No. 24-410

In the Supreme Court of the United States

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison,

Petitioner,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE* STATE OF SOUTH CAROLINA, STATE OF WEST VIRGINIA, AND 16 OTHER STATES IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Nearly 85 percent of schoolchildren—about 50 million—attend state-run schools. U.S. DEP'T OF EDUC., REPORT ON THE CONDITION OF EDUCATION 2024 2 (2024). These schools employ millions of teachers and administrators. And they cost States almost $900 billion a year. *Id.* at 21. So suffice it to say that public schools play a central role in American life—and constitute a central focus for the States.

But public schools aren't important just because of their scale. They also serve an essential function in our democratic society: "teach[ing] what it is to be a true human being, living within a moral order." Russell Kirk, *The Conservative Purpose of a Liberal Education*, in THE ESSENTIAL RUSSELL KIRK (George A. Panichas ed., 2007). These schools "transmit culture"—including civic culture. T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE 96 (1948). And they teach "reverence" for our civic inheritance. ABRAHAM LINCOLN, THE PERPETUATION OF OUR POLITICAL INSTITUTIONS (1838). Only an education that both teaches knowledge *and* inculcates virtue can adequately "prepare[] children to participate effectively in the common public sphere." E.D. HIRSCH, THE MAKING OF AMERICANS: DEMOCRACY AND OUR SCHOOLS xi (2009); *see also* HORACE MANN, THE NECESSITY OF EDUCATION IN A REPUBLICAN GOVERNMENT (1839).

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[1] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

This Court has long recognized as much. Public education "prepare[s] pupils for citizenship in the Republic" by "inculcat[ing] the habits and manners of civility," which is "indispensable to the practice of self-government in the community and the nation." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986). Forming virtuous, wise human beings who know how to carry themselves within a moral order is "necessary to the maintenance of [our] democratic political system." *Ambach* v. *Norwick*, 441 U.S. 68, 77 (1979). And a fulsome education is "the very foundation of good citizenship." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). So public schools have long prioritized instruction in "fundamental values." *Ambach*, 441 U.S. at 86.

These civic virtues include the ability to respectfully engage in public debate about the big questions facing society. Panelists, *The Roots of Modern Education*, 35 REGENT U. L. REV. 471, 474 (2023). Public schools can act "as an 'assimilative force'" that brings "diverse and conflicting elements in our society … together on a broad but common ground." *Ambach*, 441 U.S. at 78. Exposing children to diverse ideas helps them "awaken … to cultural values" and "adjust normally to [their civic] environment." *Brown*, 347 U.S. at 493; *see also Fraser*, 478 U.S. at 681 (explaining how schools model ideals "essential to a democratic society," like "tolerance of divergent political and religious views, even when the views expressed may be unpopular").

But these principles could quickly unravel. In *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969), this Court struck a sound balance between developing civic virtue through tolerance of

diverse ideas and keeping the order needed to impart knowledge. It did so because "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Id.* at 512 (quoting *Keyishian* v. *Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967)). The First Circuit upset that balance in the decision below.

Here, Middleborough prohibited L.M., a middle school student, from wearing t-shirts with the simple messages, "There are only two genders" and "There are [censored] genders." Meanwhile, it actively promoted gender identity theory in the classroom. The First Circuit deferred to the school's censorship and viewpoint discrimination.

At bottom, the First Circuit's decision undercuts one of the most important purposes of public education: forming civic virtues by pursuing truth—even when uncomfortable. The Court should grant the Petition to restore that function.

SUMMARY OF ARGUMENT

By silencing L.M., the First Circuit created a speech-hostile standard that—contrary to *Tinker*—allows schools to restrain even silent, passive displays of speech that cause no actual disruption. It split from other circuits on issues like what facts a school must show to justify a restriction on student speech. And it effectively sanctioned viewpoint discrimination in public schools. If the decision below holds, public schools could become an incomplete forum of ideas, more concerned with avoiding offense than developing character.

