Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 1 of 21

No. 25-5641

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RODERICK E. THEIS, II, Plaintiff - Appellant,

v.

INTERMOUNTAIN EDUCATION SERVICE DISTRICT BOARD OF DIRECTORS;
MARK S. MULVIHILL, Superintendent; and AIMEE VANNICE, Assistant Superintendent and Director of Human Resources,

Defendants - Appellees.

On appeal from the U.S. District Court for the District of Oregon Case No. 2:25-cv-00865-HL

BRIEF OF AMICUS CURIAE DEFENDING EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT

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October 24, 2025

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Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 2 of 21

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I hereby certify that De-

fending Education is a non-profit entity. It has no parent corporation, and no corpora-

tion owns 10% or more of its stock.

Dated: October 24, 2025

/s/ J. Michael Connolly

J. Michael Connolly

Counsel for Defending Education

i

Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 3 of 21

TABLE OF CONTENTS

DISCLOS	URE STATEMENT	i
TABLE O	F AUTHORITIES	iii
INTRODU	UCTION & INTEREST OF AMICUS CURIAE	. 1
SUMMAR	Y OF ARGUMENT	.2
ARGUME	ENT	.3
	When public schools allow employees to engage in personal speech, they nay not discriminate based on viewpoint	.3
C	Schools across the country are flouting this constitutional command and censoring teachers, counselors, and other employees who espouse disfavored views.	.8
CONCLU	SION1	13
CERTIFIC	CATE OF SERVICE1	14

TABLE OF AUTHORITIES

Cases

Austin v. Reagan Nat'l Advertising, 596 U.S. 61 (2022)	2
Berner v. Delahanty, 129 F.3d 20 (1st Cir. 1997)	6
Bible Club v. Placentia-Yorba Linda Sch. Dist., 573 F. Supp. 2d 1291 (C.D. Cal. 2008)	5
Cajune v. Indep. Sch. Dist. 194, 105 F.4th 1070 (8th Cir. 2024)	7
Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536 (6th Cir. 2001)	7
Cernek v. Argyle Sch. Dist., 3:24-cv-00447 (W.D. Wis. filed July 8, 2024)	12
Cornelius v. NAACP, 473 U.S. 788 (1985)	6
Demmon v. Loudoun Cnty. Pub. Schs., 342 F. Supp. 2d 474 (E.D. Va. 2004)	7
Dodge. v. Evergreen Sch. Dist. #114, 56 F.4th 767 (9th Cir. 2022)	7
Eng v. Cooley, 552 F.3d 1062 (9th Cir. 2009)	5
Garcetti v. Ceballos, 547 U.S. 410 (2006)	2
Grayned v. City of Rockford, 408 U.S. 104 (1972)	2
Iancu v. Brunetti, 588 U.S. 388 (2019)	6
Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)	8
Johnson v. Poway Unified Sch. Dist., 658 F.3d 954 (9th Cir. 2011)	5
Kluge v. Brownsburg Cmty. Sch. Corp., 1:19-cv-02462 (S.D. Ind. filed June 18, 2019)	

L. M. v. Middleborough, 145 S. Ct. 1489 (2025)1	13
Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)	. 6
Marshall v. Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223 (6th Cir. 2005)	. 1
Matal v. Tam, 582 U.S. 218 (2017)	. 6
Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021)	.6
Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900 (9th Cir. 2021)	.2
NRA v. Vullo, 602 U.S. 175 (2024)4-	-5
Pickering v. Board of Education, 391 U.S. 563, (1968)	.5
R.A.V. v. St. Paul, 505 U.S. 377 (1992)	8
Rosenberger v. University of Virginia, 515 U.S. 819 (1995)	13
Sacks v. Perkiomen V alley Sch. Dist., 2:20-cv-06155 (E.D. Pa. filed Dec. 7, 2020)1	
Shurtleff v. Boston, 596 U.S. 243 (2022)	.8
Tapia v. Jurupa Unified Sch. Dist., 5:23-cv-00789 (C.D. Cal. filed May 3, 2023)1	12
Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)	. 5
University of Wisconsin v. Southworth, 529 U.S. 217 (2000)	
Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200 (2015)	
West Virginia v. Barnette, 319 U.S. 624 (1943)	.4

Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 6 of 21

Other Authorities

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Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 7 of 21

INTRODUCTION & INTEREST OF AMICUS CURIAE

Defending Education is a national, nonprofit, grassroots association.¹ Its mem-

bers include educators, students, parents with school-aged children, and other con-

cerned citizens. DE uses advocacy, disclosure, and litigation to combat the increasing

politicization and indoctrination of K-12 and post-secondary education, including at-

tempts to silence teachers and students who express views outside of the prevailing

orthodoxy.

