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School Pronoun Policy Divide: How the Expansion of Free Exercise May Help Teachers Challenge Mandatory Student Pronoun Reporting Policies

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I. Introduction

In the past year, Florida and Governor Ron DeSantis garnered significant media attention by passing the controversial "Don't Say Gay" law that recently expanded to include all school-age children.[1] The Parental Rights in Education Act, referred to as the "Don't Say Gay" bill, was passed in 2022 and includes sweeping restrictions on classroom discussions of sexual orientation and gender identity.[2] The bill along with several other anti-LGBTQ bills have been criticized for marginalizing LGBTQ people and censoring teachers.[3] While many news outlets focus on the policies in Florida, other states and schools throughout the country developed policies in recent years to address cultural conflicts over sexual orientation and gender identity.[4] Included in larger policies and bills concerning classroom instruction, legislatures and schools are deciding whether to allow teachers to report to a child's parent when that child uses different gender pronouns in school or engages in social transitioning.[5]

Some states like California designed policies that require teachers to protect the privacy of transgender and nonbinary students and therefore prevents teachers from sharing a student's gender identity with parents.[6] Within the past year, other states considered legislation that requires the opposite, that teachers *must* report a student's gender identity to parents even if the student does not wish to disclose this information.[7] While both policies reflect different philosophies on parental rights and student privacy, teachers are responsible for enforcing both

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[1] Anthony Izaguirre, *Florida Expands 'Don't Say Gay'; House OKs anti-LGBTQ Bills*, Associated Press (Apr. 19, 2023), https://apnews.com/article/desantis-florida-dont-say-gay-ban-684ed25a303f83208a89c556543183cb.
[2] *Id.*
[3] Izaguirre, *supra* note 1. Another bill passed by the Florida House on April 19, 2023 will make it a felony to provide gender-affirming health care to transgender minors.
[4] Katie J. Baker, *When Students Change Gender Identity, and Parents Don't Know*, N.Y. Times (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html.
[5] *Id.*
[6] *See, e.g.* A.B. 1266, 2013 Leg., (Ca. 2013) (enacted).
[7] H.B. 1608, 2023 Gen. Assemb., Reg. Sess. (Ind. 2023).

categories of policies. This duty to report or not report creates potential legal issues regarding the free exercise rights of teachers and whether their sincerely held religious beliefs can exempt them from either policy.

A few states and school districts that adopted policies like the one in California were sued by teachers that were disciplined for refusing to not disclose student pronouns to parents.[8] In one 2022 case from Kansas, a teacher challenged the pronoun policy of her school district as a violation of her Christian beliefs, arguing that her religious beliefs did not permit her to be dishonest to parents.[9] With states like Indiana in the process of implementing policies that require teachers to report student pronouns without student consent, teachers can challenge these policies for violating their sincerely held religious beliefs by using the same free exercise arguments as the Kansas teacher in order to protect transgender and nonbinary students from harassment both at home and in school.[10] Part II of this paper discusses the gender pronoun policies implemented in California and Kansas and how courts are approaching free exercise complaints to these policies. While challenges to pronoun nondisclosure policies move through the courts, the Supreme Court is currently deciding the case of *303 Creative*, which could impact how courts analyze future cases where governments infringe on free exercise, like what is at issue in Kansas.[11] Part III discusses the evolution of the tests courts apply to determine if the government has burdened free exercise, and how the decision in *303 Creative* may change how courts consider free exercise challenges to school pronoun policies. Finally, Part IV considers how teachers can challenge the proposed mandatory reporting policies, focusing on the proposed

[8] *See* Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *6-15 (D. Kan. May 9, 2022).
[9] *Id.*
[10] H.B. 1608, 2023 Gen. Assemb., Reg. Sess. (Ind. 2023).
[11] 303 Creative Ltd. Liab. Co. v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted,* 90 U.S.L.W. 3255 (U.S. Feb. 22, 2022) (No. 21-476).

policy in Indiana, and using the same free exercise argument at issue in Kansas and considering the Supreme Court's potential ruling in *303 Creative.*

II. Pronoun Policies

A. Growing Mental Health Concerns for LGBT Youth

The debate over discussions of gender identity and sexual orientation in classrooms is occurring alongside a growing recognition of LGBTQ identity by Generation Z students. The percentage of Generation Z members who identify as LGBTQ in a Gallup survey nearly doubled from 10.5% in 2017 to 20.8% in 2021.[12] Further, it is estimated that nearly one in five people who identify as transgender are between the ages of thirteen and seventeen.[13] The rising number of youth identifying as LGBTQ has been followed with rising mental health challenges for youth that are in the process of socially transitioning and who face harassment.[14] The Trevor Project's 2022 National Survey on LGBTQ Mental Health found that "fewer than one in three transgender and nonbinary youth found their home to be gender-affirming."[15] Additionally, "37% of transgender and nonbinary youth reported that they have been physically threatened or harmed due to their gender identity."[16] Alarmingly, 45% of LGBTQ youth that were surveyed reported seriously considering attempting suicide in the past year.[17] For transgender and nonbinary youth that do not feel that their home is a gender-affirming space, school policies must reflect the

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[12] Jeffrey M. Jones, *LGBT Identification in U.S. Ticks up to 7.1%*, Gallup, (Jun. 10, 2022), https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx. Generation Z are those born between 1997 and 2012. Gallup first began measuring LGBT identification in 2012.

[13] Jody Herman, Andrew Flores, and Kathryn O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?* UCLA School of Law Williams Institute, https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ (last visited Apr. 17, 2023).

[14] Jack L. Turban et al., *Timing of Social Transition for Transgender and Gender Diverse Youth, K-12 Harassment, and Adult Mental Health Outcomes*, Journal of Adolescent Health 69, no. 6, 991, 991-2 (2021). "Social transition" is defined in the study as one who lives full-time in a gender that is different than the one assigned at birth. This often involves a change in gender expression to align with the individual's gender identity

[15] *2022 National Survey on LGBTQ Youth Mental Health*, The Trevor Project, 2022, https://www.thetrevorproject.org/survey-2022/ (last visited Apr. 17, 2023).