REASONS FOR GRANTING THE PETITION

I. The First Circuit Eroded Student Speech Rights by Misapplying *Tinker*.

A. *Tinker* Imposes a Demanding Standard for Restricting Student Speech.

In public schools, some tension will always exist between the Constitution's guarantee of free speech and maintaining order. *Zamecnik* v. *Indian Prairie Sch. Dist., No. 204*, 636 F.3d 874, 877–78 (7th Cir. 2011). But *Tinker* struck an effective balance. Under *Tinker*—at least applied correctly—a student may express his mind "if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Tinker*, 393 U.S. at 524. This framing makes free speech the default. And if a state school wants to upset that default, the burden is on the State to justify it.

A school's burden under *Tinker* isn't light. It is, in fact, a "demanding standard" for two reasons. *Mahanoy Area Sch. Dist.* v. *B. L. ex rel. Levy*, 594 U.S. 180, 193 (2021). First, it is factually demanding, requiring solid evidence to show a reasonable fear of "substantial disruption." *Id.* Second, it is legally demanding, calling on States *and* courts to carefully balance the need to build civic virtue with an orderly learning environment. By requiring both aspects—a factual and legal vetting—*Tinker* ensures that States do not inadvertently "teach youth to discount important principles of our government as mere

platitudes." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637(1943).

Properly balancing these concerns is vital to making public education worthwhile. After all, the Constitution generally protects minors as it does adults—including their speech. *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U.S. 52 (1976); *Tinker*, 393 U.S. at 506. And robust speech is the only way students can begin to "prepare ... for citizenship in the Republic," *Bethel*, 478 U.S. at 681—a citizenship that includes learning the value of and "how to operate within our marketplace of ideas," *Mahanoy*, 594 U.S. at 190. Of course, students should be taught "socially appropriate behavior," *Bethel*, 478 U.S. at 681, and good manners, *Mahanoy*, 594 U.S. at 191-92. And schools require some "modicum of discipline and order." *Goss* v. *Lopez*, 419 U.S. 565, 580 (1975). Yet *Tinker*'s speech-friendly standard shows that this Court expects States to both keep order *and* model for students that, even if they disagree with another's speech, they should be ready to "defend to the death [their] right to say it." *Mahanoy*, 594 U.S. at 190. Sometimes this speech protection means permitting and even "encouraging debate on controversial topics." *Zamecnik*, 636 F.3d at 878.

For a sense of what "controversial" means, recall *Tinker*'s facts. In the 1960s, the national temperature on the Vietnam War had hit a boiling point. THE WHITE HOUSE HIST. ASS'N, *Anti-War Protests of the 1960s-70s*, http://bit.ly/3XY1LRn (last visited Oct. 10, 2024). Decisions about Vietnam "disrupted and divided this country as few other issues ever have." *Tinker*, 393 U.S. at 524 (Black, J., dissenting). The government took sides—calling protestors

"communist-inspired or traitorous." Robert N. Strassfeld, *Lose in Vietnam, Bring the Boys Home*, 82 N.C. L. REV. 1891, 1926 (2004). Several schoolchildren in Des Moines inserted themselves into this "highly emotional subject" by wearing black armbands—symbols of protest against the war. *Tinker*, at 516 (Black, J., dissenting). These armbands took the other "students' minds off their classwork and diverted them to thoughts about" the war. *Id.* at 518 (cataloging many classroom and interpersonal disruptions). The emotional turmoil was also significant: the armbands inevitably "call[ed] attention to the wounded and dead of the war, some of the wounded and the dead being [affected students'] friends and neighbors." *Id.* at 524.

But this gut-wrenching controversy didn't justify restricting speech. *Tinker* held that a school could prohibit "a particular expression of opinion" only if it showed that prohibition "was caused by something more than a mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. The school had to "forecast substantial disruption of or material interference with school activities." *Id.* at 514. *Tinker*, then, embraced a notion that "free speech rights should be as broad as possible so long as the school can still maintain discipline and its basic educational purpose." Brandon James Hoover, *An Analysis of the Applicability of First Amendment Freedom of Speech Protections to Students in Public Schools*, 30 U. LA VERNE L. REV. 39, 65 (2008).

