No. 22-2927

In the
United States Court of Appeals for the Eighth Circuit

PARENTS DEFENDING EDUCATION,
Plaintiff – Appellant,

v.

LINN-MAR COMMUNITY SCHOOL DISTRICT, ET AL.,
Defendants – Appellees

On Appeal from the United States District Court for the
Northern District of Iowa
Case No. 1:22-cv-00078

Brief of *Amicus Curiae* Institute for Faith and Family in Support of Plaintiff-Appellant and Reversal

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CORPORATE DISCLOSURE STATEMENT

Institute for Faith and Family is a nonprofit, tax-exempt organization that does not issue stock and has no parent corporation.

DATED: November 10, 2022

/s/Deborah J. Dewart
Deborah J. Dewart

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Faith and Family is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com. IFFNC is engaged in fighting policies like the one challenged here.

AUTHORITY TO FILE *AMICUS* BRIEF

Amicus curiae has obtained written consent from all parties to file this brief. Fed. R. App. P. 29(a).

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Counsel for *amicus* authored this brief in whole. No party or party's counsel authored this brief in any respect, and no person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

INTRODUCTION AND SUMMARY

Transgender ideology is invading many areas of American life at a rapidly escalating rate. In addition to the massive intrusion on parental rights, Linn-Marr School District's Policy 504.13-R threatens First Amendment rights by demanding use of a minor child's preferred name and pronouns—often without parental consent or even knowledge.

Pronouns are an integral part of common, everyday speech, typically based on objective biological reality concerning another person's sex and often coupled with the belief that each person is created immutably male or female. This aspect of speech touches a matter of intense public concern and debate. Not everyone accepts culturally popular "gender identity" concepts or believes that a person can transition from one sex to the other. The First Amendment safeguards the rights of students, teachers, and parents to speak according to each one's own beliefs on these matters, even in public schools. Students can respect the dignity of others without sacrificing their own rights to thought, conscience, and speech.

The Policy's combination of speech and viewpoint compulsion is a formula for tyranny that cannot be salvaged by appealing to cases that allow restrictions of student speech under limited circumstances. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 409 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). Public school students do not sacrifice their constitutional rights as a condition of attending public school.

ARGUMENT

I. THE POLICY VIOLATES THE FIRST AMENDMENT BY COMPELLING SPEECH.

There is hardly a more "dramatic example of authoritarian government and compelled speech" than when King Henry commanded Sir Thomas More to sign a

statement blessing the King's divorce and remarriage. Richard F. Duncan, *Article: Defense Against the Dark Arts: Justice Jackson, Justice Kennedy, and the No-Compelled Speech Doctrine*, 32 Regent U. L. Rev. 265, 292 (2019-2020), citing Robert Bolt, *A Man For All Seasons*: *A Play in Two Acts* (1st ed., Vintage Int'l 1990) (1962). Thomas More, a faithful Catholic, could not sign.

Five centuries later, the Linn-Mar School District has created a conundrum that is no less momentous than Thomas More's predicament. Its "gender support" Policy reeks of viewpoint-based compelled speech. As in *Barnette*, there is "probably no deeper division" than a conflict provoked by the choice of "what doctrine . . . public educational officials shall compel youth to unite in embracing." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 292, citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There are deep divisions over what public schools should teach, particularly about sexuality and other contentious matters. These divisions impact the speech of students, parents, teachers, and other school personnel.

Compelled speech is anathema to the First Amendment, particularly where government mandates conformity to its preferred viewpoint. *Barnette, Wooley, NIFLA* and other "eloquent and powerful opinions" stand as "landmarks of liberty and strong shields against an authoritarian government's tyrannical attempts to coerce ideological orthodoxy." Duncan, *Defense Against the Dark Arts*, 32 Regent

U. L. Rev. at 266; *Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705 (1977); *NationaI Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018).

II. COMPELLED SPEECH AND VIEWPOINT DISCRIMINATION ARE UNIQUELY PERNICIOUS FREE SPEECH VIOLATIONS.

The "proudest boast" of America's free speech jurisprudence is that we safeguard "the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Gender identity may be "embraced and advocated by increasing numbers of people," but that is "all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000). Our law also protects the right to remain silent—to *not* express viewpoints a speaker hates. Compelled expression is even worse than compelled silence, although both are constitutionally impermissible, because compelled speech affirmatively associates the speaker with a viewpoint he does not hold.

