No. 22-2927

United States Court of Appeals
for the Eighth Circuit

Parents Defending Education,

Plaintiff-Appellant,

v.

Linn-Mar Community School District

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Iowa
Case No. 22-CV-78 CJW-MAR

BRIEF OF *AMICUS CURIAE* LIBERTY JUSTICE CENTER IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT

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INTEREST OF AMICUS CURIAE

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

This case interests Amicus because the freedom of speech is a core value vital to a free society. To that end, Amicus has long represented clients seeking to protect their First Amendment rights. *See, e.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). *Janus*, like the current case before this Court, involved the government attempting to compel speech. As the Supreme Court stated in *Janus*, it is "always demeaning" when the government coerces individuals into betraying their convictions and thus cannot be "casually allowed." *Id.* at 2464.

LJC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all parties to the appeal have consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

There are certain types of speech restrictions that are especially disfavored under the First Amendment. Among those are restrictions on speech based on its viewpoint. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination."). Another category, which is Amicus's focus here, includes laws compelling speech. *Janus*, 138 S. Ct. at 2464 ("When speech is compelled, however, additional damage is done.").

Under the First Amendment, government attempts to compel speech, like those Appellant Parents Defending Education challenge here, are uniquely pernicious violations of free speech. This is so for three reasons. First, compelled speech is uniquely harmful because it coerces thought and invades one's freedom of thought. Second, this invasion of an individual's freedom of thought extinguishes liberty because freedom of thought is at the heart of what it means to be free. Third, invading freedom of thought undermines democracy. Accordingly, "'the right to refrain from speaking at all'" is "perhaps" even "more sacred" than the "'right to speak freely.'" *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). Thus, laws

compelling student speech are subject to a higher level of scrutiny than laws suppressing student speech.

The public-school setting of this case only amplifies the already egregious nature of compelled speech because it "strangle[s] the free mind at its source." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Compelling the speech of students has the negative effect of teaching this Nation's budding citizens that free thought is not valued. It also deprives them of the types of classmates who could help them grow into free thinkers themselves. The result will be students who lack the spirit of liberty that characterized previous generations of Americans. Not only that, but they will also grow up less informed and less equipped to participate in democracy as adults. That is why *Barnette* applied rigorous scrutiny to compelled speech in a K-12 public school stating that "[i]t would seem that involuntary affirmation could be commanded only on *even more* immediate and urgent grounds than silence." *Id.* at 633 (emphasis added).

This case is no different from *Barnette*. The challenged policy of Appellee Linn-Mar Community School District's (the "District") policy prohibits students from engaging in: "[a]n intentional and/or persistent refusal . . . to respect a student's gender identity." Add. for Appellant 7; R. Doc. 38, at 7.

The district court below acknowledged that this means that "if a student does use [classmates'] names or pronouns, they must be preferred names or pronouns." *Id.* at 23.

Thus, this policy implicates the concerns with compelled speech. Compelled pronouns invade freedom of thought, given the power that speech has on thought. Such compelled thought undermines democracy by stamping out dissenting views on transgenderism and stunts students' growth into future citizens.

Thus, the Court should apply heightened scrutiny to the District's policy because it involves compelled speech. The Supreme Court's cases involving mere speech suppression in schools, which looked at speech's "disruption" at the school, are inapposite because they did not involve the unique harms that compelled speech causes. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

Under that heightened scrutiny, the lower court's holding that the District's pronoun policy does not compel speech should be reversed.

ARGUMENT

Compelling public-school students to utter pronouns against their will is a uniquely pernicious violation of free speech rights that is subject to heightened scrutiny.

A. Compelling speech is an egregious free speech violation because it invades freedom of thought.

1. The First Amendment's original public meaning reveals a deep concern with protecting speech for the sake of free thought.