[16] *Id.*

[17] *Id.*

potential harm that can come from reporting a student's pronouns to parents without that student's consent. With these concerns in mind, states like California implemented policies to protect transgender and nonbinary youth from potential harassment at school and at home.[18]

B. Policies that Prevent Pronoun Disclosure to Parents

California was an early adopter of sweeping LBGTQ youth policies in 2014 with the passage of AB 1266, also known as the "School Success and Opportunity Act."[19] This bill required schools to allow pupils to participate in sex-segregated school programs and activities and to use facilities consistent with the pupil's gender identity irrespective of the gender listed on the pupil's record.[20] After the bill passed, the California Department of Education (CDE) published an online Frequently Asked Questions (FAQ) page with guidance on protecting the privacy of transgender and nonbinary students.[21] On whether teachers may share a student's gender identity with the student's parents, CDE stated, "Disclosing that a student is transgender without the student's permission may violate California's antidiscrimination law by increasing the student's vulnerability to harassment and may violate the student's right to privacy."[22] California teachers can however disclose "personal observations" to appropriate student health or welfare personnel if the teacher develops a concern for the student based on these observations.[23] Welfare personnel can then decide to disclose the student's transgender status where appropriate without violating the policy.[24] Further, in "very rare circumstances" where the school determines that the parent has a compelling "need to know" of the student's transgender or nonbinary status,

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[18] *Frequently Asked Questions - Equal Opportunity & Access*, CA Dept. of Education, https://www.cde.ca.gov/re/di/eo/faqs.asp. (last visited Mar. 13, 2023).
[19] School Success and Opportunity Act, CA A.B. 1266 (2014).
[20] *Id.*
[21] CA Dept. of Education, *supra*.
[22] *Id.* CDE cited the Public Records Act (Education Code Section 49060), Family Educational and Privacy Rights (FERPA) and Article I, Section I of the California Constitution as sources for a student's right to privacy.
[23] *Id.*
[24] *Id.*

the teacher must inform the student and give the student the opportunity to make that disclosure herself or himself.[25]

Referendum No. 1598 sought to overturn A.B. 1266, however the referendum fell 17,276 votes short of qualifying for the November 2014 ballot after county election officials disqualified over 130,000 signatures.[26] Proponents of the ballot initiative challenged the disqualification of the 130,000 signatures in court, however the lawsuit was ultimately dismissed.[27] A.B. 1266 and the gender identity disclosure policy have thus remained intact despite efforts from parents groups and citizens to repeal them. The next legal challenge to A.B. 1266 may come from the people tasked with enforcing these school policies: teachers. Jurupa Unified School District Physical Education teacher Jessica Tapia ("Tapia") was dismissed by her school district in January 2023 for failing to comply with the gender pronoun policy set forth in A.B. 1266.[28] Tapia also violated the district's locker room policy of permitting students to use the facility consistent with the student's gender identity.[29] In an interview with Fox News, Tapia stated that the school district violated her religious beliefs in not allowing her to disclose a student's gender identity to his/her/their parent(s).[30] In describing the conflict, Tapia said to Fox News, "'I essentially had to pick one. Am I going to obey the district in the directive that are not lining up with. . . my own beliefs, convictions and faith? . . . I couldn't be a Christian and a teacher.'"[31]

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[25] *Id.*
[26] Gleason v. Padilla, 2014 Cal. App. LEXIS 1257.
[27] *Id.*
[28] Hannah Grossman, *Christian Teacher Loses Job after Refusing to Deceive Parents on Kids' Gender Transitions: 'from the Devil'*, Fox News, (Feb. 15, 2023), https://www.foxnews.com/media/christian-teacher-loses-job-refusing-deceive-parents-kids-gender-transitions-devil.
[29] *Id.*
[30] *Id.*
[31] *Id.*

Tapia further stated, "I believe firmly that God created man and woman, and you are who he made you to be."[32]

While the Jurupa Unified School District denied allegations that they discriminated against Tapia's religious beliefs, Tapia has retained an attorney and intends to sue.[33] This case has partly resulted in renewed interest by some lawmakers in discarding A.B. 1266 and creating new legislation that aligns with the goals of parental rights advocates.[34] These parental rights advocates argue that concealing a student's gender identity from parents is "dangerous and harmful to the emotional and physical safety of trans minors," which contrasts with CDE's belief that disclosure without student consent can be harmful.[35] Is there a proper legal challenge against Jurupa Unified School District, and by extension California, based on a teacher's religious objections to gender identity non-disclosure policies? This recent challenge is not unique, and more challenges may follow in the coming months as states and school districts grapple with the political climate surrounding gender identity and sexual orientation in schools.

C. Kansas Teacher Challenges Pronoun Nondisclosure Policy

A former Kansas teacher's lawsuit may offer insight into a potential legal outcome for Tapia if she sues her school district or the State of California. Pamela Ricard ("Ricard"), a former Kansas middle school teacher, filed a complaint in 2021 after she was suspended for using the incorrect pronouns to address an LGBTQ student.[36] Ricard was granted a limited

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[32] *Id.*
[33] Grossman, *supra* note 27.
[34] Carlos Granda, *SoCal Teacher Says She Was Fired for Not Hiding Students' Gender Preferences from Parents,* ABC7 Los Angeles, (March 14, 2023), https://abc7.com/jurupa-valley-high-school-teacher-fired-students-gender-identity/12950847/.
[35] *Id.*
[36] Li Cohen, *Kansas Middle School Teacher Who Was Suspended for Repeatedly Misgendering Student Gets $95,000 from District in Lawsuit Settlement*, CBS News, (September 2, 2022), https://www.cbsnews.com/news/pamela-ricard-kansas-fort-riley-middle-school-teacher-disciplined-misgendering-student-95k-settlement/.

preliminary injunction on her free exercise claim.[37] Like California, the Kansas school district prohibits employees and teachers from disclosing to parents that a student requested use of a preferred name or gender pronoun unless the student requests that an administrator or counselor do so.[38] Also like California, the Kansas school district attempted to ground the policy in federal privacy policy by citing FERPA.[39] Ricard testified that she is a Christian and that she "believes the Bible prohibits dishonesty and lying," and that not disclosing a student's gender pronouns to parents is a form of dishonesty.[40] The United States District Court for the District of Kansas assessed the free exercise claim using a lengthy analysis rooted in doctrine that has been applied by most federal courts for over thirty years.[41]

First, the court looked to see if the school district's ("the District") parent communication policy burdened Ricard's exercise of religion.[42] The district court found Ricard's testimony to be "credible and genuinely sincere" and accepted the premise that in withholding a student's gender pronouns from parents, Ricard was forced to engage in dishonesty and lying, which is prohibited by the Bible and her Christian faith.[43] The court described how the policy burdens Ricard's free exercise and reasoned that "[Ricard] would face the Hobbesian choice of complying with the District's policy and violating her religious beliefs, or abiding by her religious beliefs and facing discipline."[44]

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[37] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *6 (D. Kan. May 9, 2022). To obtain a preliminary injunction, the Kansas court stated that "the movant must show that she is (1) substantially likely to succeed on the merits, (2) will suffer irreparable injury if the injunction is denied, (3) her threatened injury outweighs the injury the opposing party will suffer under the injunction, and (4) the injunction would not be adverse to the public interest."
[38] *Id.* at 9-10.
[39] *Id.*
[40] *Id.* at 12.
[41] *Id.* at 10-25.
[42] *Id.* at 12.
[43] *Id.*
[44] *Id.*

Next, the district court considered the parent communication policy itself, and whether the policy was "neutral and generally applicable."[45] The court found that policy was not "neutral and generally applicable" because the district created multiple secular exceptions[46] to the policy but did not extend those exceptions for religious purposes.[47] The United States Supreme Court established in *Bowen v. Roy* that where a state creates a secular exemption, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[48]

