motivated its withdrawal of Mr. Kluge's accommodation.

When an employee actually requires a religious accommodation and an employer's "desire to avoid the . . . accommodation is a motivating factor [for an adverse employment decision], the employer violates Title VII." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773–74 (2015). So the district's motives in withdrawing Mr. Kluge's religious accommodation and forcing him to resign are directly at issue. If hypothetical future Title IX litigation was a hardship

[4] There is nothing "discriminatory" about Mr. Kluge's religious beliefs, United States Br.31, which have long "been held—and continue[ ] to be held—in good faith by reasonable and sincere people here and throughout the world." *Obergefell*, 576 U.S. at 657.

that motivated the district's withdrawal of Mr. Kluge's religious accommodation—rather than a desire to scuttle the accommodation because it generated complaints—the district would cite corroborating evidence. But the district cites nothing in the record to support this claim. *E.g.*, Appellee's Br.42.

"Summary judgment is the 'put up or shut up' moment in a lawsuit." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (quotation omitted). The district must raise more than "metaphysical" arguments concerning its motives. *Id.* It has the duty to cite "evidence on which the jury could reasonably find in [its] favor." *Id.* But the district never "'set forth *specific facts* showing that [its potential-litigation defense] is a genuine issue.'" *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (quoting Fed. R. Civ. P. 56(e)). And the district's failure to "come forward with evidence that would reasonably permit the finder of fact to find in [the district's] favor on [this] material question" is grounds for granting summary judgment to Mr. Kluge. *Id.*

A contrary rule would allow employers (or their counsel) to dream up, after the fact, all manner of "undue hardships." Such purported hardships would be mere litigation defenses that played no role in the challenged employment decision. That is not what Congress intended in requiring employers to "reasonably accommodate . . . an employee's . . . religious observance or practice" unless a genuine "undue hardship" would result. 42 U.S.C. § 2000e(j).

E. The district's litigation defense lacks merit.

The district argued below that Mr. Kluge's religious accommodation placed it "on the 'razor's edge' of [Title IX] liability." Doc. 121 at 43 (quoting *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011)). The district now abandons that claim. On appeal, it argues only that (1) an "exposure-to-litigation defense" is not limited to harassment cases, as in *Matthews*, and (2) a hypothetical Title IX

lawsuit filed by a transgender plaintiff created "an unreasonable risk of liability." Appellee's Br.42–43. Neither proves undue hardship.

First, Mr. Kluge never argued that a potential litigation defense is limited to harassment cases. Appellee's Br.42–43. He simply explored the circumstances in *Matthews* to elucidate what this Court meant by "the razor's edge of liability," *i.e.*, the employer liability was—practically-speaking—a sure thing. Appellant's Br.38. Because the district now recognizes that Mr. Kluge's accommodation did *not* place it on the razor's edge of Title IX liability, it drops that baseless argument on appeal. Appellee's Br.41–44. *Matthews* cannot substantiate the district's undue hardship, as the lower court ruled. RSA-046.

Second, this Court has never held that "an unreasonable risk of liability" creates undue hardship. Appellee's Br.43. It has "[a]ssum[ed] [a]rguendo that the possibility of a *substantial legal challenge* can *in some cases* constitute undue hardship." *Minkus v. Metro. Sanitary Dist. of Greater Chi.*, 600 F.2d 80, 83 (7th Cir. 1979) (emphasis added). But no substantial legal challenge is feasible here. The district cites no "prior litigation involv[ing] circumstances similar to this case." *Id.* It relies only on *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1040 (7th Cir. 2017), in which this Court faulted a high school for mandating that transgender students use a gender-neutral restroom in the office, which *no other students* used. Appellee's Br.43. Mr. Kluge's use of last names for *all students* (of either sex) is not comparable: he treated all students the same and never singled transgender students out. Appellant's Br.11. A hypothetical Title IX plaintiff would have "little likelihood of . . . succeeding on the merits." *Minkus*, 600 F.2d at 83.

The district's only cavil is that "even though Kluge called all students in a class with a transgender student by their last names, it was obvious that he was doing so because of the transgender student's presence." Appellee's Br.43. But the record defies that assertion. Mr. Kluge called *all* students by their last names in *all*

his classes, no matter whether a transgender student was present. Doc. 120-2 at 3–4; 120-3 at 18. There was no objective reason for any student to feel singled out. Nor was Mr. Kluge's practice of using last names objectively tied to transgender students. During the prior school year when Mr. Kluge *had no transgender students*, he referred to students by their last names preceded by honorifics to simulate a college-level class. Doc. 52-1 at 3. The only change under the accommodation was that Mr. Kluge ceased using honorifics, Doc. 120-2 at 3–4; 120-3 at 18, and he explained that shift by drawing a sports analogy to the orchestra team, rather than citing his religious beliefs. Doc. 120-3 at 34.