The history of the First Amendment reveals a special concern that speech regulations ultimately invade freedom of thought. Prominent members of the founding generation strongly opposed the federal Sedition Act of 1798 because they viewed speech and thought as one and the same. Thomas Jefferson and James Madison led the resistance to the Sedition Act, which made it illegal to "'write, print, utter or publish . . . any false, scandalous and malicious writing . . . with intent to defame the . . . government.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-74 (1964). In response, Virginia's General Assembly passed the Virginia Resolutions of 1798—which Jefferson and Madison drafted—denouncing the Sedition Act as unconstitutional and labeling it null and void. *Id.* at 274.

Madison then drafted his Report on the Virginia Resolutions defending the resolutions' legitimacy. *Id.* at 274-75. In arguing that the federal government

lacked the power to police seditious speech, he referred to both "liberty of conscience" and "freedom of the press." James Madison, *Rep. on the Va. Resolutions reprinted in* 5 *The Founders' Constitution* 146 (Philip B. Kurland & Ralph Lerner eds. 1987).[1] He argued that "[t]he liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States." *Id.* He then concluded that the Sedition Act was especially dangerous because it legislates on the "freedom of the press," and establishes "a precedent which may be fatal" to the "liberty of conscience." *Id.* Thus, he saw a close connection between freedom of speech and freedom of thought (or "liberty of conscience," as Madison called it).

The American public vindicated Madison and Jefferson's interpretation of the First Amendment when Jefferson's Republicans won the election of 1800 and swept the Federalists (who largely supported the Sedition Act) out of power. As the Supreme Court noted in *Sullivan*, "the attack upon [the Sedition Act]'s validity has carried the day in the court of history." 376 U.S. at 276. It explained that "Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating:

[1] https://press-pubs.uchicago.edu/founders/documents/amendI_speechs24.html

'I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.'" *Id.* (quotation omitted). The Court noted that Congress repaid "[f]ines levied in its prosecution" in 1840 "on the ground that it was unconstitutional." *Id.* The Court also pointed to subsequent statements by Supreme Court justices condemning the Act and concluded that "[t]hese views reflect a broad consensus that the Act" violated the First Amendment. *Id.*

Madison and Jefferson's views on the importance of freedom of thought are also seen in Virginia's debate over whether to use taxes for supporting churches. In Madison's Memorial and Remonstrance, he argued against the tax based on the principle that a free society requires that "the minds of men always be wholly free." *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-12 (1947). And Virginia adopted Thomas Jefferson's Virginia Bill for Religious Liberty. *Id.* Its preamble shows that Jefferson viewed compelled contributions as invading freedom of thought because he argued that "'Almighty God hath created the mind free'" and the "statute itself" prohibited compelled financial support of churches. *Id.*

Thus, the U.S. Supreme Court correctly observed in *Barnette* that the "objection" to compelled speech is "an old one, well known to the framers of the Bill of Rights." 319 U.S. at 633; *see also Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 790 (1961) (Black, J., dissenting) ("These views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment."). What is striking about these efforts is that they viewed restrictions on speech, including compelled speech, as especially dangerous because they invaded freedom of thought. As St. George Tucker, a contemporary of Madison and Jefferson, stated: "Thought and speech are equally the immediate gifts of the Creator, the one being intended as the vehicle of the other." Randy E. Barnett, *Restoring the Lost Constitution* 261 n.25 (2004) (citation omitted).

2. U.S. Supreme Court precedent views compelled speech as an especially pernicious free speech violation because it compels thought.

U.S. Supreme Court precedent echoes early concerns that compelled speech is especially dangerous because it invades freedom of thought. In *Barnette*, the Court reasoned that compelling speech erodes "individual freedom of mind." 319 U.S. at 637. The Court concluded that compelling students to salute the American flag "invades the sphere of intellect and

spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

In *Wooley v. Maynard*, the Court held that a state compelling a motorist to have the state motto on his license plate violated the First Amendment's ban on compelled speech. 430 U.S. 705 (1977). The Court explained that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 637 (quoting *Barnette*, 319 U.S. at 645).