Because the policy was not "neutral and generally applicable," the district court stated that the District had the burden to demonstrate that the policy was justified by '"interests of the highest order' – a so called, 'compelling' interest – and that the policy in question is 'narrowly tailored' to achieve those interests."[49] The district court then concluded that there was no "compelling interest" because FERPA did not bar disclosure of pronouns to parents, and that parents in the United States have "a constitutional right to control the upbringing of their children."[50] Further, the district court reasoned that even if there was a compelling interest to withhold student information from parents, such as to prevent potential abuse, the policy was both "overinclusive" and "underinclusive."[51] The district court reasoned that the policy was overinclusive because it prohibited the disclosure of student pronouns to parents without conducting a risk assessment.[52] The policy was also underinclusive in that it permitted

[45] *Id.* at 14.
[46] *Id.* Testimony at a hearing established that a "couple" other District employees inadvertently disclosed the preferred pronouns of children to parents and were not disciplined. Additionally, the District admitted that if parents requested copies of education records that contained a student's preferred pronouns, the District was compelled by FERPA to provide them.
[47] *Id.*
[48] Bowen v. Roy, 476 U.S. 693, 708 (1986).
[49] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *15 (D. Kan. May 9, 2022), quoting Fulton v. City of Phila., 141 S. Ct. 1868, 1881 (2021).
[50] *Id.* at 20, citing Yellowbear v. Lampert, 741 F.3d 48, 54-59 (10th Cir. 2014).
[51] *Id.* at 21-23.
[52] *Id.*

administrators to disclose the student's pronouns to parents if asked and without any risk assessment.[53]

While the preliminary injunction was granted, the case did not proceed and instead the District settled with Ricard and paid her $95,000.[54] After the injunction was granted, the school board removed the pronoun communication policy.[55] While the injunction and settlement had the intended effect of removing the pronoun communication policy, what could have happened if the case proceeded on the merits? The district court reasoned that there were several areas of the policy that created constitutional problems. These same areas could perhaps underly the policies in California and other states or school districts. Here, the district court granted broad deference to Ricard in establishing that the policy of the District burdened her free exercise. Other courts may not provide such deference. The next portion of the district court's analysis may also conclude differently depending on how the United States Supreme Court rules in *303 Creative LLC v. Elenis*.[56] Currently before the United States Supreme Court, *303 Creative* has the potential to overturn thirty years of precedence and establish (or reestablish) a new analysis for determining if a state law burdens free exercise. This is pertinent for not only analyzing pronoun policies that prohibit communication to parents, but policies that *require* that teachers disclose pronouns to parents.

In the past two years, several states have passed or are currently enacting legislation that requires teachers to disclose student pronouns to parents, even without a student's consent.[57] Part of an overall trend of "parental rights," states like Florida passed laws that banned classroom

[53] *Id.* citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) (where the Supreme Court found that laws that were substantially overinclusive or underinclusive were not narrowly tailored).
[54] Cohen, *supra* note 35.
[55] *Id.*
[56] 303 Creative Ltd. Liab. Co. v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, 90 U.S.L.W. 3255 (U.S. Feb. 22, 2022) (No. 21-476)
[57] Baker, *supra* note 3.

instruction on sexual orientation and gender identity.[58] Indiana State Senators advanced a bill in early April that would require public school teachers to tell parents when a student requests pronoun changes.[59] While other states consider similar bills that would require teachers to tell parents when students request pronoun changes, Republicans in the House of Representatives approved legislation that would require parental consent before honoring a student's request to change their pronouns. [60] If a teacher can challenge state and school policies that prevent a teacher from disclosing student pronouns, can a teacher challenge these new laws that require a teacher to disclose student pronouns on the same free exercise grounds? This question may rest on what type of test is applied by courts, and whether that test changes under the current United States Supreme Court session.

III. History of Religious Free Exercise Burden Analysis

A. Free Exercise in Education

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[61] While the First Amendment only applies to Congress, it has been applied to states and local governments– like school districts–through the Fourteenth Amendment.[62] Religion in schools was prominent in the recent case of *Kennedy v. Bremerton Sch. Dist.* where the Supreme Court held in part that a school district violated a football coach's free exercise rights because the school district did not

[58] Annie Karni, *Divided House Passes G.O.P. Bill on Hot-Button Schools Issues*, N.Y. Times (March 24, 2023), https://www.nytimes.com/2023/03/24/us/politics/parents-bill-of-rights-act.html.
[59] Leslie Bonilla Muniz, *Senate passes bill requiring schools notify parents of transgender student requests*, Indiana Capital Chronicle (Apr. 11, 2023), https://indianacapitalchronicle.com/2023/04/11/senate-passes-bill-requiring-school-notify-parents-of-transgender-student-requests/#:~:text=Indiana%20senators%20on%20Monday%20approved,instruction%20to%20the%20youngest%20students.
[60] Karni, *supra* note 56.
[61] U.S. Const. amend. I.
[62] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

act in a neutral and generally applicable manner in disciplining the coach after he prayed on the football field after games.[63] The language of the test used, generally applicable and neutral, is the subject of debate and criticism that the Supreme Court acknowledges.[64] *Kennedy* was fundamental in that it expanded the free exercise rights of teachers and rebalanced how free exercise claims interact with Establishment Clause violations.[65] To understand the controversy and where future cases may lead, one must first understand how the Supreme Court created different tests to evaluate free exercise claims.

In 1940, the U.S. Supreme Court held in *Cantwell v. Connecticut* that laws targeting religious beliefs are never permissible.[66] In the intervening years, it became clear that laws could target religious practices without explicitly doing so, and the U.S. Supreme Court identified instances in which a law could on its face be neutral towards religion, but still demonstrate a discriminatory purpose.[67] In the case of *Church of Lukumi Babalu Aye v. City of Hialeah*, the city of Hialeah passed a city ordinance that banned animal sacrifices.[68] While this ordinance appeared on its face neutral, the rationale behind the ordinance and debate preceding its passage demonstrated a hostility to the practices of the Santeria religion, of which ritual animal sacrifice was a key aspect of the faith.[69] The city council of Hialeah held emergency public meetings after members of the Church of Lukumi Babalu Aye, who practice the Santeria religion, sought to

[63] Kennedy v. Bremerton Sch. Dist., 142 S. Ct, 2407, 2422 (2022).
[64] *Id.* at 2423 footnote 1.
[65] *Id.* at 2426-8. The Court overruled the "Lemon test" that previously was used by courts to determine if a law created "entanglement" with religion and therefore a "reasonable observer" would consider the government to be endorsing religion. The school district in *Kennedy* argued that the plaintiff coach's on-field prayer could lead one to believe the school district endorsed religion under the "lemon test," and therefore the potential Establishment Clause violation outweighed the coach's free exercise.
[66] Cantwell, 310 U.S. at 303-304.
[67] *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[68] *Id.* at 527.
[69] *Id.* at 524-526.