That context explains why *Mahanoy* called *Tinker*'s standard "demanding." Amid a bitter, explosive, and disruptive debate, the Court demanded

that schools show evidence of a major disturbance before policing speech. And it required courts to not just rubber stamp school decisions, but to carefully balance order and civic virtue. Anything less than this "scrupulous protection" of speech would end up "strangl[ing]" students' minds at their "source"—a truly dismal way to "educat[e] the young for citizenship." *Barnette*, 319 U.S. at 637. No, "[a] decent democracy depends on free speech for the sake of both its democracy and its decency." Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 520 (1997).

Unfortunately, the First Circuit's preferred approach would do what cases like *Barnette* and *Tinker* feared, squeezing young minds whenever their views create discomfort in others. That "speech last" approach would upend *Tinker*'s carefully crafted standard, heavily favoring the school at the cost of free speech. And this upside-down preference hamstrings students' capacity to confront opposing ideas—a core purpose of the States' public schools and a necessary ingredient to building that civic virtue vital to our Republic's citizenry.

B. The First Circuit Misapplied *Tinker* and Its Progeny by Creating a New Lower Standard.

1. The First Circuit's speech-stifling decision cannot be squared with *Tinker*. Consider how similar *Tinker*'s and *L.M.*'s facts are on all key points. In both, the government picked sides in a heated national debate: pro-Vietnam War and pro-gender identity. *See* Strassfeld, *supra*; Pet. App. 55a. In both, students took an opposite position by silently and passively

wearing certain clothing. *See Tinker*, 393 U.S. at 508 (calling the armbands a "silent, passive expression of opinion,"); Pet. App. 34a (calling the T-shirt a "passive and silent[]" message). Both displays "target[ed] no specific student." *Id.* Potential disruption similarly stemmed from alleged psychological turmoil: school officials in *Tinker* forecasted that some students would be reminded of their dead and wounded family and friends, *Tinker*, 393 U.S. at 524 (Black, J., dissenting), and school officials in *L.M.* forecasted that some students would be reminded of the "serious nature" of their "struggles" with "their gender identities," Pet. App. 52a. And in both cases, the schools' anticipated worst-case disruption scenarios were the same: *Tinker*'s school worried that other students would "wear arm bands of other colors," causing the situation to "evolve into something which would be difficult to control," 393 U.S. at 509 n.3, while *L.M.*'s school worried that "others would follow suit" if L.M. wore his T-shirt, resulting in a standoff between groups of students, Pet. App. 50a. Despite this factual indistinguishability, *L.M.* allowed the school to ban L.M.'s speech. Coming to "differing results" despite a "materially identical" fact pattern should be fatal. *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).

2. What's more, though, the First Circuit's ruling differs from *Tinker*'s circuit court progeny. Consider just two ways: first, in deciding what facts count as a substantial disruption (the same issue where *L.M.* ignored *Tinker*); and second, in understanding a court's role in applying *Tinker*.

A survey of other circuits' major student-speech decisions confirms that *L.M.* greatly lowered the

"substantial disruption" bar. The Third, Sixth, Eleventh, and other circuits consistently require a far "more robust" standard than the First Circuit's "anemic" imitation, *Holloman ex rel. Holloman* v. *Harland*, 370 F.3d 1252, 1271 (11th Cir. 2004); *see also Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001); *Barr* v. *Lafon*, 538 F.3d 554, 568 (6th Cir. 2008). In *Holloman*, for example, the court said a substantial disruption is more than a possible or momentary distraction, mere discussions or upset feelings, or even hostile remarks. *See* 370 F.3d at 1272–73. The facts must show "actual disorder"—either real or significantly threatened. *Id.* at 1273. Most circuits say that the more attenuated speech is from past or predicted future disruptions, the less likely it is to be a substantial disruption. *Sypniewski* v. *Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002). That's why most limit their analysis to the context of the school at issue. *See id.* For example, courts will analyze efforts to restrict racist speech at a school with a history of racism differently from efforts at another school without that history. *See Barr*, 538 F.3d at 568. That *L.M.* relied solely on speculation about upset feelings and broad, non-school-specific generalizations contradicts this majority rule.