In short, the district's hypothetical litigation defense turns on a rewrite of the record. Any Title IX claim of a "hostile atmosphere," Appellee's Br.43, in a high school where 99% of faculty and staff used a transgender plaintiff's preferred first name and pronoun would be frivolous. Appellant's Br.38–39.

F. The district wrongly relies on after-created evidence.

The district admits that the affidavits by transgender students—which formed the groundwork of its undue-hardship defense and the district court's ruling—"postdated Kluge's [forced] resignation." Appellee's Br.40–41. Yet the district bears the burden of citing evidence that undue hardship is what actually motivated its withdrawal of Mr. Kluge's religious accommodation, not the district's aversion to his religious beliefs or conclusion that religious accommodations were just too much trouble. *Abercrombie*, 575 U.S. at 773–74. The district "could not have been motivated by knowledge it did not have" when it constructively discharged Mr. Kluge. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).

The district's excuse for this error is a game of telephone: "students reported their concerns during Equality Alliance Club meetings . . . and . . . Craig Lee, in turn reported their concerns . . . to Dr. Daghe." Appellee's Br.41. But the record does

not support the district's flawed assumptions that: (a) two students made the same comments in club meetings they made *over a year later* in affidavits filed after Mr. Kluge was forced to resign, he filed this Title VII lawsuit, and a transgender advocacy group tried to intervene; (b) the students' club-meeting comments were fully and accurately relayed to the district administration by Mr. Lee; and (c) the district rescinded Mr. Kluge's religious accommodation based on a number of club-meeting comments that administrators never even obliquely referenced. On summary judgment, these wild leaps in logic are insufficient. The district must cite record evidence supporting its claims. *Waldridge*, 24 F.3d at 920.

On its face, there is little (if any) alignment between transgender students' after-created affidavits and administrators' stated motives for ending Mr. Kluge's religious accommodation. Administrators gave three main reasons for putting Mr. Kluge to the choice of his religion or his job: (1) the accommodation "creat[ed] tension" at the school, Doc. 120-3 at 23; (2) some students were "offended by being called by their last name," Doc. 113-4 at 26; and (3) transgender affirmation was a district policy that, after the current school year, allowed no religious exceptions, Doc. 113-4 at 27, 29, 43, 47. No evidence shows that administrators knew about or credited students' subjective claims of dreading going to orchestra class, uncomfortableness talking to Mr. Kluge, or feeling targeted. Appellee's Br.13–14. And it was impossible for officials to know about (or rely on) a student's decision to drop orchestra class and eventually leave the next school year. *Id.* at 13. Those events occurred *long after* the district cancelled Mr. Kluge's religious accommodation and forced him to resign. So they are not a result of the accommodation and cannot prove the district's undue-hardship claim.

Nor is the district's allusion to parental complaints credible. Appellee's Br.12. It cites no evidence that administrators ever took these targeted complaints seriously. To the contrary, Principal Daghe recognized that such parental

grumblings were based on opposition to Mr. Kluge's religious beliefs. Doc. 113-5 at 7 ("None of the other Fine Arts Department teachers were having any kind of problem with that policy. It was just Mr. Kluge and it was because of the way he was handling this accommodation."); *accord* Docs. 115-3 at 4–5; 120-3 at 22. No other explanation is possible: the complaints the district cites were made *before* a transgender student's name was changed in PowerSchool and *before* the district's transgender-affirmation mandate even applied. Docs. 120-12 at 2 (complaining about Mr. Kluge before requesting a PowerSchool name change); 120-13 at 2 (inquiring when the district would approve a PowerSchool name change).