The Policy "[m]andates speech" many students "would not otherwise make" and "exacts a penalty" (school discipline) for refusal to comply. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Policy demands that students make assertions they know are false, such as using *male* pronouns for a biological *female* or *female* pronouns for a biological male—all based on the

command of a gender-confused child. This mandate is obviously based on *content*. Worse yet, it is viewpoint-based because it requires students to endorse transgender ideology regardless of conscience and religious faith. It is not an adequate response that a student need not use names or pronouns when speaking to other students—or may use the plural "they" instead of singular pronouns. *Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.* ("*PDE*"), 2022 U.S. Dist. LEXIS 169459, *32. Nor is it sufficient to presume that "students will not interact, again, intentionally and unintentionally, with students with whom they fundamentally disagree or whose lifestyles they do not agree with." *Id*., *33. This severe limitation on association flouts the "diversity" and "inclusion" rhetoric so often championed by LGBT advocates and creates the very discrimination the Policy aims to eliminate.

"When the law strikes at free speech it hits human dignity . . . *when the law compels a person to say that which he believes to be untrue, the blade cuts deeper* because it requires the person to be untrue to himself, perhaps even untrue to God." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 59 (2020) (emphasis added). The Policy combines the worst of two worlds—compelled speech and viewpoint discrimination.

Freedom of thought is the "indispensable condition" of "nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)), *overruled*

on other grounds by Benton v. Maryland, 395 U.S. 784 (1969). The freedom of thought that undergirds the First Amendment merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These two are "complementary components" of the "individual freedom of mind." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 637. Together they guard "both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633-634; *id.,* at 645 (Murphy, J., concurring). A system that protects the right to promote ideological causes "must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714; Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63.

The Policy is a government demand that forces students, teachers, and parents to become "instrument[s] for fostering . . . an ideological point of view" that many find "morally objectionable." *Wooley*, 430 U.S. at 714-715. A government edict that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018), citing *Barnette*, 319 U.S. at 633 (internal quotation marks omitted). Even a legitimate and substantial government or pedagogical purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when

the end can be more narrowly achieved." *Wooley*, 430 U.S. at 716-717, citing *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). The Policy cannot jump this hurdle.

A. The Policy is a paradigmatic example of compelled speech that is anathema to the First Amendment.

Compelled speech "invades the private space of one's mind and beliefs." Richard F. Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 275. While "ordinary authoritarians" merely demand silence, prohibiting people from saying what they believe is true, "[t]otalitarians insist on forcing people to say things they know or believe to be untrue." *Id*., quoting Robert P. George.[1] The Policy adopts a totalitarian mode by demanding that students, parents, and teachers adopt a distorted view of reality that aligns with whatever "gender identity" any child demands. Many cannot in good conscience comply.

B. The Policy transgresses liberties of religion and conscience.

In addition to speech, the Policy threatens to encroach on religious liberty and conscience. Religious speech is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v.*

[1] Robert P. George, Facebook (Aug. 2, 2017), Professor of Jurisprudence at Princeton, https://www.facebook.com/ RobertPGeorge/posts/10155417655377906.

Pinette, 515 U.S. 753, 760 (1995) (internal citations omitted). Convictions about sexuality are integrally intertwined with religious faith and conscience, as many faith traditions have strong teachings about sexual morality, marriage, and the distinction between male and female. Compelled speech—that a boy is a girl or a girl is a boy—tramples deeply held religious beliefs and attacks conscience.

The vast majority of state constitutions expressly define religious liberty in terms of conscience.[2] A few, including Iowa, do not use the term "conscience" but nevertheless protect their citizens against state compulsion.[3] Some limit religious liberty only by licentiousness or acts that would threaten public morals, peace and/or

[2] *See* A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III-IV; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

[3] Alabama Const. Art. I, Sec. 4; Iowa Const. Art. I, § 3; Md. Dec. of R. art. 36; W. Va. Const. Art. III, § 15.

safety.[4] Several essentially duplicate the federal Constitution.[5] Oklahoma's unique language provides for "perfect toleration of religious sentiment" and mode of worship and prohibits any religious test for the exercise of civil rights. Okl. Const. Art. I, § 2.

