No. 23-2543

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KAYLA SMILEY,

Plaintiff-Appellant,

v.

KATIE JENNER, in her official capacity,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:23-cv-1001-JPH-MKK, The Honorable James P. Hanlon, Judge

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RESPONSE BRIEF FOR DEFENDANT-APPELLEE

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INTRODUCTION

Indiana, like many other States, sets curriculum requirements that public-school teachers must follow. Longstanding requirements include prohibitions on providing "instruction on human sexuality" without parental consent and requirements to teach abstinence throughout any "instruction on human sexuality." Ind. Code §§ 20-30-5-13, 20-30-5-17(c). None of those requirements has ever been challenged as too vague to understand. Recently, through House Enrolled Act (HEA) 1608, Indiana added one more requirement to its rules concerning "instruction on human sexuality," prohibiting public-school teachers from providing that instruction to students in prekindergarten through third grade. Ind. Code § 20-30-17-2. That new requirement (and that new requirement only) drew a facial challenge from Kayla Smiley, a 23-year-old newly licensed teacher leading her very first class, who says that HEA 1608 infringes protected speech and is impermissibly vague.

The district court correctly denied Smiley's request for a preliminary injunction. As the Supreme Court and this Court have recognized, public-school teachers do not have a First Amendment right to say whatever they wish in carrying out "their professional duties." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 426 (2006). "[I]n-classroom instruction" is not protected speech. *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016). Smiley alleges that HEA 1608 may apply to some speech outside of the classroom, such as remarks to students in the lunchroom or answers to student queries. But remarks made while supervising students around school or guiding their learning are still made pursuant to a teacher's official duties and therefore are not

protected by the First Amendment. And regardless, Smiley's concern that HEA 1068 might reach *some* protected speech does not warrant the "strong medicine" of facial invalidation. *United States v. Hansen*, 599 U.S. 762, 770 (2023).

Smiley's vagueness challenge under the Fourteenth Amendment is equally meritless. To survive a vagueness challenge, a statute need only have an "understandable core." *Planned Parenthood of Ind. & Ky. v. Marion Cnty. Prosecutor,* 7 F.4th 594, 603 (7th Cir. 2021). As Smiley's own admissions show, HEA 1608 has an understandable core. "She understands" the term "instruction" to encompass "many of her activities"—including "standing in front of her class executing a lesson plan." Br. 17. And Smiley further concedes that instruction on "human sexuality"—a term used in other Indiana statutes that teachers have followed for years without any apparent difficulty—includes "sex education" and "going into what sexual intercourse is." Dkt. 26-1 at 13 (Smiley Dep. 42:20–25). Smiley's concern is about how HEA 1068 might apply to other potential topics of conversation with students. To the extent that HEA 1068 applies at all, however, the appropriate way to clarify a statute's margins is through case-by-case adjudication. The answer is not to enjoin a statute in all of its applications. The district court correctly concluded that no injunction is warranted.

JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that House Enrolled Act 1608 (codified at Indiana Code § 20-30-17-2)—which prohibits schools and their employees

or vendors from "provid[ing] any instruction to a student in prekindergarten through grade 3 on human sexuality"—does not prohibit a substantial amount of protected speech and therefore, on its face, comports with the First Amendment.

2. Whether the district court correctly held that HEA 1608 covers an understandable core of conduct and therefore, on its face, comports with the Due Process Clause of the Fourteenth Amendment.

3. Whether the remaining requirements for a preliminary injunction weigh against issuing such an injunction against HEA 1608's enforcement.

STATEMENT OF THE CASE

I. Indiana's Curriculum Requirements and Teacher Licensing

A. Indiana's curriculum requirements prohibit instructing young children on human sexuality

Article 30—titled "Curriculum"—of Title 20 of the Indiana Code imposes various requirements on what must be taught, and not taught, in schools. *See, e.g.*, Ind. Code § 20-30-5-1 (requiring instruction on federal and state constitutions); *id.* § 20-30-5-9 (requiring instruction on hygiene and sanitary science); *id.* § 20-30-5-5.5 (requiring instruction on bullying prevention); *id.* § 20-30-5-21 (prohibiting "student instruction that is contrary to a curriculum require[ment]"). Several of these longstanding curriculum requirements concern human sexuality. For example, "[t]hroughout instruction on human sexuality," Indiana requires teachers at state-accredited schools to "teach abstinence from sexual activity outside of marriage as the expected standard for all school age children" and to "include in the instruction that abstinence from sexual activity is the only certain way to avoid out-of-wedlock

pregnancy, sexually transmitted diseases, and other associated health problems." *Id.* § 20-30-5-13.

Indiana law also provides that, "[b]efore a school may provide a student with instruction on human sexuality, the school must provide the parent of the student . . . with a written request for consent of instruction." Ind. Code § 20-30-5-17(c). This consent form "must accurately summarize the contents and nature of the instruction on human sexuality that will be provided to the student and indicate that a parent of a student . . . has the right to review and inspect all materials related to the instruction on human sexuality." *Id.* A parent may "consent[] to" or "decline[]" the instruction. *Id.* "If a student does not participate in the instruction on human sexuality, the school shall provide the student with alternative academic instruction during the same time frame that the instruction on human sexuality is provided." *Id.*

In 2023, through House Enrolled Act 1608, Indiana added a new provision to Article 30. HEA 1608 provides that a public "school, an employee or staff member of a school, or a third party vendor used by a school to provide instruction may not provide any instruction to a student in prekindergarten through grade 3 on human sexuality." Ind. Code § 20-30-17-2. The statute further provides that "[n]othing in this chapter may be construed to prohibit a teacher from providing instruction on academic standards developed by the department under I[ndiana] C[ode] 20-31-3-2 or instruction required under I[ndiana] C[ode] 20-30-5-5.7" (a provision requiring "age appropriate . . . instruction on child abuse and child sexual abuse"). *Id.* §§ 20-30-5-5.7, 20-30-17-3. And "[n]othing in this chapter," the statute specifies, "may be

construed to prevent a school employee or a school staff member from responding to a question from a student regarding the topic described in section 2 of this chapter." *Id.* § 20-30-17-4. HEA 1608 does not specify any consequences for noncompliance.

B. Indiana Department of Education's regulatory authority and practices

The Indiana Department of Education exercises authority over teacher licensing in Indiana. Ind. Code § 20-28-5-1. To obtain a teaching license, an applicant generally must hold a bachelor's degree, complete an approved teacher preparation program, and pass the state-required tests. Dist. Ct. Dkt. 26-2 at 3 (Declaration of Chad Ranney ¶ 4); *see Teacher*, Ind. Dep't of Educ., https://www.in.gov/doe/educators/educator-licensing/teacher/#InState. After two years of teaching, an initial practitioner can convert her license to a practitioner's license, which does not require a qualitative review of a teacher's performance. Ind. Code § 20-28-5-12; Dkt. 26-2 at 3 (Ranney Decl. ¶ 5). Thereafter, teachers renew their licenses every five or ten years, depending on certain criteria. Dkt. 26-2 at 3 (Ranney Decl. ¶ 5).

Indiana law permits the Department, "[o]n the written recommendation of the secretary of education," to "suspend or revoke a license" for four reasons: (1) immorality; (2) misconduct in office; (3) incompetency; or (4) willful neglect of duty." Ind. Code § 20-28-5-7. In any proceeding to suspend or revoke a license, the Department must "comply with I[ndiana] C[ode] 4-21.5-3," *id.*, which governs adjudicative proceedings under Indiana's Administrative Orders and Procedures Act (AOPA). *See* Ind. Code § 4-21.5-3-1 *et seq.* That article permits parties to seek discovery, to make filings, and to participate in a hearing before an administrative

law judge (ALJ). *See id.* §§ 4-21.5-3-17, 4-21.5-5-2. It also permits parties to seek judicial review of the ALJ's factual findings and legal conclusions. *See id.* § 4-21.5-3-17.