open a church in the city.[70] During the meeting, the city council adopted a resolution that expressed that "certain religions" may engage in practices that are "inconsistent with public morals."[71] The Supreme Court accepted that animal sacrifice was a key aspect of the Santeria religion, and notably said "'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment Protection.'"[72] The Court then established that if the object of the law is to "restrict practices because of their religious motivation, the law is not neutral. . . and it is invalid unless justified by a compelling interest and is narrowly tailored to advance that interest."[73] To determine the motivation behind the law, the Court in *Hialeah* looked at the initial statements from the emergency meetings as well as the language of the statute to see that an "integral part" of the Santeria religion was the target of the bill. [74]

Applying this test to pronoun nondisclosure policies like in *Ricard*, are those policies "generally applicable and neutral?" Unlike *Hialeah*, there are not any statements that would infer a targeting of religion, therefore the laws themselves would not need to be "narrowly tailored." Further, how do we define what an "integral part" of a religion is and if that practice is worthy of an exemption or the invalidation of a law? The 1990 case of *Emp't Div., of Hum. Res. of Or. V. Smith* is perhaps the most important free exercise case of the last thirty years and is still good law today.[75] *Smith* was controversial with religious organizations and Congress attempted to overturn it shortly after the decision with the Religious Freedom Restoration Act of 1993 (RFRA), which was eventually invalidated by the Supreme Court as applied to the States in *City of Boerne v. Flores.*[76] Several states passed their own versions of the RFRA that ensure that state and local

[70] *Id.* at 526.
[71] *Id.*
[72] *Id.* at 531, quoting Thomas v. Review Bd. Of Indiana Employment Security Div., 450 U.S. 707, 714 (1981).
[73] *Id.* at 533.
[74] *Id.* at 534-535.
[75] Emp't Div., Dept' of Hum. Res. of Or. V. Smith, 494 U.S. 872, 877-78 (1990).
[76] City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

governments do not pass laws that substantially burden religious exercise, and that laws are narrowly tailored and serve a compelling government interest.[77] *Smith* itself dealt with the question of whether the religious exercise of using peyote exempted individuals from Oregon's criminal peyote statutes because peyote was a religious practice.[78] The Court asserted that free exercise meant, "the right to believe and profess whatever religious doctrine one desires," and that a government cannot, "impose special disabilities on the basis of religious views or religious status."[79] The Court further recognized that the "exercise of religion" also involved "the performance of" or "abstention from" physical acts, such as specific worship practices.[80]

The Court accepted that individuals have the right to profess whatever religious doctrine they desire, but where the law is generally applicable and does not target one's religious beliefs, there is no exemption. The Court reasoned that individuals still must follow general laws that are not aimed at promoting or restricting religious beliefs, even if compliance is contrary to the "conduct that his religion prescribes."[81] As an example, the Court relied on the case of *Gillette v. United States*, where the Court held that the Military Selective Service does not violate the free exercise of individuals that are opposed to specific wars on religious grounds.[82] Further, when the law is generally applicable, the government does not need a compelling reason to justify the law, because the Court reasons it would make laws "'contingent upon the law's coincidence with [one's] religious beliefs'" and would permit one "'to become a law unto himself.'"[83] However, the Court in *Smith* acknowledged that "where the State has in place a system of individual

[77] Campbell Robertson, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana,* N.Y. Times, (Mar. 31, 2015), *https://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0*
[78] Smith, 494 U.S. at 878.
[79] *Id.* at 877.
[80] *Id.* at 877-978.
[81] *Id.* at 879.
[82] *Id.* at 880, *citing* Gillette v. United States, 401 U.S. 437, 461 (1971).
[83] *Id.* at 890, *quoting* Reynolds v. United States, 98 U.S. 145, 167 (1878).

exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[84] Therefore, the analysis changes once secular exemptions are granted and the State must then demonstrate a compelling reason for not extending those exemptions for religious beliefs. In recent years, the Court has used the presence of secular exemptions to hold that certain policies are not neutral and generally applicable.[85]

The pronoun policies that prevent teacher disclosure in *Ricard* appear to be neutral and generally applicable under *Smith* because the policy does not directly target religion.[86] However, as the district court in *Ricard* noted, the policy was not neutral because it created secular exemptions that were not available for religious purposes.[87] If the policy in *Ricard* did not contain those exemptions, it is possible that the district court could have held that the policy was generally applicable. In the coming California case with Tapia, the court there will also look at the policies and comments of government officials preceding them to see if they are neutral and generally applicable. Like *Ricard*, the key indicator may be the presence of exemptions. The analysis does not end with *Smith* however, as the *Smith* doctrine has been eroded in recent years and the Court has signaled it may be overturned.[88]

B. Anti-Discrimination Laws Spur Change: *Smith* in Danger

The *Smith* doctrine was relatively unchallenged until the 2018 *Masterpiece Cakeshop* case that concerned the free expression and compelled speech claims of a Colorado baker.[89] While the Court did not rule on the compelled speech claim, the Court did hold that the baker's free

[84] *Id.* at 889, *citing* Bowen v. Roy, 476 U.S. 693, 708 (1986).
[85] *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1875 (2021).
[86] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *14 (D. Kan. May 9, 2022).
[87] *Id.*
[88] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1720 (2018).
[89] *Id.*

exercise was violated by the Colorado Civil Rights Commission that investigated a discrimination claim against the baker for refusing to bake a wedding cake for a same-sex couple.[90] Following the Supreme Court's recognition of the right for same-sex couples to marry in *Obergefell*, Colorado implemented a public accommodations law known as the Colorado Anti-Discrimination Act (CADA) which prohibited discrimination based on sexual orientation in businesses that engage in any sales to the public or offering services to the public.[91] CADA itself was not at issue in the case, but the conduct of the commission charged with investigating the alleged discrimination by the baker was at issue.[92] The Court recognized that in the context of same-sex marriage and a public accommodations law, that while religious and philosophical objections to same-sex marriage are protected by the First Amendment, business owners cannot deny protected persons "equal access to goods and services under a neutral and generally applicable public accommodations law."[93] The Court effectively dodged the *Smith* question here, and did not answer the question of whether the baker should have baked the cake, but whether his claim was treated fairly by the government.[94] Because the Colorado commission made hostile and discriminatory remarks against the baker's religion, the Court held that the commission violated the baker's free exercise.[95]

Smith was again the focus in the 2021 Supreme Court decision in *Fulton v. City of Phila.* [96] Like *Masterpiece*, an anti-discrimination law was at issue.[97] The City of Philadelphia stopped referring children to Catholic Social Services (CSS) for adoption after discovering that CSS

[90] *Id.*
[91] *Id.*
[92] *Id.* at 1721.
[93] *Id.* at 1727.
[94] *Id.*
[95] *Id.*
[96] Fulton v. City of Phila., 141 S. Ct. 1868, 1875 (2021).
[97] *Id.*

would not certify same-sex couples to be foster parents due to the agency's beliefs about marriage.[98] The City of Philadelphia then refused to renew its foster care contract with CSS unless it certified same-sex couples.[99] CSS then filed a claim against the City of Philadelphia for violating the agency's First Amendment rights.[100]