The victory for freedom of thought recorded in the Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States,* 328 U.S. 61, 68 (1946). Courts have an affirmative "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Policy assaults liberty of thought and conscience, compelling students "to contradict [their] most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts"—by affirming the lie that a biological female is a male (or that a male is a female). *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring); *see* Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 65-66.

[4] Conn. Const. Art. I., Sec. 3; Fla. Const. Art. I, § 3; Md. Dec. of R. art. 36; Miss. Const. Ann. Art. 3, § 18.

[5] Alaska Const. Art. I, § 4; HRS Const. Art. I, § 4; La. Const. Art. I, § 8; Mont. Const., Art. II § 5; S.C. Const. Ann. Art. I, § 2.

C. The Policy exemplifies the blatant viewpoint discrimination characteristic of tyrannical government.

"The possibility of enforcing not only complete obedience to the will of the State, but *complete uniformity of opinion* on all subjects, now existed for the first time." George Orwell, "1984" 206 (Penguin Group 1977) (1949) (emphasis added).

Viewpoint discrimination ushers in an orwellian system that destroys liberty of thought. As Justice Kennedy cautioned, "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); *see* Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 265. The Policy imperils these liberties.

"[T]he history of authoritarian government . . . shows how relentless authoritarian regimes are in their attempts to stifle free speech." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). There is "no such thing as good orthodoxy" under a Constitution that safeguards thought, speech, conscience, and religion, even when the government pursues seemingly benign purposes like national allegiance (*Barnette*), equality, or tolerance. Erica Goldberg, *"Good Orthodoxy" and the Legacy of Barnette*, 13 FIU L. Rev. 639, 643 (2019). "Even commendable public values can furnish the spark for the dynamic that Jackson insists leads to the 'unanimity of the graveyard.'" Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. Rev. 689, 723 (2019).

Every speaker must decide "what to say and what to leave unsaid." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.,* 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original). An individual's "intellectual autonomy" is the freedom to say what that person believes is true and to refrain from saying what is false. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 85. A speaker's choice "not to propound a particular point of view" is simply "beyond the government's power to control," regardless of the speaker's reasons for remaining silent. *Hurley*, 515 U.S. at 575. There is "no more certain antithesis" to the Free Speech Clause than a government mandate imposed to produce "orthodox expression." *Id*. at 579. Such a restriction "grates on the First Amendment." *Id*. "Only a tyrannical government"—or School District—"requires one to say that which he believes is not true," e.g., that "two plus two make five." *Id*. Here, the Policy requires students (and faculty) to make false statements about the sex of other students.

The Supreme Court has *never* upheld a viewpoint-based mandate compelling "an unwilling speaker to express a message that takes a particular ideological position on a particular subject." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 78. But that is precisely what the Policy requires, darkening the "fixed star in our constitutional constellation" that forbids

any government official, "high or petty," from prescribing "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Regardless of how acceptable transgender ideology is in the current culture, the School District's interest in disseminating that ideology "cannot outweigh [a student's] First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. *Barnette* and *Wooley* solidify the principle that government lacks the "power to compel a person to speak, compose, create, or disseminate a message on any matter of political, ideological, religious, or public concern." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63-64. The Policy is even more intrusive than in *Wooley*, where the state did not "require an individual to speak any words, affirm any beliefs, or create or compose any expressive message," but rather to serve as a "mobile billboard" for an ideological message obviously attributable to the state. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63. Even this passive display violated the First Amendment because it "usurp[ed] speaker autonomy." *Id*. at 76.

D. Viewpoint-based compelled speech stifles debate and attacks the dignity of those who disagree with the prevailing state orthodoxy.

Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995). It creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue."

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994). This is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

Citizens who hold competing views on public issues may use the political process to enact legislation consistent with their views, but under *Barnette*, the government may not "insist that the victory of one side, of one creed or value, be memorialized by compelling the defeated side to literally give voice to its submission." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 278, quoting Horwitz, *A Close Reading of* Barnette, 13 FIU L. REV. at 723. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464.

The government may not regulate speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The Policy is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). The Policy's viewpoint-based compulsion to speak seeks not only to control content (names and pronouns) but also to promote an ideology unacceptable to many students and their families. Such coerced compliance attacks dignity. "Freedom of thought, belief, and speech are fundamental to the

dignity of the human person." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59.