This case directly implicates DE's mission, and its outcome will have real-world

consequences for DE's members. Public school employees have First Amendment

rights, and they do not discard those rights when they are on school grounds. See Evans-

Marshall v. Tipp City Exempted Vill. Sch. Dist., 428 F.3d 223, 229 (6th Cir. 2005) ("In light

of Supreme Court precedent, the argument that teachers have no First Amendment

rights when teaching, or that the government can censor teacher speech without re-

striction, is totally unpersuasive." (cleaned up)). Among the most important of the rights

that public school employees retain is the right not to have their speech suppressed

based on their viewpoint.

But the district court's decision here threatens exactly that. If the district court's

decision is upheld, then school employees throughout the Ninth Circuit—teachers,

¹ No counsel for a party authored this brief in whole or in part, and no person other than Defending Education, its members, or its counsel made a monetary contri-

bution to its preparation or submission.

1

counselors, administrators, and others—may be compelled to either endorse their bosses' views on important political topics or bite their tongue. Unfortunately, many schools have already forced their teachers into such a dilemma. DE, and the Constitution, oppose this practice.

SUMMARY OF ARGUMENT

The First Amendment protects the free exchange of ideas required for our democracy to function. *Austin v. Reagan Nat'l Advertising*, 596 U.S. 61, 78 (2022) (Breyer, J., concurring). This "robust exchange of ideas" is especially important in schools, where exposure to different ideas is an "important part of the educational process." *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972).

To be sure, public schools, like any government employer, can regulate employee speech that is made pursuant to or threatens to compromise an employee's professional responsibilities. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006); *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 908-09 (9th Cir. 2021). But when schools choose to allow their employees to engage in personal speech—when, for example, schools allow teachers and counselors to keep books discussing sexuality and gender in their classrooms and offices—they cannot do so selectively, permitting speech with which they agree but punishing speech they dislike. Viewpoint discrimination is never allowed, even when the speech at issue is not otherwise constitutionally protected. *R.A.V. v. St. Paul*, 505 U.S. 377, 391-94 (1992).

America's public schools, however, are flouting this basic constitutional principle with increasing frequency. Schools often allow or even invite their employees to express personal views on important political and cultural issues and then punish those employees if they express a disfavored (usually right-of-center) viewpoint. In this case, for instance, InterMountain allowed employees to display books affirming non-biological gender identities but censored Roderick Theis when he displayed books affirming students' actual biological gender. Elsewhere, schools punish teachers who share right-of-center posts on social media or hang posters of conservative political figures in the classroom, but they allow teachers to share left-leaning messages, display pride flags, or hang posters with liberal figures. This pattern betrays the Constitution's promise of viewpoint neutrality and discourages speech from any employee whose views do not comfortably align with school administrators' own opinions.

This Court should reverse the district court's decision and hold that schools may not allow some speech on a controversial topic (e.g., speech endorsing transgender ideology) while prohibiting the opposite viewpoint (e.g., speech endorsing traditional views on sex and gender).

ARGUMENT

I. When public schools allow employees to engage in personal speech, they may not discriminate based on viewpoint.

Public schools can impose reasonable limits on employee speech in school. But when schools allow their employees to engage in personal expression on school time, they cannot discriminate based on viewpoint, allowing some ideas while punishing others. The First Amendment prohibits such censorship.

A. The First Amendment, at its core, "protect[s] the marketplace of ideas." Walker v. Texas Div., Sons of Confederate Veterans, 576 U.S. 200, 207 (2015). It guarantees "the opportunity for free political discussion to the end that government may be responsive to the will of the people," enabling the "democratic electoral process" to function. Id. Therefore, the government ordinarily may not punish an individual for his speech or compel him to express a view with which he disagrees. See West Virginia v. Barnette, 319 U.S. 624, 640-42 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in ... matters of opinion or force citizens to confess by word or act their faith therein.").