Once again, the Court used the *Smith* analysis to determine if Philadelphia applied a neutral and generally applicable policy for their foster care standards.[101] Like *Ricard,* the decision hinged on the ability of the State to grant exemptions.[102] The Court in *Fulton* held that the policy was not generally applicable because the commissioner had the sole discretion to grant exemptions for the foster care policy, and here the commissioner refused to grant one to CSS. Justice Kennedy quoted *Smith* in his rationale saying that a government may not "'refuse to extend that [exemption] system to cases of religious hardship without a compelling reason.'"[103]

While the majority decision appeared to support *Smith,* the concurring opinions of Justices Barrett, Alito, and Gorsuch demonstrated a strong desire to revisit and overturn *Smith.*[104] Justice Barret argued that textually, it may be appropriate to overrule *Smith*, but cautioned that the Court needs to determine what test to replace it with as strict scrutiny should not apply in every case.[105] Justice Alito was more firm in his conviction to overrule *Smith*, saying that the original decision had "startling consequences."[106] Justice Alito's extensive concurrence detailed the history of free exercise cases and argued that *Smith* is the outlier.[107] In arguing for what *Smith*

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1876.
[102] *Id.* at 1878.
[103] *Id. quoting* Emp't Div., Dept' of Hum. Res. of Or. V. Smith, 494 U.S. 872, 884 (1990).
[104] *Id.* at 1883.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1890.

should be replaced with, Justice Alito referenced the case of *Wisconsin v. Yoder*, a pre-*Smith* case whereby members of the Amish community were granted an exemption from compulsory education laws because they conflicted with the Amish community's religious beliefs.[108] There, the Wisconsin compulsory education law was generally applicable and uniformly applied. However, the Court still held that the Amish community were exempt from this law because the beliefs of the Amish community were so integral to their faith that they could not follow the compulsory education law.[109] Justice Alito then argued that the Court should return to the standard used prior to *Smith.*[110]

Prior to *Smith*, the Supreme Court held in the case of *Sherbert v. Verner* that the denial of unemployment compensation benefits to a Seventh Day Adventist restricted her free exercise of religion.[111] The appellant Seventh Day Adventist in *Sherbert* was discharged by her employer because the appellant refused to work Saturdays, the Sabbath Day of her faith.[112] The appellant did not obtain other work because she refused to work Saturdays, and so she filed a claim for unemployment compensation pursuant to the South Carolina Unemployment Compensation Act that was denied by the Employment Security Commission because appellant's unavailability for Saturday work was not a "good cause" to reject suitable work when offered under the Act.[113] The Supreme Court held that the Act violated the appellant's free exercise rights after conducting a multi-step analysis.[114]

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[108] *Id. citing* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).
[109] *Id.*
[110] *Id.*
[111] Sherbert v. Verner, 374 U.S. 398, 399 (1963).
[112] *Id.*
[113] *Id.* at 400-1.
[114] *Id.* at 402-10.

First, the Court asked if the disqualification of benefits "imposes any burden on the free exercise of appellant's religion."[115] The Court held that it did burden appellant's religion, and the Court reasoned that laws could be constitutionally invalid even if they indirectly burdened that religion.[116] Because the appellant's denial of benefits derived "solely from the practice of her religion," the Court reasoned that the appellant was in essence forced to choose between following her religion and forfeiting the benefits or abandoning one of the precepts of her religion in order to accept work.[117] Next, the Court struck down the State's claim that unemployment compensation was a "privilege" and not appellant's "right" because conditioning the acceptance of a benefit on a person's "willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[118] Finally, the Court evaluated the State's interest, reasoning that the substantial infringement of appellant's First Amendment right could only be justified by a compelling interest arising to "the gravest abuses."[119] The Court did not accept the State's argument that potential dilution of the unemployment fund could occur due to fraudulent religious exemption claims, and held that there was no justification for not permitting the exemption to the appellant.[120]

While *Smith* did not explicitly overturn *Sherbert*, it substantially limited it to the unemployment compensation field and the Court refused to extend the test to be applied in instances of invalidating laws rather than determining if exemptions are appropriate.[121] With Justice Alito's preference for a return to pre-*Smith* doctrine, there is a possibility that the *Sherbert* test or something similar could become the prevailing test.

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[115] *Id.* at 403.
[116] *Id.*
[117] *Id.* at 404.
[118] *Id.* at 405-6.
[119] *Id.* at 406.
[120] *Id.* at 407.
[121] Emp't Div., Dept' of Hum. Res. of Or. V. Smith, 494 U.S. 872, 889-90 (1990).

C. The End of *Smith* and Future of Religious Exemptions

The U.S. Supreme Court is currently deciding the case of *303 Creative LLC v. Elenis,* which could lead to the overturing or limiting of the *Smith* doctrine.[122] *303 Creative* concerns free exercise and compelled speech, and similar to *Masterpiece*, deals with wedding vendors and whether CADA interferes with religious free exercise when the web designer refuses to create a wedding website for same-sex couples because of religious beliefs.[123] In the petition for a writ of certiorari, the petitioner argued that the Tenth Circuit holding, which upheld CADA, effectively "neutered" *Fulton* because CADA creates a "pro-LGBT gerrymander" by requiring artists to "celebrate same-sex marriage" while permitting exemptions for secular artists.[124] The petitioner also cited the *Fulton* concurrences and argued for *Smith* to be overturned, arguing that if the Tenth Circuit is correct, then *Smith* has no effect, and that CADA is not generally applicable. [125]

If the Supreme Court rules in favor of the petitioner on the free exercise claim, then *Smith* could be overturned. However, it is also possible that the Court could uphold *Smith* and use rationale from *Fulton* to overrule the Tenth Circuit. The petitioner in *303 Creative* argued that the Tenth Circuit incorrectly concluded that CADA's exemption mechanism was "irrelevant without prior enforcement" despite *Fulton's* reasoning that any exemption mechanism is problematic no matter if an exemption has been granted.[126] Therefore, there is still a path to upholding *Smith* while holding that CADA violated the petitioner's free exercise.

If *Smith* is overturned, will the Court return to a test like *Sherbert*? While Justice Alito's concurrence in *Fulton* demonstrates a willingness to apply something like *Sherbert* and strict

[122] Petition for a Writ of Certiorari at 23, 303 Creative Ltd. Liab. Co. v. Elenis, 90 U.S.L.W. 3255 (2022) (No. 21-476).
[123] *Id.* A website designer that creates wedding websites for couples is the petitioner in this case.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 9.

scrutiny, Justice Barrett's concurrence argues that there needs to be a test more calculated than pure strict scrutiny. One can imagine just as the Court did in *Smith* that should States need to demonstrate a compelling interest for passing generally applicable laws, the risk exists of allowing someone "'to become a law unto himself.'"[127] States may have to allow religious exemptions for generally applicable laws just like *Sherbert* or risk being held unconstitutional.