And in *Abood v. Detroit Board of Education*, the Court held that compelling a public-school teacher to fund a union's political activities was unconstitutional compelled speech. 431 U.S. 209 (1977), *overruled on other grounds by Janus*, 138 S. Ct. at 2448. *Abood* cited freedom of thought for its rationale. It reasoned that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-35.

Most recently, in *Janus*, the Court reiterated that compelled speech is uniquely harmful because it invades freedom of thought. It explained that compelling speech does the "additional damage" of forcing "free and

independent individuals" into "betraying their convictions." 138 S. Ct. at 2464.

3. Protecting against compelled speech for the sake of freedom of thought is warranted because of the power speech has on thought.

The concern that compelled speech is especially dangerous because it invades freedom of thought is well-founded. There is a strong connection between words and thought. John Locke wrote: "Words in their primary or immediate signification, stand for nothing but the ideas in the mind of him that uses them." Patrick J. Connolly, *John Locke (1632-1704)*, Internet Encyclopedia of Philosophy (cleaned up).[2]

George Orwell's dystopian novel *1984* puts this connection between speech and thought on vivid display. There, the government created a new language called "Newspeak" to control the citizens of Oceania. George Orwell, *1984* 286 (1949). The language's "purpose was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of [English Socialism], but to make all other modes of thought impossible." *Id.* Its inventors hoped that it would make a "heretical thought . . . literally unthinkable." *Id.* "This was done partly by the invention of new words, but

[2] https://iep.utm.edu/locke/.

chiefly by eliminating undesirable words and by stripping such words as remained of unorthodox meanings, and so far as possible of all secondary meanings whatever." *Id.* at 286-87. Thus, Newspeak's vocabulary "grew smaller" each year because "the smaller the area of choice, the smaller the temptation to take thought." *Id.* at 295.

For example, "[t]he word free" was only used in the sense of "[t]his dog is free from lice" and "could not be used in its old sense of "politically free" because that concept "no longer existed." *Id.* at 287. And the Newspeak "vocabulary consisted of words which had been deliberately constructed for political purposes" and "were intended to impose a desirable mental attitude upon the person using them." *Id.* at 290. Other Newspeak words were not intended "to express meanings but instead to destroy them." *Id.* at 291. Thus, "Newspeak was designed not to extend but to *diminish* the range of thought." *Id.* at 287.

Orwell's account, although fictional, illustrates how the power to compel speech is the power to control thought and why compelled speech is especially pernicious.

B. Compelled speech is especially pernicious because destroying freedom of thought extinguishes liberty.

Given the power of compelled speech on freedom of thought, compelled speech is especially pernicious because coercing thought enslaves the individual.

Indeed, Americans strongly opposed the Sedition Act because of their view that destroying freedom of thought extinguishes what it means to be free. In defending Virginia's Resolutions denouncing the Sedition Act, Madison said that "liberty of conscience" is an "essential right[]." Madison, *Rep. on Va. Resolutions*, *supra*. And in writing his Memorial and Remonstrance against a proposed Virginia state tax to support churches, Madison argued that liberty of "conscience" was "an unalienable right." Madison, *Memorial and Remonstrance Against Religious Assessments*, Nat'l Archives.[3] Likewise, Jefferson viewed freedom of thought in terms of an inalienable natural right by stating in his religious liberty bill that "Almighty God hath created the mind free." *Everson*, 330 U.S. at 13.

Not surprisingly, the Supreme Court has called "freedom of belief" an "absolute" right. *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). *Barnette* explained that coerced thought is something for which "history indicates a

[3] https://founders.archives.gov/documents/Madison/01-08-02-0163.

disappointing and disastrous end." *Id.* at 637. It reasoned that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Id.* at 641. And "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." *Id.* The Court also noted that coercing thought destroys the individual by invading his or her "sphere of intellect and spirit." *Id.* at 642.