The Policy contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where the government must respect a wide range of diverse viewpoints. The government itself may adopt a viewpoint but may never "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

The School District may not enhance the dignity of some students by censoring the protected expression of other students or compelling them to regurgitate the state's preferred message. That is exactly what the Policy attempts, but this purpose is "insufficient to override First Amendment concerns." *Goldberg, "Good Orthodoxy"*, 13 FIU L. Rev. at 664. Even when it is appropriate to regulate harmful discriminatory conduct, the state may not require that some citizens—in this case, young students—"communicate a message of tolerance that affirms the dignity of others." *Id*. Dignity is an interest "so amorphous as to invite viewpoint-based discrimination, antithetical to our viewpoint-neutral free speech regime, by courts and legislatures." *Id*. at 665.

As *Hurley* teaches, the state must guard against "conflation of message with messenger" because "a speaker's objection to speaking or disseminating a particular ideological message is at the core of the no-compelled-speech doctrine." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 64. The trial judge in *Hurley* erroneously reasoned that the parade organizer's rejection of a group's *message* was tantamount to "discrimination on the basis of the innate *personhood* of the group's members." *Id.* (emphasis added). The First Amendment guards a speaker's autonomy to "discriminate" by favoring viewpoints he wishes to express and rejecting other viewpoints. *Id*. Rejecting a *message* is not equivalent to rejecting a *person* who prefers that message. Similarly, rejecting transgender ideology that conflicts with biological reality is not tantamount to rejecting a *person* who is confused about his or her gender.

E. The prohibition of viewpoint discrimination, firmly entrenched in Supreme Court precedent, is a necessary component of the Free Speech Clause.

A century ago, the Supreme Court affirmed a conviction under the Espionage Act, which criminalized publication of "disloyal, scurrilous and abusive language" about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today, no doubt "the statute itself would be invalidated as patent viewpoint discrimination." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21

(2019). A few years after *Abrams*, the Court shifted gears in *Barnette*, "a forerunner of the more recent viewpoint-discrimination principle." *Id*. *Barnette*'s often-quoted "fixed star" passage was informed by "the fear of government manipulation of the marketplace of ideas." *Id*. Justice Kennedy echoed the thought: "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . . To permit viewpoint discrimination . . . is to permit Government censorship." *Matal*, 137 S. Ct. at 1767-1768 (Kennedy, J., concurring). Justice Kennedy's comments "explain why viewpoint discrimination is particularly inconsistent with free speech values." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 36.

Since *Barnette*, courts have further refined the concept of viewpoint discrimination. In *Cohen v. California*, Justice Harlan warned that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." 403 U.S. 15, 26 (1971); *see* Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 22. A year later the Court affirmed that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" and "must afford all points of view an equal opportunity to be heard." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

Further development occurred in the 1980's. Both the majority and dissent in *Perry Education Ass'n v. Perry Local Educators' Ass'n* agreed that viewpoint discrimination is impermissible, with the dissent explaining that such discrimination "is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). It became apparent that the Court considered viewpoint regulation an "even more serious threat" to speech than "mere content discrimination." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 23. Three years later, the Court struck down a viewpoint-based regulation based on coerced association with the views of other speakers. *Pacific Gas & Electric*, 475 U.S. at 20-21 (plurality opinion). At the end of this decade, the Court affirmed the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down Texas statute that made it a crime to desecrate a venerated object, including a state or national flag).

Justice Scalia authored a key decision in the early 1990's striking down a Minnesota ordinance that criminalized placing a symbol on private property that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (burning

cross). The Supreme Court considered "the anti-viewpoint-discrimination principle . . . so important to free speech jurisprudence that it applied even to speech that was otherwise excluded from First Amendment protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25, citing *R.A.V.*, 505 U.S. at 384-385. The ruling defined viewpoint discrimination as "hostility—or favoritism—towards the underlying message expressed" (*R.A.V.*, 505 U.S. at 385 (citing *Carey v. Brown*, 447 U.S. 455 (1980)), effectively placing the principle "at the very heart of serious free speech protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25. As Justice Scalia observed, the government may not "license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

During this same time frame, the Supreme Court held that the government may not discriminate against speech solely because of its religious perspective. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) (policy for use of school premises could not exclude film series based on its religious perspective); *Rosenberger*, 515 U.S. at 829 (invalidating university regulation that prohibited reimbursement of expenses to student newspaper that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality"); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001) (striking down regulation that discriminated against religious speech).