But even those circuits that adopt "a[n] expansive interpretation of school board authority" to restrict speech have not gone as far as the First Circuit. *See* Ralph D. Mawdsley & Charles J. Russo, *Hostility Toward Religion and the Rise and Decline of Constitutionally Protected Religious Speech*, 240 ED. LAW REP. 524, 525 (2009) (describing the positions of the Seventh and Tenth Circuits). For instance,

Seventh Circuit cases show how *L.M.* departs from even the more anti-free-speech (minority) view. And they are doubly helpful comparators because *L.M.* relied on them heavily.

In *Nuxoll*, the Seventh Circuit held that a student's "Be Happy, Not Gay" T-shirt was protected First Amendment speech. The T-shirt's message was "disapprov[ing] of," "negative" about, and "denigrating" towards homosexuality—an intensely "sensitiv[e]" issue. *Nuxoll* v. *Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 675-76 (7th Cir. 2008). Even so, the court ultimately protected this "tepidly negative" shirt because a "substantial disruption" requires more than speaking on self-conception and identity. *See id*. Three years later, the same school tried to ban the same T-shirt—this time because the wearer was being harassed. *Zamecnik*, 636 F.3d at 875, 881. For round two, the school marshaled more facts: the T-shirt-wearing student had to dodge a water bottle and was so harassed online and in school that she was escorted by school staff from class to class. *Id.* at 880. But the court said it was too speculative to believe that those minor disturbances would evolve into the sort of "*substantial* disruption" *Tinker* contemplated. *Id.*

Compare that to *L.M.* The school's facts showing "substantial disruption" were a survey of some LGBTQ+ students saying they sometimes felt unwelcome or bullied at school, a teacher who said they thought LGBTQ+ students "impacted" by the T-shirt could "potentially disrupt classes," and a belief that LGBTQ+ students generally struggle with suicide. Pet. App. 6a, 9a. As *Zamecnik* recognized, such evidence is far too attenuated and

"speculative"—and thus "too thin a reed on which to hang a prohibition of" speech. 636 F.3d at 877.

L.M. justifies its deviation by saying *Tinker* did not involve deeply rooted characteristics of self-perception. Pet. App. 51a. But *Tinker* never said speech about another's self-conception deserves less constitutional protection. If anything, the stakes on those issues are higher—and so speech concerning them warrants *more* protection, not less. And *Tinker* nowhere suggests that inwardly focused discomfort (emotions about self-identity) is legally different than externally focused feelings (emotions about wounded and killed family and friends). Nor has any circuit said so—until now. *Nuxoll* and *Zamecnik*, for example, didn't think so, and sexual orientation is no less central to self-conception than gender identity.

L.M.'s anti-speech posture does exactly what *Tinker* feared—it makes students learn in an "intellectual bubble." *Zamecnik*, 636 F.3d 876. Middleboro advocates for and "permits advocacy of" gender identity theory ideas, but then "stifle[s] criticism of" those ideas. *Id.*; *see* Pet. App. 66a (noting Middleboro actively "promot[ed] messages commonly associated with 'LGBTQ Pride' such as 'Pride Month,' and 'Pride Day'"). Its message to its students is that it will tolerate no dissent—even on topics of national debate—and that emotionally difficult ideas must be suppressed, not encouraged. That's a dreadful way to model those civic virtues key to public education and a healthy Republic.

3. Equally concerning is the way *L.M.* abdicates the courts' proper role under *Tinker*. Yes, the court owes deference to States' expertise in "educational

policy," but the ultimate question of First Amendment compliance rests with the court. *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of the L.* v. *Martinez*, 561 U.S. 661, 687 n.16 (2010). "[D]eference does not mean abdication; there are situations where school officials overstep their bounds and violate the Constitution." *LaVine* v. *Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001).

L.M. goes far beyond deference, however, saying a court may not "second-guess[]" a school's "assessment" of "material disruption." Pet. App. 50a. This flips *Tinker* on its head: rather than conducting a robust inquiry with a strong pro-speech default, *L.M.* leaves courts rubber stamping every school's preferred "learning environment." *Id.* at 45a–46a; contra, *e.g.*, *J.S. ex rel. Snyder* v. *Blue Mountain Sch. Dist.*, 650 F.3d 915, 930 (3d Cir. 2011) (refusing to defer to a school's judgment that a student's speech would substantially disrupt or materially interfere with the school). This blind deference erases any meaningful role for the courts and leaves schools as sole adjudicators of the First Amendment. After all, if substantial disruptions justify speech restrictions, and schools' substantial-disruption assessments cannot be second-guessed, then a court is just checking boxes. *See, e.g.*, John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 613 (2009) (saying *Tinker* "would be largely undermined if schools could simply define any set of disruptive consequences as substantial").