G. The district takes *Baz v. Walters* out of context.

The district takes a few lines from *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986), out of context and spins them into an undue-hardship theory that would erase employers' Title VII duty to accommodate religion. Appellee's Br.32–33. This Court referred to "Reverend Baz's philosophy of the care of psychiatric patients [being] antithetical to that of the V.A" medical center at which he worked. *Baz*, 782 F.2d at 707. As this Court explained, what it meant was that the government hired Reverend Baz to do the job of a VA hospital chaplain, which meant serving "as a quiescent, passive listener and cautious counselor." *Id.* at 704. The government did not hire Reverend Baz to perform the function of a pastor at a Christian church, including serving as "an active, evangelistic, charismatic preacher." *Id.*

The *Baz* Court's references to "philosophy" were made in the context of a specifically religious job—a hospital chaplain—in a case where the VA hospital and the chaplain disagreed on the nature of that pastoral role. *Id.* at 704. (Baz's "view of his function as a [VA] chaplain in a [VA] hospital with psychiatric patients was decidedly different from the demands of his superiors"). At a government hospital serving psychiatric patients, the VA created a chaplain job that was religious but

restricted. Chaplains could not actively "proselytize" or "impose [their] ministry on those who [did] not desire it." *Id.* at 705 n.4. This conflicted with Reverend Baz's "view of his ministry and his call to preach the Gospel," regardless of whether patients were open to hearing it. *Id.* at 706 (quotation omitted). Even though Reverend Baz was an ordained minister hired to do a religious job, the VA had "to walk a fine constitutional line," *id.* at 709, and was not required to "adopt his [religious] philosophy" of what a chaplain's "ministry" entails. *Id.* at 707.

Neither this Court nor any other federal appellate court has applied *Baz*'s "philosophy" language outside of the chaplaincy context. Yet the district treats this turn of phrase as a ready-made way for employers to defeat *any* religious accommodation request. Under the district's theory, whenever an employer claims that a religious employee's "philosophy" of the job is at odds with the employer's, the employer's duty to accommodate religion under Title VII melts away. Appellee's Br.32. *Baz* held no such thing.

What's more, the district's theory conflicts with Title VII's text and purpose. Employees only need religious accommodations when they have a "philosophical" conflict with their employers in some sense. Defining the undue hardship exception as *any* ideological conflict would swallow the accommodation rule. And it would frustrate Title VII's purpose of ensuring the faithful need not forfeit their livelihoods to practice their faith. *Cf. Abercrombie*, 575 U.S. at 775 ("Title VII requires otherwise-neutral policies to give way to the need for an accommodation.").

III. Nothing in the record questions Mr. Kluge's sincerity.

If this Court reverses, the district asks for a trial on the sincerity of Mr. Kluge's religious beliefs. Appellee's Br.47–50. But the district's notion of sincerity is wrong. Normally, defendants questioning sincerity argue that the plaintiff "was not a religious person," *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir.

1997), or that a particular practice was not "religiously motivated." *Grayson v. Schuler*, 666 F.3d 450, 455 (7th Cir. 2012). The district makes no such claim. No one disputes that Mr. Kluge is a religious person or that his objection to using transgender students' preferred names and pronouns is religious in nature. And the district fails to suggest *a non-religious reason* for Mr. Kluge to (1) resist the district's transgender-affirmation policy, (2) ask repeatedly for a religious accommodation, and (3) submit a forced resignation when that accommodation was reneged. It cites no facts that bring Mr. Kluge's sincerity into doubt.

The district simply rejects Mr. Kluge's beliefs. It is perplexed by Mr. Kluge's religious understanding of what behavior affirms transgenderism, and is sinful, and what behavior does not affirm transgenderism, and is not. Appellee's Br.47–50. But "religious beliefs need not be acceptable" to merit "protection." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Difficult questions of "religion and moral philosophy" are for the faithful—not secular courts or juries—to decide. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

The truth of Mr. Kluge's religious beliefs "is not open to question" and "'sincerity' is a concept that can bear only so much adjudicative weight." *Gillette v. United States*, 401 U.S. 437, 457 (1971) (quotation omitted). There is nothing "bizarre or incredible" about Mr. Kluge's explanation of his religious beliefs. *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 n.2 (1989); *accord* Appellee's Br.6–7, 17–18. And if those beliefs were not sincere, Mr. Kluge would have kept the teaching career he labored for four years (and obtained two degrees) to achieve by conceding to the district's demands. That Mr. Kluge refused at the cost of his livelihood is the ultimate proof of his sincerity. Because no reasonable jury could doubt that Mr. Kluge's beliefs were "truly held," *Gillette*, 401 U.S. at 457 (quotation omitted), the district's last-ditch trial request is misplaced.

IV. Mr. Kluge's retaliation claim is straightforward and preserved.

The district misunderstands Mr. Kluge's retaliation claim. Appellee's Br.44–46. But the elements of that claim are straightforward and did not require much discussion either here or below. For starters, this litigation centers on Mr. Kluge's religious-accommodation request, which Title VII specifically provides for and is unmistakably statutorily protected activity. No one could reasonably doubt that Mr. Kluge was constructively discharged, a model adverse employment action. And the district has never questioned that if Mr. Kluge had stopped insisting on a religious accommodation to its transgender-affirmation rules, he would have kept his job.