Government speech mandates often implicate viewpoint discrimination by either compelling a speaker to express the government's viewpoint (*Wooley*, *NIFLA*) (transgender ideology in this case) or a third party's viewpoint (*Hurley*) (student's unilateral declaration of gender identity). Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 283. After *Hurley*, "the constitutional ideal of intellectual autonomy for speakers, artists, and parade organizers, which originated in *Barnette*, now had the support of a unanimous Supreme Court." *Id.* at 282; *Hurley*, 515 U.S. 557. Even when the government's motives are innocent, there is a residual danger of censorship in facially content-based statutes because "future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015).

In recent years, *Matal* "is the Court's most important decision in the anti-viewpoint-discrimination line of cases." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 29. As this case illustrates, "[g]iving offense [to a transgender student] is a viewpoint." *Matal*, 137 S. Ct. at 1763. The School District may not escape the charge of viewpoint discrimination "by tying censorship to the reaction of [the student's] audience." *Id.* at 1766. Shortly after *Matal*, the Court struck down a provision forbidding "immoral or scandalous" trademarks because the ban "disfavors certain ideas." *Iancu v. Brunetti*, 139 S. Ct. at 2297. The Court's approach "indicated that governmental viewpoint

discrimination is a per se violation of the First Amendment." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 33. The viewpoint-based Policy in this case is unmistakably a "per se violation of the First Amendment."

III. THERE IS NO LEGITIMATE PEDAGOGICAL PURPOSE FOR THE SCHOOL DISTRICT'S POLICY.

The District Court admits "the Policy arguably places students in the position that they cannot fully express themselves and their beliefs," but quickly dismisses the danger, contending that "schools may legitimately restrict First Amendment rights in certain limited circumstances. *Tinker*, 393 U.S. at 514." *PDE*, 2022 U.S. Dist. LEXIS 169459, *33.

The District Court fails to understand relevant case law. Public schools are not "enclaves of totalitarianism" and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring), quoting *Tinker*, 393 U.S. at 511. Students "cannot be punished merely for expressing their personal views on the school premises." *Hazelwood*, 484 U.S. at 266. They do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker*, 393 U.S. at 506. The Policy does not fall within the narrowly crafted exceptions for sexually explicit speech (*Bethel*, 478 U.S. at 685), speech that promotes illegal drug use (*Morse*, 551 U.S. at 408), or any other exception.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. Even if the School District had a legitimate purpose for the Policy, it "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488. The First Amendment facilitates the free flow of information and ideas. "The Nation's future depends upon leaders trained through wide exposure" to a "robust exchange of ideas" that "discovers truth out of a multitude of tongues" rather than "authoritative selection." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

A. Transgender ideology is a matter of intense public concern.

Speech on matters of public concern merits heightened protection. There is hardly a more contentious "matter of public concern" than gender identity, "a controversial [and] sensitive political topic[] . . . of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up). Every person has a fundamental right to speak on this matter. The Policy "use[s] pronouns to communicate a message" many students believe is false—that "[p]eople can have a gender identity inconsistent with their sex at birth." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). "Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id*. at 508. It is not the business of *any* government official

in *any* position to coerce *any* person's chosen perspective on this—even public school students.

B. The School District has no "legitimate pedagogical purpose" in suppressing a student's viewpoint about "gender identity" or compelling expression of a view the student does not hold.

There is nothing "legitimate" or "pedagogical" about the Policy's attempt to forcibly alter student speech about the sex of other students. A student's speech and beliefs about sexuality merits constitutional protection no matter how profoundly school officials—or even society generally—might disagree. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414.

The Policy is not a regulation of "academic assignments" that educators may require students to complete. *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002). Faculty can "exercis[e] editorial control over the style and content of student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Students do not have free reign to alter a school assignment and receive credit. *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (Batchelder, J., concurring) (research paper).

But courts must discern whether "educational discretion" has been used as a pretext to punish a student based on some impermissible factor. *Regents of University of California v. Bakke,* 438 U.S. 265 (1978) (improper use of racial factors in medical school admissions); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (Mormon acting student may be required to follow the script, but school officials' statements suggested hostility to her faith). On the other hand, elementary school officials violated a student's free speech rights by rejecting his candy cane project merely because the product incorporated a religious message. *Curry v. Sch. Dist. of Saginaw*, 452 F.Supp.2d 723, 736 (E.D. Mich. 2006).