This vision is flawed. Federal courts have a responsibility to say "what the law is" that doesn't stop at the schoolyard gate. *See Brown*, 347 U.S. at 492-93. It is precisely because our future "depends

upon leaders trained through wide exposure to [the] robust exchange of ideas" that schools cannot possess this "absolute authority" over students. *Tinker*, 393 U.S. at 511–12. The Constitution and *Tinker* do, in fact, call on courts to decide "what would make an environment conducive to learning," contra Pet. App. 62a—especially when learning those virtues, civic and other, so foundational to our Republic. By overinflating deference, *L.M.* "substantially waters down [*Tinker*'s] otherwise potentially speech-protective standard." Mary-Rose Papandrea, *The Great Unfulfilled Promise of* Tinker, 105 VA. L. REV. ONLINE 159, 173 (2019).

L.M. departed from *Tinker* and its progeny and should be reversed.

II. The First Circuit Sanctioned Viewpoint Discrimination Against Students.

Public schools and school districts are "not at liberty to suppress or punish speech simply because they disagree with it, or because it takes a political or social viewpoint different from theirs, or different from that subscribed to by the majority of the adults within any given school district." *Bysrom ex. rel. Bystrom* v. *Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 755 (8th Cir. 1987).

Restrained by the First Amendment, a public school may not regulate speech to "'excis[e] certain ideas or viewpoints from the public dialogue.'" *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 588 (2023) (cleaned up). Simply put, a school engages in viewpoint discrimination when it "discourage[s] one viewpoint and advance[s] another" by "granting to

'one side of a debatable public question … a monopoly in expressing its views.'" *United States* v. *Kokinda*, 497 U.S. 720, 736 (1990) (cleaned up).

That's exactly what Middleborough did here. And the First Circuit approved. It found the statements "There are only two genders" and "There are [censored] genders" to be inherently "demeaning speech," akin to profanity. Relying on possible audience reaction, the First Circuit supported Middleborough's preference for one viewpoint in a contentious and debatable public question. Middleborough's policies also do not apply equally to all students but discourage one viewpoint, confirming the policies' discriminatory nature.

This Court can set the record straight and restore protections against viewpoint discrimination to the students in the First Circuit.

A. By Upholding Middleborough's Ban, the First Circuit Preferred Middleborough's Viewpoint Over L.M.'s on the Same Topic.

This Court has "said time and again" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Matal* v. *Tam*, 582 U.S. 218, 244 (2017) (cleaned up). The "'essence of viewpoint discrimination'" is the government approving messages that are "'positive' about a person" but not those that are "'derogatory,'" because doing so "reflects the Government's disapproval of a subset of messages it finds offensive." *Iancu* v. *Brunetti*, 588 U.S. 388, 393 (2019) (quoting *Tam*, 582 U.S. at 249

(opinion of Alito, J.)). As the First Circuit said years ago, the heart of viewpoint discrimination is a "governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic." *Ridley* v. *Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004).

1. Contrary to the First Circuit's more recent reasoning, the First Amendment's prohibitions on viewpoint discrimination apply to schoolhouses.

The rule "that the government may not regulate speech based on its substantive content or the message it conveys" *isn't* up for debate; it's "axiomatic." *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). Indeed, "[i]f there is *any* fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642 (emphasis added). This means public schools, as *government* schools, "may not silence the expression of selected viewpoints" they disagree with, even when they act with the best motives. *Rosenberger*, 515 U.S. at 835. "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men." *Barnette*, 319 U.S. at 642.