So the merits of Mr. Kluge's retaliation claim should have been plain. But the district insists that Mr. Kluge erred by not arguing pretext. Appellee's Br.44. This is not a pretext case: Mr. Kluge and the district agree that administrators withdrew his religious accommodation *based on* complaints. Appellee's Br.46 ("Brownsburg sought to withdraw the last-name-only accommodation in response to complaints."). Mr. Kluge's position is—and has always been—that those ideologically-driven complaints were not a legally valid basis for revoking his accommodation. *Compare* Doc. 114 at 32 ("The emotional discomfort and complaints of a handful of students . . . cannot justify forcing Kluge to face a choice between violating his religious beliefs and losing his job."), *with* Appellant's Br.33 ("Employers cannot deny religious accommodations simply because third parties complain about them.").

This is not "a remarkable claim." Appellee's Br.45. It has always been the heart of Mr. Kluge's case. Below, Mr. Kluge explained in detail why third-party grumblings failed to show undue hardship. Doc. 114 at 29–32. And those reasons did not bear repeating in the retaliation section of his brief. Why the district believes Mr. Kluge was required to dispute its argument that "complaints from the high school community are a legitimate, nondiscriminatory reason for withdrawing the accommodation" *again* is a mystery. Appellee's Br.24, 45 (cleaned up).

As to causation, the district says "that there is no evidence Brownsburg criticized Kluge or harbored animosity." Appellee's Br.46. Wrong again. The first time Mr. Kluge mentioned his religious objection to lying about sex and gender, the superintendent grew "very angry," engaged Mr. Kluge in a theological debate, and told Mr. Kluge that his religious beliefs were "wrong." Doc. 120-3 at 19; *accord* Doc. 113-6 at 6. When Mr. Kluge declined to affirm transgenderism, the superintendent sent him home pending termination. Doc. 120-3 at 14–15. Only an intervention by his pastor saved Mr. Kluge from immediate dismissal. Docs. 120-3 at 15–16; 120-19 at 6.

Later, when students complained about Mr. Kluge's accommodation, the principal criticized Mr. Kluge for "creating tension," Doc. 120-3 at 23, and pressured him to resign and leave the school with a good reference. Docs. 15-3 at 5; 113-4 at 41; 113-5 at 7; 120-5 at 9. The upshot was that if Mr. Kluge did not leave voluntarily, he could lose his job and future employability. Both then and now, the district criticized Mr. Kluge for sticking to his religious beliefs despite third-party complaints about them. Docs. 15-3 at 5; 120-3 at 24; Appellee's Br.2, 17.

The district next rescinded Mr. Kluge's religious accommodation without warning, Doc. 120-16 at 2, left no room for future accommodations, Docs. 15-4 at 9–10; 113-4 at 27, 29, 43, 47, and openly criticized any teacher (*i.e.*, Mr. Kluge) who called "students by their last name" and did not use "correct pronouns." Doc. 15-4 at 10. Administrators ignored Mr. Kluge's claims of religious discrimination and their own equal-employment-opportunity policy, Doc. 113-4 at 10, 17, 36, 43, and demanded Mr. Kluge either follow the transgender-affirmation policy, resign, or be terminated, Doc. 113-4 at 12, 45. When Mr. Kluge resisted, the district threatened his summer pay unless he resigned, Doc. 113-4 at 33, which forced Mr. Kluge's hand, as he needed that pay to support his family. Docs. 113-4 at 51; 120-17 at 2.

The district contests none of these facts. So it is undisputed that the district subjected Mr. Kluge to "a pattern of criticism and animosity," and finally constructively discharged him. *Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chi.*, 104 F.3d 1004, 1014 (7th Cir. 1997). This Court could direct summary judgment in Mr. Kluge's favor on the retaliation claim. At the least, it should reverse and remand for a jury trial. Appellant's Br.42.

CONCLUSION

For the foregoing reasons, and those explained in Mr. Kluge's opening brief, this Court should reverse and remand for the district court to enter summary judgment in Mr. Kluge's favor on the Title VII discrimination claim, and either direct the lower court to enter summary judgment for Mr. Kluge on the Title VII retaliation claim or allow a jury to decide that claim at trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32 because this brief contains 6,561 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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