Of course, when the government itself speaks, "it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207. The government can choose what it wants to say or not say; it is free to promote its own views in the marketplace of ideas. *University of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000) ("[T]he government can speak for itself."). Indeed, it "could barely function otherwise." *NRA v. Vullo*, 602 U.S. 175, 187 (2024).

Likewise, when public employees speak *for* the government, the government may "regulate the content of what is or is not expressed." *Rosenberger v. University of Virginia*, 515 U.S. 819, 833 (1995). In that case, the individual employee's speech simply *is* the government's speech. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir.

2011). And in limited circumstances—when speech disrupts the provision of public services—the government may regulate an employee's personal speech as well. *Pickering v. Board of Education*, 391 U.S. 563, 568, 574-75 (1968); *see also Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). Schools, for example, can regulate employees' personal speech on school time if that speech "materially and substantially disrupt[s] the work and discipline of the school." *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

B. But if schools *do* allow their employees to express personal opinions in the workplace, the Constitution requires that they do so without discriminating against employees who express an opinion that school authorities don't like. Public school employees, after all, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. They are still citizens with a legitimate "interes[t] ... in commenting upon matters of public concern." *Pickering*, 391 U.S. at 568. And "[o]ne of the most important rights" they retain is the right "to be free from government discrimination based upon the viewpoint expressed by one's speech." *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1296 (C.D. Cal. 2008).

Indeed, "the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society" is at "the heart of the First Amendment's Free Speech Clause." *Vullo*, 602 U.S. at 187. It is a particularly "egregious" and "blatant" form of censorship. *Rosenberger*, 515 U.S. at 829. When governments "pick and choose among similarly situated speakers in order to advance or suppress a particular ideology," they

threaten the free exchange of ideas that the First Amendment is designed to protect. Berner v. Delahanty, 129 F.3d 20, 28 (1st Cir. 1997). Viewpoint discrimination is especially bad in schools, lest our "next generation of leaders" become "closed-circuit recipients of only that which the State chooses to communicate." Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021).

That's why viewpoint discrimination is always unconstitutional. See Iancu v. Brunetti, 588 U.S. 388, 398-99 (2019) (a "finding of viewpoint bias end[s] the matter"); Matal v. Tam, 582 U.S. 218, 243 (2017); R.A.V., 505 U.S. at 391-94. In other words, the government may be able to prohibit speech on a particular topic or in a particular forum altogether, but it cannot selectively permit or prohibit certain viewpoints once it chooses to open that topic or forum for discussion. The Supreme Court has said so explicitly and often. E.g., Rosenberger, 515 U.S. at 829 ("These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation."); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 391-94 (1993) ("The District need not have permitted after-hours use of its property for any [purpose]," but once it did it could not "regulate speech in ways that favor some viewpoints or ideas at the expense of others.""); Cornelius v. NAACP, 473 U.S. 788, 806 (1985) ("Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, ... the government violates the First Amendment when it denies access

Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 13 of 21

to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

Courts have consistently applied this rule in the school setting as well. For example, although schools may impose viewpoint-neutral restrictions on student speech to prevent disruption in the classroom, they do "not have the authority to enforce a viewpoint-specific ban on some [expressive acts] and not others." Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536, 544 (6th Cir. 2001) (holding that a school could not ban some racially divisive symbols while permitting others). A school that invites parents to donate engraved bricks for a new walkway cannot deny bricks with a religious viewpoint. Demmon v. Loudoun Cnty. Pub. Schs., 342 F. Supp. 2d 474, 476, 485-88 (E.D. Va. 2004). And when a school "allow[s] private persons to display BLM posters on school walls," it "open[s]" those walls to other viewpoints on the same topic, such that it cannot constitutionally deny others the right to display posters with "the phrases 'All Lives Matter' and 'Blue Lives Matter.'" Cajune v. Indep. Sch. Dist. 194, 105 F.4th 1070, 1083 (8th Cir. 2024). "[D]isagreement with a disfavored political stance or controversial viewpoint," as this Court has explained, "is not a valid reason to curtail expression of that viewpoint at a public school." Dodge. v. Evergreen Sch. Dist. #114, 56 F.4th 767, 786 (9th Cir. 2022).

Simply put, "[w]hen the government encourages diverse expression," it cannot then "discriminat[e] against speakers based on their viewpoint." *Shurtleff v. Boston*, 596 U.S. 243, 247 (2022) (city could not invite private groups to raise flags outside of city hall and then deny that opportunity to groups whose flag expressed a religious message).