In practice, licensing actions are rare. The Department "generally takes action against teachers' licenses only where criminal (or near-criminal) conduct has occurred." Dkt. 26-2 at 4 (Ranney Decl. ¶ 10). For example, the Department has suspended or revoked licenses "after teachers were convicted of neglect of a minor, possession of a controlled substance, or battery." *Id.* (¶ 11). The Department is not aware of any action taken on a teacher's license for a curriculum-related violation, such as failing to obtain parental consent before instruction on human sexuality under Indiana Code § 20-30-5-13. *See id.* at 5 (¶ 13).

Schools generally are responsible for administering curriculum requirements. While the Department of Education develops academic standards and monitors schools' compliance with those standards, school districts are accountable for adopting curriculum that includes content required by statute or Department-developed academic standards. *See* Ind. Code § 20-31-3; Dkt. 26-2 at 5–6 (Ranney Decl. ¶¶ 17–18). The Department and State Board of Education oversee compliance, which schools demonstrate primarily through testing, as part of their regulatory authority over school accreditation. *See* Ind. Code § 20-31-4.1-8; Dkt. 26-2 at 5 (Ranney Decl. ¶¶ 16–17). But the Department generally will address concerns with individual teachers only in serious circumstances. Dkt. 26-2 at 4–5 (Ranney Decl. ¶¶ 10–15). Schools generally evaluate teachers for compliance with school policies

and curriculum, including classroom instruction and materials. *Id.* at 5 (¶¶ 14, 18). To the extent either schools or teachers have questions about curriculum requirements, the Department is available to provide guidance. *Id.* at 5–6 (¶¶ 17, 19).

II. Newly Minted Teacher Kayla Smiley Challenges Indiana's Curriculum Requirements Regarding Human Sexuality

Plaintiff Kayla Smiley received her Indiana teaching license in December 2022, just after graduating with her degree in elementary education. Dkt. 1 at 3 (Compl. ¶¶ 14–15); Dkt. 26-1 at 5–6 (Smiley Dep. 12:21–13:2, 13:24–14:4). Smiley was scheduled to graduate in May 2022, but failed her last semester, which delayed her graduation until she re-took her failed courses. Dkt. 26-1 at 5–6 (12:23–13:1). From October 2022 through May 2023, Smiley was employed as a classroom assistant to her teaching mentor at Indianapolis Public School 56. *Id.* at 6 (13:15–18, 16:3–13). Her mentor was originally assigned to students in grades one through three, but one month after Smiley began her job as classroom assistant the school reassigned the mentor (and Smiley) to teach a fourth and fifth grade class. *Id.* (16:5–13).

In June 2023, Smiley filed a complaint in which she challenged HEA 1608's prohibition on providing instruction on human sexuality to students in prekindergarten through third grade. Dkt. 1 at 1 (Compl. ¶ 1). The complaint was filed a few weeks before Smiley was to start teaching her first class as lead teacher to first, second, and third grade students at Indianapolis Public School 51. Dkt. 1 at 3 (Compl. ¶¶ 14–15); Dkt. 26-1 at 6 (Smiley Dep. 13:19–23). The complaint alleges that HEA 1608 violates the First Amendment "[t]o the extent" that it "impinges on [Smiley's] ability to speak as a citizen on matters of public interest and to speak away from work

on matters unrelated to her employment." Dkt. 1 at 9 (Compl. ¶ 38). The complaint also alleges that HEA 1608 is impermissibility vague in violation of the Fourteenth Amendment's Due Process Clause. *Id.* (¶ 37). Smiley moved for a preliminary injunction "prohibiting the enforcement of Indiana Code § 20-30-17-2." Dkt. 9.

Smiley alleges that two terms in HEA 1608—"instruction" and "human sexuality"—are "hopelessly vague." Dkt. 21 at 16. Smiley admits that she "obviously understand[s] that 'instruction' covers what goes on while [she] formally teach[es] in class." Dkt 20-1 at 6 (Smiley Decl. ¶ 31). But she is concerned that her water bottle, which displays several "sticker-messages" that "support LGBTQ rights," including "Trans people belong here" and "Say Gay," provides such "instruction." *Id.* at 5 (¶ 26). She also worries about how someone might perceive her "new car" because she "intend[s]" to "put stickers on it supportive of LGBTQ rights" and to park it "in the parking lot on school property." *Id.* She has concerns about correcting a student's "unacceptable" use of the word "gay" or permitting students to read books that "touch on such topics as family structure, identity, parenting, AIDS, and same-sex relationships" in her classroom. *Id.* at 4 (¶¶ 21, 23–25).

Smiley is worried about the meaning of human sexuality as well. She "see[s]" human sexuality "as an umbrella term." Dkt. 26-1 at 14, 24 (Smiley Dep. 45:16–46:1, 88:12–23). When asked what she thinks "human sexuality" means, Smiley answered that it was a "great question," and she was "not sure [she] would have a formulated answer that would make sense." *Id.* at 13 (44:21–23). She agreed, however, that "teaching . . . a sex education curriculum . . . going into what sexual intercourse is"

would be providing instruction on human sexuality because "it says sex and sexuality." *Id.* (42:20–25). She also agreed that teaching about sexually transmitted infections would constitute instruction on human sexuality. *Id.* (43:5–9). And Smiley explained that teaching "sex education," even to her own class, is "not my job." *Id.* at 14 (46:7–10).

The terms "instruction" and "human sexuality" are not the only words of HEA 1608 that Smiley initially struggled to understand. According to Smiley, "[s]chool means a lot of things." Dkt. 26-1 at 36 (Smiley Dep. 135:3). Also, she was "trying to figure out who that . . . third party could possibly be," and she "had to look up what specific department" the law refers to. *Id.* (135:3–10). After reviewing HEA 1608's text, she "Googled" the definitions of the words she did not understand, such as "statute," "construed," and "code," in addition to "instruction" and "human sexuality." *Id.* (133:23–134:17, 135:3–19). As Smiley explained, "[t]here was just a lot that I had to look [up] multiple times." *Id.* (136:24–25). But having put forth that effort, she is now reasonably confident "for the most part" that she understands the law—except for "instruction" and "human sexuality." *Id.* (136:15–20).

Smiley "do[es not] actually know" who enforces HEA 1608 but worries that any departure from the statute could result in forfeiture of her teaching license. Dkt. 20-1 at 8–9 (Smiley Decl. ¶¶ 40–42); Dkt. 26-1 at 34 (Smiley Dep. 126:1–3). Smiley has not reached out to the Department of Education or any superior in her school district to gain clarity on HEA 1608, Dkt. 26-1 at 37 (Smiley Dep. 137:21–138:1), even though she admitted that she "[a]bsolutely" could ask her school principal or another school

official for guidance if she is unsure about whether a topic of discussion is consistent with state law or school policy, *id.* at 11 (35:2–6).[1]

III. The District Court Denies a Preliminary Injunction

The district court denied Smiley's motion for a preliminary injunction. SA1. The court first confronted Smiley's First Amendment challenge. SA5 & n.5. The court explained that, while the "First Amendment's protections extend to 'teachers and students,'" "[t]hat does not mean, however, that 'the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish.'" SA5 (quoting *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022)). This is because "'[i]n addition to being private citizens, teachers . . . are also government employees paid in part to speak on the government's behalf and convey its intended messages.'" *Id.* (quoting *Kennedy*, 142 S. Ct. at 2423).