Cases outside the First Amendment context support this idea too. In *United States v. Nobles*, the Court explained that the privilege "against compulsory self-incrimination is an 'intimate and personal one,' which protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.'" 422 U.S. 225, 233 (1975) (citation omitted). Thus, the heart of what it means to be free is freedom of thought, and compelled speech is especially pernicious because it directly assaults that freedom.

C. Compelled speech is a uniquely pernicious free speech violation because coercing thought undermines democracy.

Compelling speech, and thereby invading freedom of thought, also undermines democracy. Madison defended the Virginia Resolutions by citing democracy as a reason for protecting speech and what he called "liberty of conscience." Madison, *Rep. on Va. Resolutions*, *supra*. He argued that

democracy requires citizens to examine "public characters and measures" so that democratic outcomes reflect the will of the people. *Id.* This examination requires "free communication" on those subjects and it "is the only effectual guardian of every other right." *Id.*

And as the Sixth Circuit recently explained, "[i]t should come as little surprise, then, 'that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed.'" *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (quoting *Janus*, 138 S. Ct. at 2471 & n.8). The Sixth Circuit continued: "Why? Because free speech is 'essential to our democratic form of government.'" *Id.* (quoting *Janus*, 138 S. Ct. at 2464). The court concluded that "[w]ithout genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Id.*

Today, the Supreme Court often cites democracy as a reason to protect speech and thought. In *Janus*, the Court concluded that "[w]henever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines [democracy]." 138 S. Ct. at 2464. In *Mahanoy Area*

School District v. B.L., the Court reiterated that "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" 141 S. Ct. 2038, 2046 (2021). It added that "[t]his free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will." *Id.* Thus, the First Amendment prohibits compelled speech because it erodes freedom of thought, which then undermines democracy.

D. Heightened scrutiny applies to compelled speech.

Given the damage that compelled thought does to individual liberty and democracy, it is not surprising that such regulations receive the highest scrutiny. *Janus* affirmed that "'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." 138 S. Ct. at 2464 (quoting *Barnette*, 319 U.S. at 633). It also described *Riley v. National Federation of Blind* as "rejecting [a] 'deferential test' for compelled speech claims." *Id.* (explaining 487 U.S. 781, 796-97 (1988)). As a result, *Janus* held that compelling government employees to support a union in any capacity "seriously impinges on First Amendment rights" and therefore "cannot be casually allowed." *Id.* at 2464. And this Court noted that *Janus* recognized "the right to refrain from

speaking at all" as "more sacred" than "the right to speak freely." *Telescope Media Grp.*, 936 F.3d at 752. Strict scrutiny generally applies to laws suppressing speech based on content. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). So an even higher form of scrutiny applies to compelled speech.

E. The protections against compelled speech in public K-12 schools are robust and extend to the District's pronoun policy.

The K-12 public education context of this case only amplifies the pernicious free speech violation that compelled speech is and thus it is subject to heightened scrutiny. *See Barnette*, 319 U.S. at 637; *Meriwether*, 992 F.3d at 505. This is because compelled speech requirements, such as the District's pronoun policy, compel student thought and undermines democracy.

1. The District's pronoun policy is like the compelled speech in *Barnette* because it compels speech, and therefore, thought.

The damage that compelled speech inflicts on freedom of thought prevents students from developing into free and independent individuals. In *Barnette*, the Court reasoned that "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual." 319 U.S. at 637. The Court stated that government must not "strangle the free mind at its source." *Id.* It also reasoned that compelling speech teaches "youth to

discount important principles of our government as mere platitudes" given that the government is not living out constitutional principles in practice. *Id.*

So too here. If students see the government override their freedom of thought in practice through compelling pronouns, students will learn that freedom of thought is not highly valued. Compelling student speech in this way teaches students that there are certain ideas that are essentially "thoughtcrime[s]," which will "strangle the freed mind at its source." Orwell, *supra*, at 27; *Barnette*, 319 U.S. at 637. And interfering with "freedom of thought" chills the "free play of the spirit" and discourages inquiring and evaluating in public schools. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

What is more, expulsion of a student for not using pronouns deprives other students of colleagues who think freely. But under *Barnette's* reasoning, those are exactly the types of students that we want in our schools so that other students will learn how to think freely. Having people act as mere robots of the state would influence other students to also be robots. Thus, the danger of compelled thought that *Barnette* identified is present here.