IV. Challenging Mandatory Pronoun Policies for Violations of Free Exercise

A. Proposed Indiana Bill Requires Pronoun Disclosure to Parents

Under the current *Smith* and *Fulton* regimes, the pronoun non-disclosure policies will be reviewed by courts to determine if they are neutral and generally applicable. The Kansas District Court in *Ricard* applied the same logic and test from *Fulton* to determine that the law was not generally applicable because of the secular exemptions.[128] Likewise, the California court that may hear a potential challenge in the Tapia case will likely evaluate if there are exemptions, as the nondisclosure policies themselves seem generally applicable. States like Indiana that plan on implementing policies that require teachers to report student pronouns to parents will contend with the same type of analysis for teachers that object to the policies on religious free exercise grounds. If the proposed Indiana bill is implemented, then teachers in Indiana can likely challenge the bill's pronoun communication policy in a similar manner to Ricard in Kansas.

House Bill No. 1608 is the current draft of the pronoun policy awaiting the Indiana governor's signature.[129] Chapter 7.5 of the bill, titled Parental Notification Regarding Identification, includes the following section:

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[127] Emp't Div., Dept' of Hum. Res. of Or. V. Smith, 494 U.S. 872, 890 (1990), *quoting* Reynolds v. United States, 98 U.S. 145, 167 (1879).
[128] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *20 (D. Kan. May 9, 2022).
[129] H.B. 1608, 2023 Gen. Assemb., Reg. Sess. (Ind. 2023).

> Sec. 2. (a) A school shall obtain consent from at least one (1) parent of a student, if the student is an unemancipated minor, regarding a request made by the student to change the student's: (1) name; or 2) pronoun, title, or word to identify the student. b) Not later than five (5) business days after the date on which a school receives a request described in subsection (a), the school shall seek parental consent from a parent as required by subsection (a).[130]

Contrary to the California policy, this bill requires teachers to inform parents and acquire parental consent before the teacher can refer to a student using their preferred pronoun. The bill also includes a separate exemption in chapter 7.5, section 3 that says:

> Sec. 3. A school may not discipline an employee or staff member of the school for using a name, pronoun, title, or other word to identify a student that is consistent with the student's legal name if the employee or staff member does so out of a religious conviction.[131]

The bill does not detail what a religious conviction is. Additionally, the bill only provides that the staff member cannot be disciplined if they use the pronoun consistent with the student's "legal name," which implies that if a student legally changed their name, the staff member must still refer to that student with the pronoun consistent with that new legal name. The bill currently does not list any further exemptions for religious or secular reasons.[132]

B. Free Exercise Analysis: Burden on Sincerely Held Religious Belief

On what grounds could a teacher potentially challenge a law like the Indiana proposal for a violation of free exercise? Using the *Smith* doctrine there first must be a burden on the plaintiff's religion.[133] The *Ricard* and potential Tapia challenges expressed different violations of their religious beliefs. *Ricard* claimed that "being dishonest" violated her sincere religious

[130] *Id.* at 2-3.
[131] *Id.*
[132] *Id.*
[133] Emp't Div., Dept' of Hum. Res. of Or. V. Smith, 494 U.S. 872, 890 (1990).

beliefs.[134] The question of what beliefs are religious beliefs worthy of First Amendment is a question the Supreme Court grappled with in cases like *Yoder*.[135] In *Yoder*, the Supreme Court reasoned that philosophical or personal beliefs, "however virtuous and admirable," do not "rise to the demands of the Religious Clauses," and one must instead raise claims "rooted in religious belief."[136] While *Yoder* examined in depth the Amish respondents' religious convictions, *Ricard* accepted the teacher's sincere religious beliefs without examination in granting the injunction.[137] In the 2014 case *Burwell v. Hobby Lobby Stores,* the Supreme Court reiterated that the court is not in the position to challenge whether an individual's religious beliefs are flawed.[138]

Ricard's belief seems more synonymous with a philosophical or personal belief than a claim rooted in a religious belief. It is not clear what the Court considers to be claims "rooted in religious belief." Courts had to consider sincerely held religious beliefs in deciding to grant injunctions regarding mandatory COVID-19 vaccinations.[139] In one Ohio case regarding Air Force service members, the United States District Court for the Southern District of Ohio, Western Division, granted a preliminary injunction and held that the plaintiff demonstrated that the government's mandatory vaccine policy burdened his sincerely held religious beliefs.[140] In

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[134] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *12 (D. Kan. May 9, 2022).
[135] Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).
[136] *Id.* at 215-216.
[137] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *12 (D. Kan. May 9, 2022).
[138] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014). (where Hobby Lobby Stores challenged regulations promulgated by the Department of Health and Human Services (HHS) that required certain employers to cover contraceptive methods for their employees. Certain religious organizations and churches were exempt, but owners of three for-profit corporations claimed that the policy violated their sincere Christian beliefs. Because this was a federal policy, the Supreme Court did not use *Smith* to analyze the claim, but the Religious Freedom Restoration Act which applies to the federal government, but not the states).
[139] Poffenbarger v. Kendall, 588 F. Supp. 3d 770, 779 (S.D. Ohio 2022). (where the Southern District of Ohio analyzed the free exercise claim under the RFRA, applying a similar test to Smith to determine if a government action burdens the plaintiff's religious beliefs.
[140] *Id.* at 779 – 787. The plaintiff asserted that his Christian beliefs were violated by taking the vaccine because as stated in his request for an exemption, "All COVID-19 vaccines are associated with abortion. . . My faith makes it clear that murder of innocents is a sin . . . Abortion is absolutely contrary to these basic religious tenants."

describing the difference between personal beliefs and religious beliefs, the district court cited a Sixth Circuit case, *U.S. v. Barnes*, to demonstrate a situation where a free exercise claim was rejected because there was sufficient evidence to demonstrate that a claimant's belief about marijuana was primarily personal, and not religious.[141]

To demonstrate that the mandatory pronoun disclosure policies like the bill in Indiana burden religious belief, potential plaintiffs would need to show that the policy conflicts in some way with their religion. Courts may encounter issues determining where the line is between personal beliefs and religious beliefs. While the Kansas District Court found Ricard's belief in not being dishonest to be a sincerely held religious belief, would other courts categorize that as a personal philosophy? After all, is the idea of dishonesty just a general social philosophy? To combat mandatory pronoun policies, would the idea of doing no harm to children suffice for someone practicing the Christian religion? If fewer than one in three transgender and nonbinary youth found their home to be gender-affirming, then a teacher could potentially harm that student by reporting the student's pronouns or gender identity to parents.[142] And while the teacher in California, Tapia, believes that "God created man and woman, and you are who he made you to be," other teachers and other faiths may believe the exact opposite.[143] For example, some religious sects like Reform Judaism explicitly recognize same-sex couples and have supported same-sex equality since the 1970s.[144]

This same argument is visible in the context of abortion, where a group of five plaintiffs known as the Hoosier Jews for Choice requested injunctive relief from Indiana's 2022 abortion