The "only interest distinctively served by" viewpoint discrimination, after all, is to "displa[y] the [government's] special hostility towards" certain views. R.A.V., 505 U.S. at 396. And "[t]hat is precisely what the First Amendment forbids." *Id*.

II. Schools across the country are flouting this constitutional command and censoring teachers, counselors, and other employees who espouse disfavored views.

Despite the Constitution's guarantee against viewpoint discrimination, schools across the United States regularly punish employees who express disfavored views on controversial political and cultural issues. This largely one-sided trend (schools are overwhelmingly hostile to teachers who express right-of-center viewpoints) threatens to impose a "pall of orthodoxy" in our schools—the very thing the First Amendment is designed to prevent. *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870 (1982).

A. Start with InterMountain's viewpoint discrimination in this case. Though the district claims that it removed Theis's books—*He is He, She is She*, and *Johnny the Wal-rus*—to "maintain a more neutral environment," Appellant's Br. at 14, a cursory review of the record makes InterMountain's ideological motivations obvious.

The district allows teachers to keep books in their classrooms that discuss sexuality and gender. *Id.* at 18-19. But it discriminates against books that promote a traditional view on that topic. To that end, before punishing Theis, the district interrogated him about the ideas expressed in his books, disputed the scientific and religious basis for those ideas, and questioned whether the books' content was appropriate for

schoolchildren. *See id.* at 16-19. Ultimately, although Theis harbored no ill will towards anyone and although no parent or student had complained about his books, the district barred him from displaying the books in his office precisely because they did "not support transgender or gender neutral" identities. *Id.* at 19. At the same time, the district allowed other classrooms to continue displaying books that *endorsed* same-sex relationships and non-binary behavior or otherwise contained sexually explicit material. *Id.* at 18-19.

B. Unfortunately, InterMountain is not alone in flouting the Constitution. Examples abound of public schools censoring or punishing teachers whose views don't align with the liberal mainstream.

William Loggans, a teacher in Orange County, Florida, often hangs posters of inspirational figures like Rosa Parks and Martin Luther King, Jr., in his classroom. See Crombleholme, Orange County Teacher told to remove Charlie Kirk poster from classroom, WESH 2 (Oct. 15, 2025), perma.cc/3LEE-HKZX. After conservative political commentator Charlie Kirk's assassination, Loggans added a poster with an image of Kirk and a quote telling students to "[n]ever underestimate the power of your voice and the impact you can have on the world when you speak up for what you believe in." Id. When a student complained, school administrators told Loggans to take the poster down. The school claimed it demanded the poster's removal "to maintain classroom neutrality, consistent with [school] policy." Id. But that policy was not being "fairly and consistently enforced." Id. The school told Loggans to remove his Kirk poster, but it

Obama, *id.*, and "several teachers ... have Pride flags in their rooms or stickers on their doors," Abbott, *Florida teacher files grievance after district forced him to remove Charlie Kirk poster from classroom*, Not the Bee (Oct. 14, 2025), perma.cc/N65B-9JF3. Loggans's school, "like many across America, has a double standard when it comes to political and ideological messaging." *Id.*

In Pennsylvania, an elementary school principal was fired for making conservative posts on her personal Facebook account. See Huber, Principal allegedly fired for posting conservative memes on social media, The College Fix (Nov. 28, 2020), perma.cc/P7UW-6DGA. The principal, Amy Sacks, was a 20-year veteran educator, and her school ranked in the top 15 in Pennsylvania during her tenure. Id. But after she shared a series of right-leaning posts and memes on Facebook that satirized reactions to the covid virus, opposed then-candidate Joe Biden, and described politicians as "professional looters," she was unceremoniously removed from her post. Id. School district administrators told Sacks that she was being terminated because of the messages expressed in her posts. See Complaint ¶14-18, Sacks v. Perkiomen Valley Sch. Dist., 2:20-cv-06155 (E.D. Pa. filed Dec. 7, 2020), ECF No. 1-2

A Louisiana teacher, Jonathan Koeppel, was likewise targeted by school administrators for his out-of-school speech and conservative political activism. *See* Allen, *Fired Teacher Sues School Board, Claims He Was Terminated for Conservative Political Activism*, The Daily Signal (Oct. 19, 2021), perma.cc/MKE6-6FEG. A high school Spanish teacher,