Indeed, mandatory pronoun use compels thought because it changes the language "to diminish the range of thought" and make it impossible for students to think certain thoughts. Orwell, *supra*, at 287. The fictional

government in *1984* changed and eliminated words "not to extend but to *diminish* the range of thought." Orwell, *supra*, at 287 (emphasis in original). The rise of terms like "birthing people," "pregnant people," and pronouns like "ze" is a type of "Newspeak" seen in *1984*. Jessica Bennet, *She? Ze? They? What's in a Gender Pronoun*, N.Y. Times (Jan. 30, 2016);[4] Molly Kaplan, *The Culture War Over "Pregnant People,"* The Atlantic (Sept. 17, 2021).[5] The aim of compelling the use of such words is to "impose a . . . mental attitude upon the person using them" that the government considers "desirable." Orwell, *supra*, at 290. This compulsion seeks to gain a "linguistic supremacy" over those who believe that sex (male and female) is biological and immutable. *See* Massjid Nawaz, *Jordan Peterson: Why I Refuse to Use Special Pronouns for Transgender People*, LBC (May 21, 2018).[6]

To be sure, the court below concluded that compelled pronouns do not amount to expressive speech at all, but *Meriwether* shows otherwise. Add. for Appellant 19; R. Doc. 38, at 19. There, the Sixth Circuit held unconstitutional

[4] https://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html.
[5] https://www.theatlantic.com/politics/archive/2021/09/pregnant-people-gender-identity/620031/.
[6] https://www.lbc.co.uk/radio/presenters/maajid-nawaz/jordan-peterson-why-i-refuse-to-use-special-pronou/.

a public university's discipline of a professor who refused to use a student's preferred pronouns. 992 F.3d at 498. The court reasoned that the point of pronouns is "convey[ing] a message." *Id.* at 508. It explained that such "speech 'concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.'" *Id.* It also reasoned that the professor's "mode of address [not using pronouns] *was* the message." *Id.* The professor "took a side" in the debate over "sex or gender identity" by refusing to use the student's pronouns. *Id.* at 509.

Meriwether's reasoning refutes the district court's reasoning below that the families had failed to show that "the Policy's requirement of respecting another's gender identity relates to anything other than students' names or pronouns." Add. for Appellant 19; R. Doc. 38, at 19. Contrary to the district court's reasoning, names and pronouns are not "content and viewpoint neutral." *Id.* at 23. *Meriwether* shows that pronouns in and of themselves convey a message—that the "mode of address" (not using preferred pronouns) is speech. 992 F.3d at 508. Thus, by compelling pronouns, the policy compels speech and, therefore, thought.

The Fifth Circuit is in accord because it held that courts should decline to use a litigant's preferred pronouns in cases "that turn on hotly-debated issues of sex and gender identity." *United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020). The court reasoned that in using the pronouns, "the court may unintentionally convey its tacit approval of the litigant's underlying legal position." *Id.* In other words, pronouns convey an expressive message.

And just last week, the Ninth Circuit bolstered this conclusion in *Green v. Mississippi United States LLC*, No. 21-35228, 2022 U.S. App. LEXIS 30400, at *17 (9th Cir. Nov. 2, 2022). There, the court stated that the First Amendment prevented Oregon from applying its public accommodation law to force a beauty pageant to admit a biological male. *Id.* The court explained that the pageant "does not believe that biological males who identify as female are women." *Id.* at *26. The court noted that the pageant explained that it "communicates these views on womanhood every time it uses the word 'woman,' because the fact that the Pageant 'does not adjectivize the word woman is part of the message: the word 'woman' so naturally means 'born female' that the Pageant does not need or use qualifiers." *Id.* at *27. The court reasoned that this "argument is especially salient for controversies regarding transgenderism" because "an individual's use or omission of certain

words and phrases in this context often reflects a 'struggle over the social control of language.'" *Id.* at *27 n.12 (quoting *Meriwether*, 992 F.3d at 508).