The court first considered "the nature of the speech at issue." SA6. "'If a public employee speaks "pursuant to [her] official duties,"' that speech is, for constitutional

[1] In support of her motion, Smiley submitted exhibits including transcripts and video recordings of state legislators' comments during committee and floor debates. Dkt. 20-3; Dkt. 20-4; Dkt. 20-5. The State moved to strike those exhibits on the grounds that they fail to meet the statutory requirements for Indiana legislative history or evidence of the meaning of the law. Dkt. 25; *see* Ind. Code § 2-5-1.1-14 (to be "part of the legislative history" of an enrolled act, the content of video or audio coverage of legislative sessions must be "certified for accuracy and completeness" and either contemporaneously "incorporated by resolution" into the House or Senate journal or "declared to be part of the legislative history of a bill" in a contemporaneously enacted bill); Ind. Code § 2-5-1.1-15 (to constitute "an expression of the legislative intent, purpose, or meaning of an act," the content of audio or video coverage must be "certified for accuracy and completeness" and "incorporated by a bill" contemporaneously enacted"). In the district court's decision denying Smiley's motion for preliminary injunction, the court denied as "unnecessary to resolve this facial challenge" the State's motion to strike her exhibits of legislative debate. SA15 n.6.

purposes, 'the government's own speech,'" and so "the First Amendment does 'not shield the individual from an employer's control and discipline." SA6 (quoting *Kennedy*, 142 S. Ct. at 2423). The court further recognized that, in this facial challenge, "'[t]o justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep.'" SA6 (quoting *United States v. Hansen*, 599 U.S. 762, 769 (2023)). "[E]njoining the enforcement of a law in its entirety, as Smiley seeks, is 'only a last resort,'" SA6 (quoting *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012)). Examining HEA 1068, the court concluded that "[t]he First Amendment does not require that 'last resort' here." SA6.

"To start, in-classroom-speech is 'not the speech of a "citizen" for First Amendment purposes' and therefore 'does not implicate . . . First Amendment rights.'" SA6 (quoting *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016)). The court explained that, "in *Brown*, a teacher's First Amendment claim 'fail[ed] right out of the gate' when he challenged his suspension for 'a well-intentioned but poorly executed discussion of why [racial epithets] are hurtful and must not be used' that he led 'in the course of his regular grammar lesson to a sixth grade class.'" SA7 (quoting *Brown*, 824 F.3d at 715) (alterations in original). "And in *Mayer* [*v. Monroe County Community School Corporation*], an elementary teacher had no First Amendment right to share her personal views on military operations in Iraq during a 'current-events session, conducted during class hours." SA7 (quoting *Mayer*, 474 F.3d 477, 479 (7th Cir. 2007)). "*Brown* and *Mayer*," the district court explained, "show that speech

within the scope of a teacher's job duties isn't limited to speech that presents 'official curriculum,'" SA7 (quoting *Brown*, 824 F.3d at 715), as "[t]he teacher's speech in *Brown* was spontaneous and in response to discovering students' notes that included racial slurs," and the speech in *Mayer* "was made in response to a student's question." SA7. Those decisions together establish that "'[t]he Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials.'" SA8 (quoting *Mayer*, 474 F.3d at 480).

The district court saw no difference in how First Amendment principles apply to "speech outside the classroom." SA8. Inside or outside the classroom, "[t]he 'critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties.'" *Id.* (quoting *Kennedy*, 142 S. Ct. at 2424). "[I]n the elementary-education context, . . . much of what an elementary teacher says to students during a typical school day is spontaneous (as in *Brown*), in response to questions (as in *Mayer*), or otherwise outside of a formal lesson plan." SA8. This speech is "central to the job" of "an elementary teacher[]," and "the students are not any less of a captive audience when having an informal conversation with their teacher in a hallway or choosing which of the teacher's books to look at during unstructured time." SA8.

In Smiley's case, the district court observed that "Ms. Smiley wants to use classroom-library books, water bottle messages, and car bumper stickers to 'create teachable moments' for her students." SA8 (quoting Dkt. 1 at 4). "Such interactions, even when spontaneous and not part of official curriculum, are within the scope of Ms. Smiley's duties and responsibilities as an elementary school teacher and

therefore not protected by the First Amendment." SA9. And "even if some of the expression that Ms. Smiley is worried about . . . is protected by the First Amendment, Ms. Smiley is nonetheless unlikely to be able to show that HEA 1608 is unconstitutional on its face" because "Ms. Smiley asks for an injunction that would 'throw out too much of the good based on a speculative shot at the bad.'" SA10–11 (quoting *Hansen*, 143 S. Ct. at 1948). "HEA 1608's prohibition of 'instruction . . . on human sexuality' affects only expression to elementary students—rather than to the public—which the First Amendment does not protect when it's 'against the instructions of elected officials.'" SA11. Thus, the court concluded that Smiley failed to meet the "heavy burden to show that HEA 1608 is unconstitutional on its face" because the speech and conduct at issue "are within the scope of Ms. Smiley's duties and responsibilities as an elementary school teacher." SA6, SA9.

The court held that Smiley also cannot succeed on her facial Fourteenth Amendment vagueness challenge, which is "disfavored." SA12. The court explained that HEA 1608's terms "instruction . . . on human sexuality" are "not so vague that it lacks a core of understandable meaning." SA13. Ordinary persons can understand the meaning of those terms, and Smiley herself "admits that HEA 1608 legitimately applies to at least formal teaching on sex education or sexually transmitted diseases." SA13. The "appropriate way to raise constitutional concerns about the periphery of a statute's application" is through "an as-applied challenge if the Department of Education were to initiate proceedings to suspend or revoke her teaching license." SA14. The facial challenge must fail. *Id.* Having concluded that Smiley "has not

shown some likelihood of success on her First Amendment claim or her Fourteenth Amendment claim," the district court denied a preliminary injunction. SA15.

SUMMARY OF THE ARGUMENT

The district court correctly denied Smiley's request for a preliminary injunction. As the court explained, Smiley lacks any likelihood of success on her facial challenge to HEA 1608's prohibition on public-school teachers providing "instruction on human sexuality" to school children in kindergarten through third grade.

I. Courts impose the "strong medicine" of "facial invalidation" on a First Amendment overbreadth claim only if the challenged law "'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" *United States v. Hansen*, 599 U.S. 762, 770 (2023)) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). Smiley does not dispute that speech within the scope of her official duties is unprotected or that her official duties encompass formal classroom teaching. Instead, Smiley argues that HEA 1608 may reach some speech beyond her official duties, such as answering student questions and providing books to students for classroom reading time. But the conduct described is within Smiley's duties, and in any event, her few examples do not show that the statute prohibits a "substantial" amount of protected speech.

Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022), does not help Smiley. That case concerned an as-applied challenge, not an overbreadth challenge. And the coach's personal, quiet prayer away from students during a time when he was free to engage in private speech is far different from Smiley's efforts to teach

students by actively engaging them at school as part of her job. And to the extent that Smiley identifies a legitimate concern, there are good reasons to construe HEA 1608 to reach only speech pursuant to official duties.

If the Court reaches *Pickering* balancing at all, the balance favors the State. "Human sexuality provides the most obvious example of age-sensitive matter," where "[t]here can be little doubt that [the] speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students." *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416–17 (3d Cir. 2003). Indiana is justified in requiring schools and their employees to refrain from providing instruction on human sexuality to the youngest students.

II. HEA 1608 also withstands Smiley's facial challenge under the Fourteenth Amendment. The existence of an "understandable core" ends her vagueness claim. *Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 540 (7th Cir. 2019). Smiley's own concession that HEA 1608 undoubtedly reaches "teaching sex education or about sexually transmitted diseases," Br. 23, demonstrates the statute contains the requisite core. More than that, the plain meaning of "instruction on human sexuality," the statutory context within the Indiana Code's regulation of education and curriculum, and the ability of schools and teachers to seek guidance further demonstrate the understandable core of the law. The district court was right to conclude that Smiley failed to make out a void-for-vagueness claim.