Koeppel devoted much of his time outside of the classroom—on social media and at school board meetings—to speaking out against critical race theory, gender ideology, and covid mask mandates. *Id.* As Koeppel described it, "everything that [he] post[s] online or say[s] in real life ... is rooted in conservative values." *Id.* But his commentary landed him in hot water with school administrators who disagreed with his opinions. Those administrators subjected him to multiple hearings about the content of his "social media" and other speech, then fired him a few days later through a termination letter that "did not specify a reason for his dismissal." *Id.*

And of course, many schools have terminated or otherwise punished teachers who prefer to address students using biologically accurate pronouns instead of so-called chosen names and pronouns that reflect a student's transgender identity. E.g., O'Kane, Virginia school board to pay \$575,000 to teacher fired for refusing to use trans student's pronouns, CBS (Oct. 2, 2024), perma.cc/8HWA-2WGX (school district fired teacher who "refused to use a transgender student's pronouns," even though teacher agreed to refer to the student by their chosen name); Ohio public school teacher forced to resign for declining to 'put religious beliefs aside', Alliance Defending Freedom (Dec. 13, 2022), bit.ly/4hqSydr (teacher who felt it is wrong to use non-biological pronouns was told that she must "put her beliefs aside" because they conflict with the school's preferred viewpoint and, when she refused, was ordered to immediately draft a letter of resignation). A number of schools have even refused religious accommodations for teachers whose hesitation regarding non-biological pronouns is rooted in their faith. E.g., Complaint ¶36-60,

Cernek v. Argyle Sch. Dist., 3:24-cv-00447 (W.D. Wis. filed July 8, 2024), ECF No. 2 (school withdrew "religious accommodation" allowing teacher to "not use names when calling on the students" and instead "vote[d] not to renew [teacher's] contract"); Complaint ¶¶31-42, Kluge v. Brownsburg Cmty. Sch. Corp., 1:19-cv-02462 (S.D. Ind. filed June 18, 2019) (similar); Complaint ¶¶68-95, Tapia v. Jurupa Unified Sch. Dist., 5:23-cv-00789 (C.D. Cal. filed May 3, 2023), ECF No. 1 (school district denied teacher's proposed accommodations for her religious beliefs, including transfer to another school, and instead released her from employment).

C. The pattern is clear and one-sided: Schools are silencing right-of-center employee speech that bucks the left-leaning orthodoxy on controversial political issues. In addition to running afoul of the First Amendment, this trend corrodes public confidence in the American school system. Many Americans now believe, with good reason, that "schools promote a biased political perspective" favoring liberal viewpoints at the expense of conservative voices. Anglum & Manion, *Perceptions of US public schools' political leanings and the federal role in education*, Brookings Inst. (archived Oct. 22, 2025), perma.cc/P4NP-443M.

In the face of this worrying trend, it is more important than ever for courts to "reaffirm the bedrock principle that a school may not engage in viewpoint discrimination when it regulates [personal] speech." *L. M. v. Middleborough*, 145 S. Ct. 1489, 1492 (2025) (Alito, J., dissenting from the denial of certiorari). When schools open the door for discussion on a particular subject matter—whether it be gender ideology, political

Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 19 of 21

activism, critical race theory, or anything else—they cannot filter out speech they dislike.

Rosenberger, 515 U.S. at 829.

CONCLUSION

InterMountain's conduct here, censoring Theis's books because they express a

view about sex and gender that departs from the district's own perspective, reflects a

dangerous development in American public education. The court should confirm the

importance of the First Amendment's ban on viewpoint discrimination, reverse the

judgment below, and instruct the district court to enter a permanent injunction that

guarantees Theis's right to express his views on an equal footing with his colleagues.

Dated: October 24, 2025

Respectfully Submitted,

/s/ J. Michael Connolly

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13

Case: 25-5641, 10/24/2025, DktEntry: 20.2, Page 20 of 21

CERTIFICATE OF SERVICE

I certify that on October 24, 2025, I electronically filed this brief with the Clerk of the Court using the ACMS system, serving all counsel of record.

Dated: October 24, 2025 /s/ J. Michael Connolly

J. Michael Connolly

Counsel for Defending Education

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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