[141] *Id.* at 787, citing U.S. v. Barnes, 677 F. App'x 271, 277 (6th Cir. 2017).
[142] The Trevor Project, *supra* note 14.
[143] Grossman, *supra* note 27.
[144] The Associated Press, *Lesbian Rabbi Is to Become President of Reform Group*, N.Y. Times (March 16, 2015), https://www.nytimes.com/2015/03/16/us/lesbian-rabbi-is-to-become-president-of-reform-group.html.

restriction bill.[145] While the potential overturing of *Smith* may impact several states, Indiana has a statute known as Indiana's Religious Freedom Restoration Act (RFRA) that "prohibits government action that substantially burdens a person's religious exercise."[146] Indiana's RFRA therefore guides this free exercise complaint and not *Smith*.[147] Plaintiffs in the complaint alleged that, "[a]lthough some religions, and adherents of those religions, believe that human life begins at conception (however defined), this is not a theological opinion shared by all religions or all religious persons.."[148] Plaintiffs further alleged that "Jewish law recognizes that abortions may occur, and should occur as a religious matter, under circumstances not allowed by S.E.A. 1 or existing Indiana law."[149] This appears to be an articulated sincerely held religious belief, and given the Supreme Court's reluctance to challenge religious beliefs, this step of the analysis appears satisfied. However, the Becket Fund for Religious Liberty ("Becket Fund") filed an amicus brief defending the state abortion ban and argued that "[t]here is powerful evidence that Plaintiffs' beliefs are not sincere."[150] The brief relied on a quote from *Hobby Lobby,* which concerned the federal RFRA, and said "'Congress was confident of the ability of the federal courts to weed out insincere claims.'"[151] The brief then compares this to the Indiana RFRA, and argues that the legislature intended for insincere claims to be weeded out.[152] In demonstrating how to weed out insincere claims, the brief quotes a law review article collecting several cases

[145] Pl. Compl. at 1, Anonymous Plaintiff 1, et al.v. Individual Members of the Indiana Med. Licensing Board, (2022), No. 22A-PL-02938. The bill in question, Senate Enrolled Act No. 1 ("S.E.A. 1") made virtually all abortions in Indiana unlawful.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 6.
[149] *Id.* at 6.
[150] Proposed Amicus Curiae Brief of The Becket Fund for Religious Liberty in Support of Appellants at 11, Anonymous Plaintiff 1, et al.v. Individual Members of the Indiana Med. Licensing Board, (2022), No. 22A-PL-02938.
[151] *Id. quoting* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 718 (2014).
[152] *Id.*

on religious objectors and stating, '"[e]vidence that the accommodation sought by a claimant would be attractive to anyone, not just to religious objectors, may be powerful evidence of insincerity.'"[153]

While the *Smith* doctrine does not employ an analysis of one's sincerely held religious beliefs, it is possible that a post *Smith* test, like the RFRA statutes in many states, will have to distinguish between beliefs that are sincere and insincere. Where will a court draw that line between sincere belief and personal philosophy? For the purposes of school gender pronoun policies, will courts only allow religious exemptions for religions that say that marriage is between one man and one woman? At least in the Indiana abortion case, Judge Heather Welch of Marion County Superior Court believed in the sincerely held religious beliefs of the plaintiffs because she granted a preliminary injunction writing, "The Court finds that S.E.A. 1 substantially burdens the religious exercise of the Plaintiffs."[154]

To ensure that courts and other parties do not effectively challenge the sincerity of the beliefs of potential plaintiffs, claims against the Indiana pronoun policy may need to be clear in how exactly the policy burdens a teacher's religious exercise. While the *Ricard* court in Kansas did not challenge the teacher's religious beliefs, the Becket Fund's amicus brief demonstrates that religious groups and impact litigation firms may challenge these beliefs and urge the court to consider those beliefs as insincere.[155] In fact, cases that concern religious liberty often involve several amicus curiae briefs filed on both sides of the issue, with the Becket Fund most recently

[153] *Id.* at 12, *quoting* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1231-32 (2017).
[154] Daniel Trotta, *Judge Blocks Indiana Abortion Ban on Religious Freedom Grounds*, Reuters, (Dec. 3, 2022), https://www.reuters.com/legal/judge-blocks-indiana-abortion-ban-religious-freedom-grounds-2022-12-03/.
[155] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *12 (D. Kan. May 9, 2022).

involved in the *Dobbs* decision.[156] The Becket Fund's decision to challenge the sincerely held religious beliefs of Hoosier Jews for Choice opens the door for courts to challenge the sincerity of any religious belief. In their amicus brief, the Becket Fund argued that the superior court concluded that each plaintiff's religious beliefs were "sincerely held" "absent citation or explanation."[157] The Becket Fund further argued that courts should consider evidence such as the potential for "'material[] gains' from 'hiding secular interests behind a veil of religious doctrine.'"[158] Relying on the analysis from the Becket Fund's brief, would *Ricard's* beliefs survive such scrutiny? Would the court require that Ricard point to a specific verse in the Bible that says that dishonesty is against the Christian faith? Courts will need to be cautious in drawing the line between sincere and insincere beliefs, as any distinctions could appear to support one religion's beliefs over another. For this reason, potential plaintiffs should draft complaints with as much specificity as possible and avoid generalizations that can make a belief seem more personal than religious, like in *Ricard.*

C. Free Exercise Analysis: Neutral and Generally Applicable

How the bill is implemented by school districts themselves and whether there are additional modifications or exemptions could determine whether the bill can be challenged by teachers for a violation of free exercise. For example, the school district in the *Ricard* case had its own pronoun non-disclosure policy separate from the State of Kansas.[159] Theoretically, school districts in Indiana could implement their own policies that do not conflict with but potentially

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[156] Adam Feldman, *Many Scotus Friends with Ideological Interests in OT 2021*, Empirical Scotus.com, (Jul. 13, 2022), https://empiricalscotus.com/2022/07/13/friends-with-ideological-interests/. 133 amicus curiae briefs were filed in *Dobbs v. Jackson Women's Health* which overturned *Roe v. Wade* and permitted states to restrict abortion.
[157] Proposed Amicus Curiae Brief of The Becket Fund for Religious Liberty in Support of Appellants at 16, Anonymous Plaintiff 1, et al.v. Individual Members of the Indiana Med. Licensing Board, (2022), No. 22A-PL-02938.
[158] *Id.* at 15, *quoting* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).
[159] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *20 (D. Kan. May 9, 2022).

modify the bill to create additional secular exemptions. As *Fulton* has demonstrated, if the government refuses to extend an exemption for religious hardship while allowing secular exemptions, then the law or policy is not neutral and generally applicable.[160] The school district would then need to have a compelling reason for not extending that exemption, which has so far been difficult for governments to prove as in the case of *Fulton.*[161] The Indiana bill already has a religious exemption barring punishment of teachers for not using a student's requested pronoun that does not match his/her/their legal name.[162] The presence of an exemption for one part of the policy but not another could demonstrate that the bill is not neutral and generally applicable.