That same logic applies here. Students' use of pronouns is expressive speech because it communicates what they believe about sex. It is no different than the pageant using the word "woman" without an adjective to communicate that the term only applies to biological females. Forcing students to use preferred pronouns then alters their message, i.e., compels speech and, therefore, thought.

Green also undermines the district court's proffered "solution" for students to just say "they." Add. of Appellant 22; R. Doc. 38, at 22. *Green* reasoned that simply being forced to "alter" speech is compelled speech. *Id.* at *28. This echoes *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, etc.*, where the Supreme Court held that forcing a parade to admit a float promoting homosexual rights violated free speech protections by altering the parade's message. 515 U.S. 557, 572-73 (1995).

Here, being forced to say "they" instead of the biological pronoun alters a student's message from affirming a traditional view of gender and sex to being (at least) neutral on the subject. Add. for Appellant 22; R. Doc. 38, at 22. The state thus compels the student to affirm that sex and gender do not

matter. To be sure, it might be less intrusive than compelling them to use their classmates' preferred pronouns and thereby affirm that people can transition their sex and gender, but it still compels speech and therefore thought. The concerns with compelled speech (compelled thought) that *Barnette* identified are therefore present here.

2. The District's pronoun policy undermines democracy.

The public-school context also amplifies the harms of compelled speech because schools are training grounds for democracy. *Barnette* explained that compelled speech teaches "youth to discount important principles of our government as mere platitudes." *Id.* at 637. One of those important principles is democracy. The Court recently stated that "America's public schools are the nurseries of democracy." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2046. And democracy only works if the marketplace of ideas is robust. *Id.* Given that the marketplace of ideas requires the protection of unpopular ideas to thrive, Justice Breyer explained that "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Thus, the public-school context amplifies the corrosive effects that compelling speech and thought has on democracy because it limits the types of ideas that students are exposed to. This increases the likelihood that students will grow up less informed and devoid of the critical thinking skills that produce strong individuals and, therefore, a strong democracy.

This logic applies to the District's pronoun policy. Compelling pronouns and thought will limit the types of ideas that students are exposed to and will stunt their growth into adults who are effective at participating in democracy later in life.

Still, the district court concluded that the District's pronoun policy is not facially unconstitutional because students could just choose not to associate with transgender students, but this Court rejected a similar argument in *Telescope Media Group*. 936 F.3d at 754. There, this Court explained that compelled speech regulates based on content. *Id.* And it continued that the "problems with content-based regulations" that compel speech but still allow the speaker to otherwise say its message is that the regulation "still exacts a penalty." *Id.* (quoting *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256 (1974)). The Court reasoned that the videographer might decide that the "'safe course'" "would be to avoid the

wedding-video business altogether." *Id.* The Court held that this was unacceptable because "compelled self-censorship, a byproduct of regulating speech based on its content, unquestionably 'dampens the vigor and limits the variety of public debate.'" *Id.*

So too here. It is unacceptable to say that students could simply self-censor by avoiding their classmates to avoid having to say their preferred pronouns. This would allow the District's pronoun policy to effectively "'stamp out every vestige of dissent' and 'vilify [students] who are unwilling to assent to the new orthodoxy.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1748 (2018) (Thomas, J., concurring) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting)). This would lessen the variety of views that students are exposed to and leave them unprepared for the demands of democracy tomorrow.