Hazelwood seems to sandwich a "school-sponsored speech" category in between government and private speech. *Fleming v. Jefferson County Sch. Dist. R1*, 298 F.3d 918, 923 (10th Cir. 2002) (community project decorating tiles that would become a permanent part of a school reopening after the Columbine shooting). "School-sponsored speech" encompasses expressive activity that "the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. *Hazelwood* implicated the privacy concerns of students likely to be embarrassed by pregnancy articles in a school publication. However, neither religion nor viewpoint discrimination was a factor. "School-sponsored speech" may also occur "in a classroom setting as part of a school's curriculum." *Axson-Flynn v. Johnson*, 356 F.3d at 1289. It is "designed to impart particular knowledge or skills to student

participants and audiences." *Hazelwood*, 484 U.S. at 271. A teacher might encourage critical thinking by requiring students to write papers from a particular viewpoint. These *educational* purposes are poles apart from the Policy's demand that students set aside their personal convictions and speak messages they believe to be false. *Hazelwood* does not grant schools unbridled discretion to compel student speech.

The School District adopts one side of the contentious transgender debate and shuts down further inquiry, demanding compliance with its preferred side. But the Constitution protects unpopular minority viewpoints. *Dale,* 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397 (burning American flag); *Doe v. University of Michigan*, 721 F.Supp.852, 863 (E.D. Mich. 1989) (University could not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed," nor could it "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people"). This is particularly true in a changing social environment—"the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Dale,* 530 U.S. at 660. Even elementary schools may not prohibit speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. "Mere unorthodoxy or dissent from the prevailing mores is not to be

condemned. The absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957).

Schools are not a haven where educators can ignore the First Amendment with impunity. Public schools cannot invade the protected liberties of either faculty or students. It is well settled that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." *Barnette*, 319 U.S. at 633 (allowing students to quietly forego the compulsory flag salute presented no "clear and present danger"). To affirm the District Court's ruling, this Circuit would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id*. at 634. Such compulsion "invades the sphere of intellect and spirit" which the First Amendment "reserve[s] from all official control." *Id.* at 642.

The Policy compels students to either dishonestly affirm a belief they do not hold or alter their beliefs under state compulsion. Both alternatives gut the First Amendment. Students face compulsion to declare a belief, not merely academic instruction or exposure to beliefs that differ from their own. Decades of precedent drive the conclusion that the School District cannot compel students to affirm the morality of conduct that collides their own convictions. *Wooley*, 430 U.S. at 715

("The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable."); *Pacific Gas & Electric*, 475 U.S. at 16 ([I]f "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."); *Hurley,* 515 U.S. at 575 ("[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control.")

C. Schools can affirm the dignity of every student without sacrificing the constitutional liberties of other students.

It is a critical to "affirm[] the equal dignity of every student," so as to create the best environment for learning. Goldberg, *"Good Orthodoxy"*, 13 FIU L. Rev. at 666. At the same time, "students need to tolerate views that upset them, or even disturb them to their core, *especially from other students*." *Id*. (emphasis added). Students must learn to endure speech that is offensive or even false as "part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. at 590. Indeed, students attending required classes are exposed to "ideas they find distasteful or immoral or absurd or all of these." *Id*. at 591. Transgender students are not exempt but must learn to tolerate the views of those who disagree with them.

Public schools have a role in "educat[ing] youth in the values of a democratic, pluralistic society." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378 (6th Cir. 1999). Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so that we do not "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. Our Nation's deep commitment to "safeguarding academic freedom" is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Meriwether*, 992 F.3d at 504-505, 509, quoting *Keyishian*, 385 U.S. at 603.

CONCLUSION

Amicus curiae urges the Court to reverse the District Court and allow this case to proceed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

This brief contains 6,441 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: November 10, 2022 /s/Deborah J. Dewart
Deborah J. Dewart

VIRUS CHECK CERTIFICATION

The electronic version of the addendum has been scanned for viruses and is virus-free.

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Deborah J. Dewart

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I electronically filed the foregoing brief with the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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