III. The district court correctly concluded that no injunction is warranted because Smiley failed to demonstrate a likelihood of success on the merits. The

remaining preliminary-injunction factors—irreparable harm, balance of the equities, and public interest—also weigh against granting the requested injunction.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. The Court reviews the denial of a preliminary injunction for an abuse of discretion. *See Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021); *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). "The district court 'abuses its discretion when it commits a clear error of fact or an error of law.'" *Cassell*, 990 F.3d at 545 (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)).

ARGUMENT

Smiley has mounted a facial challenge to HEA 1608, imposing the most difficult standard on her claims. "The Supreme Court has repeatedly stated that facial invalidation of legislation is disfavored." *United States v. Bonin*, 932 F.3d 523, 534 (7th Cir. 2019). To succeed in such a challenge, Smiley "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Hansen*, 599 U.S. 762, 769 (2023) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Smiley has failed to meet that demanding standard, and the district court did not abuse its discretion in denying her motion for a preliminary injunction.

I. On Its Face, HEA 1608—a Curriculum Requirement for Public Schools—Does Not Violate the First Amendment

Smiley argues that HEA 1608 is facially overbroad in violation of the First Amendment. Br. 25. "'Invalidation for overbreadth is strong medicine that is not to be casually employed.'" *Hansen*, 599 U.S. at 770 (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)) (cleaned up)). Courts accordingly apply a rigorous standard, only imposing "facial invalidation" if a law "'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" *Id.* (quoting *Williams*, 553 U.S. at 293). Further, "a law's unconstitutional applications must be realistic, not fanciful, and their number must be *substantially disproportionate* to the statute's lawful sweep." *Id.* "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.* Here, the district court correctly concluded that Smiley failed to demonstrate that HEA 1608 prohibits protected speech at all, much less that the number of unconstitutional applications would be *substantially greater* than the number of legitimate ones. *See* SA6–11.

A. The district court correctly concluded that the speech at issue falls within Smiley's official duties and is not protected

Undertaking the "threshold inquiry into the nature of the speech at issue," SA6 (quoting *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022)), the district court correctly concluded that none constitutes protected speech. SA7–SA9. Smiley is an elementary-school teacher at a public school. Dkt. 1 at 3 (Compl. at ¶¶ 14–15); Dkt. 26-1 at 6 (Smiley Dep. 13:19–23). Primary public-school teachers "hire out their own speech and must provide the service for which employers are willing to pay." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). Teachers,

therefore, are subject to the government's broad discretion to restrict "the expressions employees make pursuant to their professional duties." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 426 (2006). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421–22. Thus, this Court has "already confirmed" that "authorities charged by state law with curriculum development" may require "the classroom teacher" to teach (or not teach), *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990), both "subject matter" and "perspective[s]" prescribed by state law, *Mayer*, 474 F.3d at 479.

Smiley agrees—as she must—that, "[w]hen a teacher is delivering a prescribed lesson to a class of attentive students, she is engaging not in private expressive activity, but rather in the speech of her employer." Br. 25–26. As this Court's cases establish, the First Amendment does not allow teachers to determine "curriculum content," *Webster,* 917 F.2d at 1007, or disregard state curriculum requirements in "answer[ing] a pupil's question[s]," *Mayer*, 474 F.3d at 478–79. It therefore follows that Smiley's facial challenge to HEA 1068 fails. An elementary schoolteacher like Smiley spends the majority of her time during the school day pursuing her official duties and professional responsibilities by teaching lessons in front of the classroom; supervising her students during quiet time, lunch, and recess; supplying her students

with books for reading time; and responding to their questions. Dkt. 20-1 at 2–5 (Smiley Decl. ¶¶ 14–16, 22–23, 28); Dkt. 26-1 at 8, 30 (Smiley Dep. 21:24–22:19, 112:22–24). So nothing about Smiley's challenge "realistic[ally]" suggests that the number of HEA 1608's unconstitutional applications are "substantially disproportionate" to the number of constitutional applications. *Hansen*, 599 U.S. at 770. Indeed, Smiley expresses uncertainty only as to how HEA 1068 applies to a portion of what she does at school, such as carrying a "water bottle with stickers," "calm[ing] students in the lunchroom," and "answer[ing]" questions about "her bumper stickers." Br. 17.

As the district court held, moreover, the applications about which Smiley expresses uncertainty fall outside the First Amendment's protections. Although the First Amendment protects teachers' speech when made as "private citizens," "none of this means the speech rights of public-school employees are so boundless that they may deliver any message to anyone anytime they wish." *Kennedy*, 142 S. Ct. at 2423. To the contrary, speech pursuant to the teacher's "official duties" and "professional responsibilities" is subject to state direction. *Garcetti*, 547 U.S. at 421, 426.

"The timing and circumstances" of the speech at issue can help determine whether it was undertaken as a private citizen or not. *Kennedy*, 142 S. Ct. at 2425. While taking place "in the office" is not "dispositive," *id.*, it can provide some clues as to "whether [the employee] [spoke] while acting within the scope of [her] duties." *Id.*; *Garcetti*, 547 U.S. at 421. The district court correctly observed that "in the elementary-education context, . . . much of what an elementary teacher says to students during a typical school day" "outside of a formal lesson plan" is "central to the job." SA8.

Elementary "students are not any less of a captive audience when having an informal conversation with their teacher in a hallway or choosing which of the teacher's books to look at during unstructured time." SA8. Smiley's speech to her students—whether it happens during a classroom lesson, unstructured classroom reading time, or in response to students' questions—is "speech that owes its existence to a public employee's professional responsibilities" and therefore does not have First Amendment protection. *Garcetti*, 547 U.S. at 421–22; *see Brown*, 824 F.3d at 715.

This Court's precedent underscores that the speech at issue is unprotected. In *Mayer*, an elementary-school teacher claimed a school district fired her for her political views in violation of the First Amendment. 474 F.3d at 478. At issue was her "answer" to "a pupil's question about whether she participated in political demonstrations." *Id.* The Court explained that teachers' speech to students is "hired" by the school system, and "pupils are a captive audience." *Id.* at 479. The school board chose neutrality on contentious issues, instructing Mayer that "she could teach the controversy about policy toward Iraq, drawing out arguments from all perspectives, as long as she kept her opinions to herself." *Id.* at 480. Mayer could not depart from that instruction to express her own views to her students. As the Court explained, "the First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." *Id.*

Similarly, in *Webster*, this Court rejected another First Amendment challenge by a teacher. There, a high school social studies teacher claimed that the school

district violated his First Amendment rights "by prohibiting him from teaching a non-evolutionary theory of creation in the classroom." 917 F.2d at 1005. Webster explained that he sought to discuss this subject "for the purpose of developing an open mind in his students," but the school district instructed him to refrain from "teach[ing] creation science" because it would be "advocating a particular religious viewpoint." *Id.* at 1006. This Court held that the school district did not violate his constitutional rights. The "school board," the Court stated, "had the authority and the responsibility to ensure that Mr. Webster did not stray from the established curriculum by injecting religious advocacy into the classroom." *Id.* at 1007. "[S]econdary school teachers occupy a unique position for influencing secondary school students, thus creating a concomitant power in school authorities to choose the teachers and regulate their pedagogical methods." *Id.* The Court thus reaffirmed that an "individual teacher has no right to ignore the directives of duly appointed education authorities." *Id.* at 1008.