Viewpoint protections, as four federal courts of appeal have recognized, do not end at the schoolhouse door. *See Zamecnik*, 636 F.3d at 876 (finding unconstitutional a high school policy forbidding students from wearing t-shirts or buttons stating "Be Happy, Not Gay" and holding that "a school that

permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality"); *Sypniewski*, 307 F.3d at 265 (finding unconstitutional a school district's policy forbidding middle and high school students from wearing a t-shirt bearing the word "Redneck"); *see supra Bysrom*, 822 F.2d at 755; *Chen* v. *Albany Unified Sch. Dist.*, 56 F.4th 708, 722–23 (9th Cir. 2022) (public school students are "free to express offensive and other unpopular viewpoints" as long as they do not "disseminate severely harassing invective targeted at particular classmates in a manner that is readily and foreseeably transmissible to those students").

But this consensus didn't deter the First Circuit here. The First Circuit upheld Middleborough's ban on messages expressing a binary view of gender. In so doing, the court found that such messages "den[ied] the existence of the gender identities of transgender and gender non-conforming students," and that the messages were inherently "demeaning" to such students. Pet. App. 52a–53a.

2. Yet the First Circuit had no objection to Middleborough not only permitting but lauding messages supporting a non-binary view of gender. Pet. App. 101a-102a (schools in the school district feature signs such as "Rise Up to Protect Trans and GNC [or gender non-conforming] Students," Rainbow flags, and signs declaring "Proud friend/ally of LGBTQ+").

The First Circuit found the binary view of gender inherently offensive—and missed the real point of L.M.'s speech—because it assumed the debate about gender is settled. It isn't. Gender is a hotly debated

topic, but to Middleborough, and now the First Circuit, there is only one permissible viewpoint in the public-school setting. And ironically, it's the view with the least popular support.

A full 65% of Americans fundamentally disagree with transgender ideology. *Cultural Issues and the 2024 Election,* PEW RESEARCH CENTER (June 6, 2024), https://tinyurl.com/4wd7cdn7. Indeed, "[t]his view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Obergefell* v. *Hodges*, 576 U.S. 644, 657 (2015).

The First Circuit effectively barred students from communicating the mainstream public opinion on this topic in public schools. And students will suffer for it. Public schools can't teach students what it means to engage in civil discourse and dialogue when the two-thirds of the country that hold traditional views are painted as so offensive they don't deserve to be heard.

L.M.'s message wasn't demeaning; it was his viewpoint that the First Circuit found offensive.

3. Some students may take offense at messages they do not want to hear. That's to be expected, but it's not the reaction our institutions should champion. Education is supposed to foster a capacity "[t]o endure the speech of false ideas or offensive content and then to counter it." *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992). That is—or should be—just "part of learning how to live in a pluralistic society" that "insists upon open discourse." *Id.*

The heckler's veto—proscribing speech because it offends someone—is anathema to the First

Amendment. *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). From the amendment's Establishment Clause to its Free Speech Clause, constitutionally protected conduct cannot "be proscribed based on perceptions and discomfort." *Bremerton* 597 U.S. at 534–35 (overruling *Lemon* partly because it created a "modified heckler's veto"). Courts do not use "community reaction" to "dictate whether" a person's "constitutional rights are protected." *Melzer* v. *Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 336 F.3d 185, 199 (2d Cir. 2003); *see also Munroe* v. *Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475 (3d Cir. 2015) (saying schools should not allow the public to hijack the government "to shout down unpopular ideas that stir anger").

The Dress Code's effect of banning any message "that is offensive to a substantial percentage of the members of any group" amounts to viewpoint discrimination because "[g]iving offense is a viewpoint." *Tam*, 582 U.S. at 243; *see also id.* at 244 ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'") (cleaned up).

Indeed, "a speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government's disapproval of the speaker's choice of message." *Id.* at 250 (Kennedy, J., concurring).

But that's what the First Circuit has done here. *L.M.* assumes that a message calling into question another's statement of personal identity demeans

them and strikes at the "core of [their] being"; that affected students will per se react emotionally and negatively; and that student discomfort will inevitably lead to "symptoms of a sick school." *Id*. at 873–74, 880. This standard justifies any speech restriction so long as Middleborough shows it reasonably interpreted a message as demeaning personal identity. *Id*. at 873. In *L.M.*'s framework, at least as to certain *verboten* subjects, students' discomfort automatically trumps everything. Allowing Middleborough to "proscribe speech" based on "perceptions" and "discomfort" is precisely the sort of "heckler's veto" this Court condemns. *Bremerton* 597 U.S. at 535.