3. Heightened scrutiny applies here because this case implicates the two dangers of compelled speech.

Given the harms of compelled speech in the public-school setting, it is not surprising that *Barnette* applied a heightened form of scrutiny to the compelled speech there. The Court explained that "[i]t is now a commonplace 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." 319 U.S. at 633. It then reasoned that "[i]t would seem that involuntary affirmation could be commanded only on *even more* immediate and urgent grounds than silence." *Id.* (emphasis added). The Court later cited this "even more" language in *Janus* to make the same point. 138 S. Ct. at 2464. *Barnette* also explained that the "'rational basis'" test applies to most non-speech regulations, but that speech is "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." 319 U.S. at 639.

Reading *Barnette* as applying a heightened form of scrutiny is consistent with compelled speech jurisprudence generally, which views such speech as an especially egregious First Amendment violation because it compels thought. The dangers of compelled speech in K-12 schools that *Barnette* condemned are present in the District's pronoun policy as shown above. Thus, this Court should apply heightened scrutiny here.

4. Other school speech cases applying a more deferential level of review do not apply here.

Although the Supreme Court applied a more deferential form of review to student speech restrictions in *Tinker* and other cases, those cases do not control here.

Because the school here is compelling speech and is not simply trying to suppress it, it is unlike *Tinker*. There, a public-school disciplined students for wearing black armbands to school to protest the Vietnam War. 393 U.S. at 504. It claimed that the armbands would disrupt school discipline. *Id.* at 508-09.

The Court struck down the ban. *Id.* at 514. Unlike *Barnette*, *Tinker* focused on the disruption that student speech can cause. *Tinker* held "that students are entitled to freedom of expression of their views." *Id.* at 511. But that conduct "whether it stems from time, place, or type of behavior materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. The Court then held that the armbands were protected because "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." *Id.* at 514. Thus, this case is unlike *Tinker* for two reasons.

First, *Tinker* involves the state suppressing speech, which is different from the compelled speech in this case. Accordingly, *Tinker* did not apply the

heightened standard of review that applies in compelled speech cases like *Barnette*.

Second, because *Tinker* did not involve compelled speech, it did not involve the state attempting to control the thoughts of students. State attempts to control student thought follow students home and invade their life outside of school. Conversely, preventing the armbands at school coerces thought to a lesser degree because students can think and speak those thoughts outside of school. Thus, *Tinker's* substantial disruption test does not apply here. That test only applies to the suppression of student speech and the Court has never applied it to compelled student speech.

As for the Court's other student speech cases, they all dealt with suppressing student speech and do not control this case. *Bethel School District v. Fraser*, allows schools to suppress student speech with sexual content in certain situations. 478 U.S. 675, 685 (1986). *Hazelwood School District v. Kuhlmeier*, involved school restrictions on student speech that "members of the public might reasonably perceive to bear the imprimatur of the school," such as speech in the school newspaper. 484 U.S. 260, 271 (1988). *Morse v. Frederick* allows schools to suppress student speech promoting illegal drug use. 551 U.S. 393, 409 (2007). Recently, the Court applied

Tinker's test and held that a student's criticism of her school while she was off-campus did not substantially disrupt the school. *Mahanoy*, 141 S. Ct. at 2048. None of those situations are present here because this case is about compelled speech. Therefore, this Court should apply the heightened form of scrutiny found in *Barnette* and not apply the substantial disruption test from *Tinker* or the rules from these other cases.

CONCLUSION

The Court should reverse the lower court's decision and hold that Appellant Parents Defending Education has standing and is likely to succeed on its claim that the District's pronoun policy on its face violates the First Amendment.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 5,588 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f), which is less than the 6,500 word limit.

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Date: November 10, 2022 /s/ Jeffrey D. Jennings
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Dated: November 10, 2022 /s/ Jeffrey D. Jennings
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing through the Court's CM/ECF system, which will send a notification of such filing to counsel of record.

Dated: November 10, 2022 /s/ Jeffrey D. Jennings
Jeffrey D. Jennings