In *Brown*, this Court rejected yet another teacher challenge. In that case, a sixth-grade teacher was suspended for violating a school-board policy forbidding teachers from using racial epithets in front of students after he "caught his students passing a note in class" containing a racial epithet and "used this episode as an opportunity to conduct . . . a well-intentioned but poorly executed discussion of why such words are hurtful and must not be used." 824 F.3d at 715. The Court explained that because "Brown gave his impromptu lesson on racial epithets in the course of his regular grammar lesson to a sixth grade class," "[h]is speech was therefore pursuant

to his official duties." *Id.* "That he deviated from the official curriculum does not change this fact." *Id.* "Moreover, maintaining classroom order is one of Brown's most basic duties as a teacher," so "[t]o the extent that Brown's discussion of racial slurs was an attempt to quell student misbehavior, it was still pursuant to his official duties." *Id.* "Brown made his comments as a teacher, not a citizen, and so his suspension does not implicate his First Amendment rights." *Id.* at 716.

As this Court's decisions establish, Smiley does not enjoy First Amendment protections when she supervises "students in the lunchroom" or answers their questions at school but outside of class. *Contra* Br. 17, 24–25. That speech still "owes its existence to a public employee's professional responsibilities." *Garcetti*, 547 U.S. at 421–22; *see Brown*, 824 F.3d at 715–16. Whether or not the speech is prescribed by "curricul[um]," Br. 28, does not matter. Even "impromptu" comments, *Brown*, 24 F.3d at 715–16, "answer[s]" to pupils' questions, *Mayer* 474 F.3d at 478–79, and speech "at school outside of class" can constitute "unprotected employee speech," *Brown*, 24 F.3d at 715 (citing *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671–72 (7th Cir. 2006)). The First Amendment does not protect Smiley's speech that she makes within her role as a public-school teacher. And even if some questions remain, facial invalidation is not warranted. SA10–11. The Supreme Court has "'never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

B. Smiley's contrary arguments are without merit

Smiley faults the district court for concluding that "all, or nearly all," of her speech is unprotected. Br. 25. According to her, *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022)—a decision that the district court cited repeatedly—forecloses the conclusion that "informal, non-curricular interactions with students" are employee speech even if they happen "on-duty" and at school. Br. 25–26, 28. But *Kennedy* was not a facial challenge; it was an as-applied challenge. Smiley's proposed speech at school to students, delivered with the intent of teaching them, bears no resemblance to the silent prayer said away from students in *Kennedy*. And to the extent that the district court's conclusion raises any constitutional concern, there is good reason to construe HEA 1608 more narrowly to reach classroom instruction only.

1. *Kennedy* does not support Smiley's position

In *Kennedy*, the Supreme Court held that the First Amendment prohibited a school from firing a high school football coach who said a "quiet prayer of thanks," while "his students were otherwise occupied," "during a period when school employees were free" to "attend to . . . personal matters." 142 S. Ct. at 2415–16. In so holding, however, the Court addressed a fundamentally different type of challenge than the one presented here. It addressed an *as-applied* challenge to a particular school action—not a *facial* challenge to a statute that Smiley herself concedes is valid as applied to classroom instruction and other duties teachers perform. So it is not enough for Smiley to show that HEA 1608 could be have some unconstitutional applications. She must show that the "unconstitutional applications" are "realistic" and "their

number" is "substantially disproportionate to the statute's lawful sweep." *Hansen*, 599 U.S. at 770. To the extent that HEA 1608 applies to Smiley's "water bottle," "classroom library," and "bumper stickers," Br. 28, the fact remains that teachers spend much of their day engaged in lecturing, teaching, and other curricular interactions with students Smiley herself recognizes are employee speech.

Kennedy, moreover, addressed circumstances far different than the ones here. In *Kennedy*, the Court concluded that the coach's speech was not "ordinarily within the scope" of his duties for several reasons: "When Mr. Kennedy uttered the three prayers that resulted in his suspension," the Court explained, "[h]e was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." 142 S. Ct. at 2424. Kennedy prayed "quietly without his players after th[e] games." *Id.* at 2422. Indeed, the Court emphasized, "timing" and "circumstances" further suggested that his "prayers were not delivered as an address to the team, but instead in his capacity as a private citizen." *Id.* at 2425. Kennedy prayed "during a period in which" he "was free to engage in all manner of private speech" while "his students were otherwise occupied." *Id.* at 2415, 2425.

In stark contrast, Smiley does not seek to take a private moment for herself while she is free to make personal calls and while students are otherwise occupied. She actively seeks "to explain," to "discuss," "to guide," to "teach" and to otherwise "engage" students for reasons connected with her duties. Dkt. 20-1 at 4–5 (Smiley Decl. ¶¶ 22–26). For example, Smiley maintains the books in her classroom library

to ensure that students "meet required educational standards," develop "essential building block[s]" for further learning, Dkt. 20-1 at 2–3 (Smiley Decl. ¶¶ 14–16), and further her educational goals of exposing students to "different cultures" and "different historical and cultural events," Dkt. 26-1 at 18 (Smiley Dep. 62:15–63:19). Smiley uses the books to help students "develop reading skills" during "group reading time," Dkt. 20-1 at 2–4 (Smiley Decl. ¶ 14, 22), and introduces biographies from her library when giving students lessons in "history," "cultural events," and "persuasive writing," Dkt. 26-1 at 16, 19 (Smiley Dep. 53:1–53:10, 65:4–18, 66:7–67:4). She monitors the reading levels of the books to ensure enough variety to accommodate all of her students, which reflects a pedagogical intent. *Id.* at 17–18 (58:23–59:24, 60:15–24, 62:10–14). She also does these activities in the classroom, Dkt. 20-1 at 2–5 (Smiley Decl. ¶¶ 14–16, 22, 26); Dkt. 26-1 at 29 (Smiley Dep. 105:17–107:16), when the students are a "captive audience," *Mayer*, 474 F.3d at 479.

Similarly, when Smiley engages in "informal" interactions with students, Br. 28, she is doing what she concedes to be "[p]art of [her] job as an elementary school teacher," Dkt. 20-1 at 4 (Smiley Decl. ¶ 23); *see Brown*, 824 F.3d at 715 ("maintaining classroom order is one of [a teacher's] most basic duties"). In these "teachable moments," she wishes to "teach students" about what behavior is "not appropriate." Dkt. 20-1 at 4 (Smiley Decl. ¶¶ 22–23); *see* Dkt. 26-1 at 11–12, 20, 29 (Smiley Dep. 35:14–36:4, 40:1–7, 69:2–9, 105:17–106:16). "[T]each[ing] basic tolerance" is part of her intent in carrying a sticker-emblazoned water bottle "in class" and "in the halls," "during and before and after school," and in slapping bumper stickers on a car parked "on

school property." Dkt. 20-1 at 5 (Smiley Decl. ¶ 26). Smiley's active attempts to inculcate particular views, conduct, and attitudes in her students on school grounds bear no resemblance to a silent prayer said on personal time without students present. Simply put, Smiley's use of school time to engage with students is "pursuant to [her] official duties" even when she is not using "official curriculum." *Brown*, 824 F.3d at 715.

Smiley's remaining cases provide no greater support. *Contra* Br. 26, 29. Although *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), stated that "First Amendment rights . . . are available to teachers and students," it addressed an as-applied challenge to student speech. *Id.* at 504, 506. As later cases have clarified, a different standard applies to teachers' speech as employees. *See Kennedy*, 142 S. Ct. at 2424; *Garcetti*, 547 U.S. at 421. Similarly, *Rankin v. McPherson*, 483 U.S. 378 (1987), did not examine the "first" question that the Court must ask here—whether Smiley seeks to "speak[] pursuant to . . . her official duties." *Kennedy*, 142 S. Ct. at 2423 (cleaned up). *Rankin*, another as-applied challenge, addressed a question about how to "balance" public and private interests when an employee is disciplined for speaking on a "matter of public concern." 483 U.S. at 388.

That leaves Smiley with *Local 8027, AFT-N.H., AFL-CIO v. Edelblut*, 651 F. Supp. 3d 444 (D.N.H. 2023). In *Edelblut*, the court confronted a far more sweeping statute that made it unlawful "for a public employer to 'teach, advocate, instruct, or train' [four] banned concepts to 'any employee, student, service recipient, contractor, staff member, inmate, or any other individual or group.'" *Id.* at 447 (quoting N.H.