Regardless of what happens to *Smith*, states like Indiana that have RFRA statutes may not have to change the way they analyze government policies because those statutes usually afford more religious protections than the pre-*Smith* Supreme Court tests.[163] The Indiana RFRA states that:

> (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[164]

Under Indiana law, the plaintiff does not need to prove that the law was not neutral and generally applicable, and instead the government must prove that the law furthers a compelling government interest and is the least restrictive manner of furthering that interest.[165] This is

[160] Fulton v. City of Phila., 141 S. Ct. 1868, 1878 (2021).
[161] *Id.*
[162] H.B. 1608, 2023 Gen. Assemb., Reg. Sess. (Ind. 2023).
[163] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 714-15 (2014).
[164] Ind. Code Ann. § 34-13-9-8 (Burns, Lexis Advance through P.L.2-2023 of the First Regular Session of the 123rd General Assembly).
[165] *Id.*

mostly true for other states that have similar RFRA statutes, of which at least twenty do.[166] Some states like Indiana passed RFRA-like statutes in the wake of the recognition of the constitutional right for same-sex marriage.[167] Many of these bills were criticized by business groups and LGBTQ groups as a way to legalize discrimination against members of the LGBTQ community.[168] Now, these same statutes may serve as a basis for teachers that want to challenge mandatory pronoun reporting policies because those teachers will not have to demonstrate why the law is not "neutral and generally applicable."

D. Free Exercise Analysis: Compelling Government Interest and Least Restrictive Means

The final step in the court's analysis will be to determine if the policy serves a compelling government interest and offers the least restrictive means of furthering that interest. While a lawsuit has not yet been filed, the comments of legislators that authored the bill can offer insight into the government's potential compelling interest. Indiana House Representative Michelle Davis, who authored the bill, remarked to an Indianapolis news station that, "House Bill 1608 is about transparency," and "[p]arents should not be cut out of the decision making and schools should not shield parents from knowledge about their child."[169] The focus of the broader bill, and similar bills that seek to limit discussions of gender identity and sexual orientation in the classroom, appears to be parental rights.[170] On the national Parents Bill of Rights Act, Congressional Representative Erin Houchin of Indiana said that the national bill, which is similar

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[166] *U.S. States with Religious Freedom Restoration* Acts, ABC News, (Mar. 15, 2015), https://abcnews.go.com/Politics/fullpage/us-states-religious-freedom-restoration-acts-andor-legislation-30019519.
[167] Robertson, *supra* note 74.
[168] *Id.*
[169] Emily Longnecker, *Bill on Teaching Human Sexuality and Students' Pronoun Use Heads to Full Senate*, wthr.com, (Mar. 23, 2023), https://www.wthr.com/article/news/local/indiana/bill-addressing-teaching-human-sexuality-and-students-pronoun-use-heads-to-full-indiana-senate/531-71e2fc48-e464-4d35-ae24-85bd0ff16120.
[170] Annie Karni, *House Republicans Pass 'Parents Bill of Rights' Act - the New York Times*, N.Y. Times, (Mar. 24, 2023), https://www.nytimes.com/2023/03/24/us/politics/parents-bill-of-rights-act.html.

to the Indiana bill, ". . .gives power back to parents."[171] The national and state bill appear to have the same intent regarding parental rights, and therefore the arguments surrounding both are similar.

This factor ultimately becomes a question of whose rights are afforded more weight – the parent's or the student's. While a parent's right to know what is happening with their child at school is a compelling reason, opponents of the federal bill argued that transgender and nonbinary youth could ultimately be hurt by policies that require teachers to report a student's pronouns to his/her/their parents without consent. Congressional representative Mark Takano of California described the federal bill as ". . . a fundamental invasion of privacy that puts children in danger."[172] Nevertheless, courts may not rely on "broadly formulated interests" and instead look at whether the state or school district has an interest in denying a religious exemption, like in *Fulton.*[173]

While the Indiana bill may have a compelling government interest for parents, courts will also consider if the policy is the least restrictive method of furthering the government's compelling interest. If that compelling interest is parental rights, then Indiana needs to show how the current policy is the least restrictive. Here, the balance may shift to demonstrating the potential harm the bill or policy will cause transgender and nonbinary students that do not feel safe at home. Further, the sincerely held religious beliefs of the teacher claiming the exemption will need to align with that goal of protecting students or protecting their religious beliefs concerning same-sex equality. The policy in *Ricard* did not meet this "least restrictive means"

[171] *Id.*
[172] *Id.*
[173] Fulton v. City of Phila., 141 S. Ct. 1868, 1881 (2021).

test as the policy was simultaneously "overinclusive" and "underinclusive."[174] Here too, the Indiana policy may be underinclusive in that it allows for religious exemptions for teachers that refuse to identify a student by their preferred pronouns but does not offer an exemption for teachers that do not wish to disclose that student's pronouns without that student's consent.[175] The policy may be overinclusive in that it applies to all teachers, all unemancipated minors, and all parents.[176] A narrowly tailored policy may instead require parents to opt-in to receiving certain communications rather than requiring parental consent every time a child wishes to be identified by a new gender pronoun.

Under either a *Smith* doctrine analysis or RFRA analysis, courts may have to contend with free exercise complaints against new bills like the one in Indiana that require teachers to report student pronouns to parents. Given the success of the *Ricard* injunction, teachers would not need to necessarily succeed beyond the preliminary injunction stage to force districts and the State to the negotiating table.[177] The timing of a potential lawsuit will also need to be considered to ensure justiciability. In the case of *Ricard,* the plaintiff was already disciplined for disobeying the policy.[178] If teachers challenge the policies before they are applied and before the teacher can demonstrate that this policy was unconstitutionally applied to her, then the suit will not move forward.[179]

[174] Ricard v. USD 475 Geary Cnty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *2, *21-3 (D. Kan. May 9, 2022).
[175] H.B. 1608, 2023 Gen. Assemb., Reg. Sess. (Ind. 2023).
[176] *Id.*
[177] Ricard, U.S. Dist. LEXIS 83742 at 21-23.
[178] *Id.*
[179] *See* McCullen v. Coakley, 573 U.S. 464, 485 (2014).

V. Conclusion

Teachers can challenge policies that require them to report a student's pronouns to his/her/their parents if those policies violate their sincerely held religious beliefs. Pamela Ricard's free exercise complaint in Kansas may demonstrate how a free exercise analysis would be conducted by courts that oversee challenges to laws like the proposed bill in Indiana. Under a traditional *Smith* analysis, the proposed Indiana bill may be neutral and generally applicable unless there are secular exemptions not applied to religious claims. However, Indiana's RFRA statute creates a higher standard for government policies than *Smith*, and future decisions may reflect that heightened standard should *Smith* be overturned during this Supreme Court session. Because Indiana's proposed bill may burden the religious exercise of teachers that practice faiths like Reform Judaism, the Indiana bill must be the least restrictive means of serving a compelling government interest. For the same reasons that the policies in Kansas were over/under inclusive, the Indiana law is not narrowly tailored and therefore burdens free exercise. To protect transgender and nonbinary youth from bills that could endanger them through the mandatory reporting of pronouns to parents without consent, teachers should challenge these policies if they conflict with their sincerely held religious beliefs.