Rev. Stat. Ann. § 345-A:31). In examining the law, the court agreed that "the First Amendment does not protect the curricular speech of primary and secondary school teachers." *Id.* at 453. It declined to dismiss a complaint on the ground that the law "*arguably* prohibit[ed] any advocacy of a banned concept that a teacher directs at a student," even at "third-party events or activities . . . administered by outside organizations." *Id.* (emphasis added). The court, however, did not conclude that the law actually reached protected speech. Nor did it ask the critical question here—whether the arguably "unconstitutional applications" are "realistic," or "their number" is "substantially disproportionate to the statute's lawful sweep." *Hansen*, 599 U.S. at 770.

2. HEA 1608 does not reach as far as Smiley alleges

Although the district court "resolve[d] the preliminary injunction motion . . . without deciding HEA 1608's scope," SA5, a plain reading of HEA 1608's language shows that it does not sweep as far as Smiley alleges but encompasses only speech teachers make in connection with their official duties. That narrower reading provides an alternative basis for holding that the statute does not implicate a "substantially disproportionate" amount of protected speech.

HEA 1608 states that "[a] school, an employee or staff member of a school, or a third party vendor used by a school to provide instruction may not provide any instruction to a student in prekindergarten through grade 3 on human sexuality." Ind. Code § 20-30-17-2. When determining the meaning of an Indiana statute, a court must "start with the text of the statute itself," *Fix v. State*, 186 N.E.3d 1134, 1139 (Ind. 2022), and "give [the statute's] words their plain meaning," *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016); *see Frye v. Auto-Owners*

Ins. Co., 845 F.3d 782, 786 (7th Cir. 2017) ("In construing a state statute, we must interpret the statute as we think the state's highest court would interpret it.").

One way to determine "the plain and ordinary meaning of words" is to "consult . . . dictionaries." *United Rural Elec. Membership Corp. v. Ind. Mich. Power Co.*, 716 N.E.2d 1007, 1014 (Ind. Ct. App. 1999). Dictionaries agree that "instruction" encompasses a teacher's speech pursuant to her official duties. Merriam-Webster defines "instruction" as, among other things, "the action, practice, or profession of teaching." *Instruction*, Merriam-Webster (2023), https://www.merriam-webster.com/dictionary/instruction; *see Instruction*, Cambridge Dictionary (2023), https://dictionary.cambridge.org/us/dictionary/english/instruction ("the teaching of a particular skill or subject"); *Instruction*, American Heritage Dictionary (2022), https://www.ahdictionary.com/word/search.html?q=instruction ("[t]he act, practice, or profession of instructing"). These definitions indicate that instruction concerns teaching, especially in the context of the profession, which comports with common usage. Indeed, Smiley admits that "obviously . . . instruction covers what goes on while I formally teach my class." Dkt. 20-1 at 6 (Smiley Decl. ¶ 31).

Statutory context reinforces that "instruction" means teaching during instructional time or otherwise in association with a teacher's duties. *See Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 376 (Ind. 2017) ("We start with the plain language of the statute, giving its words their ordinary meaning and considering the structure of the statute as a whole." (quoting *West v. Off. of Ind. Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016))). HEA 1608 appears in Title 20 of the Indiana

Code, which addresses "Education," and in Article 30, which addresses "Curriculum," alongside many other provisions addressing matters that teachers must (and must not) cover. The statute's position within the code indicates that HEA 1608 concerns the duties of teachers in carrying out the prescribed curriculum. It is not using "instruction" to refer to what may in some cases occur when a child watches "television" at home or surfs the "internet." *Contra* Br. 19.

Other education-related sections of the Indiana Code that use the term "instruction" point in the same direction, using the term to speak of official duties. *See Schrenker v. Clifford*, 387 N.E.2d 59, 60 (Ind. 1979) ("Where there are two statutes on the same subject, they should be construed together so as to harmonize and give effect to each, if possible, because they are in pari materia."). For example, in Chapter 2 of Article 30, the term "instructional time" is defined as "time during which students are participating in: (1) an approved course; (2) a curriculum; or (3) an educationally related activity; under the direction of a teacher, including a reasonable amount of passing time between classes. Instructional time does not include lunch or recess." Ind. Code § 20-30-2-1. There, "instructional time" includes courses, curricula, and educationally related activities—all things that teachers, in performance of their official duties, organize, supervise, and implement. And by carving out "lunch or recess," it does not include activities unrelated to a formal educational purpose.

When discussing the proper use of "educational support costs," Title 21 speaks to "material required . . . to participate in a particular class, seminar, laboratory, *or*

other type of instruction." Ind. Code § 21-7-13-15(2). Taken alongside the maxim that general words take meaning from associated specific terms, *see Woods v. State*, 140 N.E.2d 752, 753 (Ind. 1957), such usage continues throughout that title, where "instruction" refers to activities within the scope of a teacher's official duties. *See, e.g.*, Ind. Code § 21-18.5-6-4(3) (requiring the "form of *instruction* to be followed with a *class*, *shop*, or *laboratory*" to be included in an application for authorization) (emphasis added)); *id.* § 21-41-8-1 (section titled "authority to offer instruction in American Sign Language" describes how an institution may "offer classes" in ASL). That the Code also refers to "classroom instruction" in certain instances, *see* Br. 18–19, does not indicate that "instruction" is "without meaning." *Contra* Br. 20. Rather, the modifier "classroom" emphasizes that the term refers to a particular type of instruction. It does not follow that "instruction" in Title 20, Article 30 refers to conversations away from school occurring apart from a teacher's official duties.

Smiley emphasizes that HEA 1608 applies to school employees other than teachers, suggesting this means it reaches beyond "classroom lessons." Br. 18. But HEA 1608's reference to "employee[s] or staff member[s] of a school" and "third party vendor[s] *used by a school to provide instruction*," Ind. Code § 20-30-17-2, simply reflects that schools ordinarily use a variety of persons to provide students with instruction. For example, Smiley herself admitted that a "social worker," rather than a teacher, provides sex education at her school, Dkt. 26-1 at 14 (Smiley Dep. 46:7–13)—a type of lesson that Smiley agrees constitutes "instruction on human sexuality," *see id.* (Smiley Dep. 42:20–25); Ind. Code §§ 20-30-5-13, 20-30-5-17(c).

Finally, to the extent that Smiley's constitutional arguments raise a valid concern, constitutional avoidance counsels against construing "instruction" to reach beyond a teacher's official duties. Constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996) ("[W]e will not presume that the legislature violated the constitution unless such is required by the unambiguous language of the statute."). "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark*, 543 U.S. at 380–81.

However construed, HEA 1608 is not unconstitutionally overbroad. It does not reach any protected speech because the First Amendment does not confer the right on a public-school teacher acting within her official duties to teach whatever she wants. HEA 1608's application to anything beyond what is protected by the First Amendment does not make the law facially unconstitutional because the "substantial" sweep of the law is "plainly legitimate." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 476 (7th Cir. 2012) (quoting *Williams*, 553 U.S. at 292).

C. HEA 1608 is justified by the State's interests in regulating teachers' interactions with students and protecting young children from inappropriate instruction

HEA 1608 survives under *Pickering* balancing regardless. Under *Pickering*, where a public school teacher speaks "as a citizen upon matters of public concern,"

courts compare the state's "interests as an employer" with the teacher's interests "as a citizen." *Garcetti*, 547 U.S. at 416–17 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Smiley argues that HEA 1608 is "a form of prior restraint," requiring "additional weight [to be] added to the balance." Br. 30. It is unclear what Smiley means. Ordinarily, the term "prior restraint" "refers to requiring governmental permission to engage in specified expressive activity, in contrast to punishing the activity after it has taken place." *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001). It does not encompass "all rules" regarding "curricula." *Piggee*, 464 F.3d at 673–74. And here Smiley worries about losing her teaching license or her job "after the activity has taken place." This is not a prior-restraint scenario.

In any event, while the topics Smiley wants to express might be considered matters of public interest in some abstract sense, she cannot get away from the problem that the speech with which she is concerned would be directed at schoolchildren, not the public at large. Dkt. 26-1 at 11–12, 18, 28–31 (Smiley Dep. 35:14–36:4, 38:3–39:20, 62:15–63:19, 103:23–104:13, 105:17–107:16, 111:9–114:6). In *Pickering*, the teacher published a letter "critici[zing] . . . the Board's allocation of school funds," which the Court concluded was a "matter of public interest," rather than within the teacher's ordinary work responsibilities. 391 U.S. at 569. The Court emphasized the letter was "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher." *Id.* at 569–70. In contrast to an open letter to the public regarding school finances—which is certainly a matter of public concern—Smiley is not attempting to speak to

the public on "matters of public interest." Instead, she seeks to "teach" students, to guide them as "[p]art of her job," and to display her "personal feelings." Dkt. 20-1 at 4–5 (Smiley Decl. ¶¶ 23, 26–27).

Putting aside that initial impediment, Indiana's interests in regulating teachers' speech to students and ensuring schoolchildren receive age-appropriate education justify HEA 1608. The State has strong interests in controlling school curriculum, *Mayer*, 474 F.3d at 478–79; preventing disruption to students by teachers, *Connick v. Myers*, 461 U.S. 138, 150–51 (1983) (the government has a "legitimate purpose in 'promot[ing] efficiency and integrity . . . and to maintain proper discipline'" (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1882))); and protecting the mental wellbeing of children, *see Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–85 (1986) (recognizing government interest in preventing "lewd" "speech [that] could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality"). These interests are even stronger when they concern younger schoolchildren. *See, e.g.*, *Webster*, 917 F.2d at 1007 ("A junior high school's immature stage of intellectual development imposes a heightened responsibility upon the school board to control the curriculum."). Suffice it to say that teaching kindergarteners and early elementary students about sexual intercourse, sexual attraction, or sex organs' significance is not appropriate.

Besides, Smiley remains free to speak her mind on any number of topics of public importance—including her desired "advocacy of LGBTQ rights," Dkt. 21 at 27—to an extremely wide audience. Nothing in HEA 1608 prevents Smiley from

expressing her views to anyone but young children as part of instruction. Her purported interest in speaking specifically to students in prekindergarten, kindergarten, first, second, and third grade concerning "instruction . . . on human sexuality" is minimal—in contrast with *Pickering*, where the teacher's "public statements" critical of the school could "contribute to public debate," 391 U.S. at 573. Indeed, "[h]uman sexuality provides the most obvious example of age-sensitive matter" to which schools may restrict young students' exposure. *Walker-Serrano*, 325 F.3d at 416–17 ("There can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students."). The State's strong interest in protecting young, impressionable schoolchildren from being subjected to age-inappropriate instruction on "human sexuality" justifies HEA 1608's modest restrictions.

II. HEA 1608 Does Not Violate the Fourteenth Amendment

HEA 1608 is not so vague as to violate due process either. *Contra* Br. 15–24. Outside the First Amendment context, "facial challenges" to statutes "are disfavored." *Planned Parenthood of Ind. & Ky. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 603 (7th Cir. 2021). A facial vagueness challenge to a statute succeeds only if a statute has "no discernable core." *Id.* at 604; *see Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 n.7 (1982). A "core of meaning is enough to reject a vagueness challenge, leaving to future adjudication the inevitable questions at the statutory margin." *Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019). Courts will "not assume" that statutes with an understandable core will be subject to "arbitrary

enforcement." *Planned Parenthood*, 7 F.4th at 605 (internal quotations omitted). Here, the district court correctly concluded that HEA 1608's prohibition of "instruction . . . on human sexuality" contains a discernible core of understandable meaning.

A. "Instruction" contains a core of meaning

Start with the term "instruction." Br. 20. An "ordinary person exercising ordinary common sense can sufficiently understand and comply with" HEA 1608's prohibition on certain "instruction." *Arnett v. Kennedy*, 416 U.S. 134, 158–61 (1974). To start, "instruction" is a term[] that people 'use and understand in normal life.'" SA13 (quoting *Trs. of Ind. Univ.*, 918 F.3d at 540). "Instruction" encompasses "the action, practice, or profession of teaching." *Instruction*, Merriam-Webster (2023), https://www.merriam-webster.com/dictionary/instruction; *see* p.28, *supra*. However one construes the term, there is no dispute that "instruction" covers what teachers do when they "stand[] in front of [a] class executing a lesson plan." Br. 17; *see id.* at 25–26. That admission establishes that "instruction" captures much of what elementary-school teachers—and Smiley specifically—do, demonstrating that the term has a "substantial, understandable core." *Trs. of Ind. Univ.*, 918 F.3d at 540. Smiley cannot show "that no set of circumstances exists under which [HEA 1608] would be valid." *Salerno*, 481 U.S. at 745.

Smiley posits uncertainty about whether the term "instruction" in HEA 1608 encompasses other activities "[s]he understands" to "include 'instruction,'" such as "send[ing] students to pick a book from her classroom library," "carr[ying] her water bottle with stickers," or "explain[ing] to [students] what the word 'gay' means and

why it should never be used as an epithet." Br. 17. As discussed above, context shows that the term "instruction"—which appears in a set of curriculum requirements directed at teachers, school employees, and school vendors—is properly construed only to reach conduct undertaken pursuant to one's official duties as a teacher. *See* pp.27–31, *supra*. The term is not so broad as to include all colloquial senses of "instruction." "Given this 'particular context'" of this "statute written specifically for the school context," the statute "gives 'fair notice.'" *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

Factual context helps resolve some of Smiley's purported difficulties as well. According to Smiley, people "could" perhaps disagree about whether "send[ing] students to pick a book from her classroom library" constitutes "instruction." Br. 17. Even if that were true in the abstract, however, persons of ordinary common sense do not operate at that level of abstraction. In this case, for example, Smiley's view that this action involves "instruction" seems to be informed by her own intent—namely, that she uses books from the classroom library to help students "meet required educational standards," Dkt. 20-1 at 3 (Smiley Decl. ¶ 16), and to give students lessons in "history," "cultural events," and "persuasive writing," Dkt. 26-1 at 16, 19 (Smiley Dep. 53:1–53:10, 65:4–18, 66:7–67:4). This illustrates that any doubt is at the margins rather than the core.

B. "Human sexuality" contains a core of meaning

An "ordinary person exercising ordinary common sense" also "can sufficiently understand and comply with" HEA 1608's use of the term "human sexuality." *Arnett*,

416 U.S. at 158–61. Although Smiley claims that "[i]t is impossible to tell" what "human sexuality" means, Br. 20, her own statements identifying some conduct that falls under that term again spell the end of her facial vagueness claim. "Smiley certainly does not dispute that some subjects would clearly fall within the statute's prohibition, such as teaching sex education or about sexually transmitted diseases." Br. 23; *see* Dkt. 26-1 at 13 (Smiley Dep. 42:20–25, 43:5–9) (similar admissions). Smiley also identified additional conduct "involv[ing] what can be easily understood as 'human sexuality,'" including "her informal conversations with students, the stickers on her water bottle, and the bumper stickers on her car," Br. 22—all of which she characterizes as concerning "LGBTQ" issues, Dkt. 20-1 at 3, 5 (Smiley Decl. ¶¶ 17, 26); Dkt. 26-1 at 20–21, 28–31 (Smiley Dep. 69:2–9, 74:12–76:1, 104:14–107:16, 111:8–114:6). Smiley's concessions that "several" matters fall within the term "human sexuality" demonstrate it has a "core of meaning." *Planned Parenthood*, 7 F.4th at 603–04.

If that were not enough, other considerations demonstrate that the term's plain meaning provides sufficient notice of the core of the statute. Dictionaries define "sexuality" as "the condition of having sex; sexual activity; [and] expression of sexual receptivity or interest." *Sexuality*, Merriam-Webster (2023), https://www.merriam-webster.com/dictionary/sexuality; *see also Sexuality*, Cambridge Dictionary (2023), https://dictionary.cambridge.org/us/dictionary/english/sexuality ("attitudes and activities relating to sex," such as "human sexuality"); *Sexuality*, American Heritage Dictionary (2022), https://www.ahdictionary.com/word/search.html?q=sexuality ("[t]he quality of being sexual, especially sexual orientation and behavior," or "[a]

manner of being sexual or engaging in sexual activity"). Ordinary persons understand and use these terms.

Smiley's "survey of case law" using the term "human sexuality," Br. 21–22, does more to undercut her vagueness argument than support it. None of these cases held that "human sexuality" lacks a discernible core of meaning. Instead, they used the term to help shed light on the meaning of other words, especially in light of their contexts. In *Texas v. EEOC*, 633 F. Supp. 3d 824 (N.D. Tex. 2022), the court interpreted Title VII of the Civil Rights Act of 1964's prohibition on employment discrimination "because of . . . sex" to "prohibit 'sexual orientation' and 'gender identity' discrimination in employment." *Id.* at 830. The court referred to "human sexuality" only in passing, explaining that "the [Supreme] Court cabined its definitions and descriptions of 'being homosexual' and 'being transgender' to *status*." *Id. Jane Roes 1–2 v. SFBSC Management, LLC*, 77 F. Supp. 3d 990 (N.D. Cal. 2015), similarly mentioned "human sexuality" in passing, not to define it. In that decision, the court was explaining why "courts have often allowed parties to use pseudonyms when a case involves topics in this 'sensitive and highly personal' area," and therefore granted the plaintiffs' motion to proceed anonymously. *Id.* at 994, 997. *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67 (Ill. App. Ct. 2021), likewise only mentioned the term once to help explain "sexual orientation" in an Illinois statute. *Id.* at 78.

Existing statutory provisions already regulate Indiana schools and teachers when providing instruction on human sexuality. For example, under a law enacted in 2018, schools must obtain parents' written consent *before* providing such

instruction—and provide a student with "alternative academic instruction during the same time frame that the instruction on human sexuality is provided" if she does not participate. Ind. Code § 20-30-5-17(c); 2018 Ind. Legis. Serv. P.L. 154-2018. Another statutory provision requires that schools make available to parents "any instructional materials, including teacher's manuals, curricular materials, films or other video materials, tapes, and other materials, used in connection with . . . instruction on human sexuality." Ind. Code § 20-30-5-17(a). And since 1988, schools must "require a teacher to teach abstinence from sexual activity outside of marriage as the expected standard for all school age children" "[t]hroughout instruction on human sexuality or sexually transmitted diseases," Ind. Code § 20-30-5-13; 1988 Ind. Legis. Serv. 134-1988 (then-codified at Ind. Code § 20-10.1-4-11) (repealed and re-codified at Ind. Code § 20-30-5-13 in 2005, 2005 Ind. Legis. Serv. P.L. 1-2005). These laws have restricted school "instruction on human sexuality" for years without complaint.

* * *

Ultimately, Smiley misunderstands the facial vagueness standard. She seems to believe a statute is vague if it fails to "guide her actions" in every case. Br. 23. But the "core of meaning" is just that—a *core*—and contemplates that unknown questions on the edges exist. *Planned Parenthood*, 7 F.4th at 605. Rather than hold a law facially unenforceable simply because some future application would raise concerns, the vagueness doctrine recognizes that courts will identify those situations on a case-by-case basis. *See id.* Teachers, moreover, are not without protections in any future proceedings. The Secretary of Education can enforce HEA 1608 against teachers only

through her authority over teacher licensing. And contrary to Smiley's suggestion, Br. 12, Indiana statutes governing *all* licensing enforcement actions provide that "[o]n the written recommendation of the secretary of education, the department may suspend or revoke a license for: (1) immorality; (2) misconduct in office; (3) incompetency; or (4) willful neglect of duty." Ind. Code § 20-28-5-7. So any violation of HEA 1608 would have to rise to the level of immorality, misconduct, incompetence, or willful neglect of duty to sustain a licensing action. And in any action, a teacher would have full enjoyment of the protections of Indiana's Administrative Orders and Procedures Act (AOPA), Ind. Code § 4-21.5-3-1 *et seq*. And of course teachers could ask the Department of Education or their school principals for clarification about how HEA 1608 applies at the outset. Dkt. 26-2 at 5–6 (Ranney Decl. ¶¶ 17, 19); Dkt. 26-1 at 11 (Smiley Dep. 35:2–6); *see Vill. of Hoffman Ests.*, 455 U.S. at 498 (explaining "the ability to clarify the meaning of the regulation" lessens vagueness concerns).

III. The Remaining Preliminary Injunction Factors Favor No Relief

The district court did not address the equitable factors relevant to a preliminary injunction and so this Court need not do so either. *See Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 19–20 (7th Cir. 1992). Nevertheless, Smiley's arguments on these factors fail.

On irreparable harm, Smiley argues that she "is faced with the loss of her license and the ability to do the job she loves." Br. 32. Smiley presented no evidence that she faces an actual or imminent threat to her license, however. The record instead demonstrates that only the most egregious or near-criminal conduct is likely to

result in a licensing-enforcement action. Dkt. 26-1 at 6, 40 (Smiley Dep. 14:8–17, 150:15–151:17); Dkt. 26-2 at 4–5 (Ranney Decl. ¶¶ 10–13). No imminent threat to Smiley's license or her job exists that would justify a preliminary injunction to issue against the law's enforcement. *See Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (explaining plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction" (emphasis in original)). Smiley also argues that she faces a threat to her "First Amendment and due process rights." Br. 32–33. But the First Amendment is not violated here, *see* pp.17–34, *supra*, and Smiley cites no authority for the idea that a void-for-vagueness due-process violation inflicts per se harm.

The equities and public interest also weigh against a preliminary injunction. *Mays*, 974 F.3d at 818 ("[T]he court must weigh the harm the denial of the preliminary injunction would cause the plaintiff against the harm to the defendant if the court were to grant it."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))). HEA 1608 expresses the legislature's decision that schools and their employees should refrain from providing instruction on human sexuality to students in prekindergarten through third grade. A duly enacted state law expresses the public interest, and enjoining the State from "effectuating statutes enacted by representatives of its people" would "irreparabl[y] injur[e]" it. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). HEA 1608, moreover,

protects young students from exposure to potentially inappropriate instruction from teachers on sex and sexuality. *See, e.g.*, Laura Meckler, *Gender Identity Lessons, Banned in Some Schools, Are Rising in Others*, Wash. Post (June 3, 2022), https://www.washingtonpost.com/education/2022/06/03/schools-gender-identity-transgender-lessons/ (reporting that a teacher in Maine "explain[ed] gender identity to kindergartners" by "say[ing] that sometimes doctors 'make a mistake' when they tell parents whether their newborns are boys or girls," which prompted the Maine Department of Education to respond it would "not recommend" the lesson for kindergarten). The public interest is best served by allowing HEA 1608 to remain in effect.

CONCLUSION

This Court should affirm the district court's denial of plaintiff's motion for preliminary injunction.

Respectfully submitted,

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December 8, 2023

/s/ James A. Barta
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I hereby certify that on December 8, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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