Unfortunately, *L.M.* isn't alone in endorsing the heckler's veto. In *Dariano* v. *Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (9th Cir. 2014), the Ninth Circuit saw no difference "between 'substantial disruption' caused by the speaker' and 'substantial disruption' caused by reactions of onlookers." Judge O'Scannlain in dissent explained that, in fact, *Tinker* "went out of its way to reaffirm the heckler's veto doctrine." *Id.* at 773 (O'Scannlain, J., dissenting from the denial of rehearing en banc). And the Ninth Circuit's contrary holding "create[d] a split," "imperils minority viewpoints" and "contravenes foundational First Amendment principles." *Id.* At least one other court has since taken a similarly misguided approach. *See Munroe*, 805 F.3d at 475 (explaining why a heckler's veto should not prevail in speech retaliation cases but then seemingly embracing the heckler's veto in the school context).

The Court should resolve this circuit split. After all, the reason the Court rejects a heckler's veto

standard in free speech cases largely overlaps with States' interests in robust free speech in schools: part and parcel of being American is hearing others' viewpoints—even (perhaps especially) when those viewpoints are new, different, or uncomfortable. *See Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949). Speech that is "provocative and challenging … may strike at prejudices and preconceptions and have profound effects as it presses for acceptance of an idea." *Id.* So "silencing the speech" that "is associated with particular problems" should generally not be an option, even if it is sometimes the path of least resistance." *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014).

Forcing a confrontation of ideas is precisely what *L.M.* was trying to accomplish here. He wanted to share his opinion about gender identity with others in an environment actively promoting the contrary view. Pet. App. 8a. Undoubtedly his T-shirt offered a challenging and different view on gender identity. But Middleborough banned it for textbook heckler's veto reasons: because others would be upset. It is dangerous to teach our youth to smother uncomfortable dissent in the public square. States cannot provide a healthy, integrated public education so long as a core reason for that education— building civic virtue—is being actively undermined by an institutionalized heckler's veto. The Bill of Rights "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Barnette*, 319 U.S. at 637.

B. By Upholding a Dress Code That Does Not Apply Equally to All Students, the First Circuit Burdened L.M.'s Viewpoint but Not Middleborough's.

One way to spot viewpoint discrimination is by asking whether a speech restriction "applie[s] equally" to both sides of the debate. *Barr*, 538 F.3d at 572. In *Barr v Lafon*, for example, the Sixth Circuit upheld a school's prohibition on students wearing clothing depicting the Confederate flag because, *inter alia*, it "applied equally to a student displaying a Confederate flag in solidarity with hate groups, and [to] another who displayed a Confederate flag in a circle with a line drawn through it," and therefore did not discriminate based upon viewpoint. *Id.*

The "applied equally" principle is familiar to this Court. In *R.A.V.* v. *City of Saint Paul,* an individual challenged a city ordinance prohibiting messages arousing "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender ...." 505 U.S. 377, 380 (1992). The Court held the ordinance unconstitutional (in part) because it amounted to viewpoint discrimination due to its lack of equal application. *Id.* at 391. The ordinance allowed fighting words in favor of tolerance and equality, but not those in opposition. *Id.* "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.'" *Id.* at 391–92. This Court held the city couldn't "license one side of a debate to fight freestyle,

while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

The First Circuit's ruling ignored that equal application requirement. While it mentioned *Barr* in passing, it did not bother to wrestle with the part of *Barr* that examined whether the dress code applied equally to all students. And it's clear why: the Dress Code provisions in question do not apply equally to all students.

The First Circuit's refusal to grapple with equal application means the traditional viewpoint on gender is singled out for discrimination. Reminiscent of Henry Ford's quip that buyers could get the Model T in any color so long as it was black, the Dress Code says students can express any belief they want about gender identity so long as it aligns with the school's support for a non-binary view of gender. Students are allowed, even encouraged, to display messages that support LGBTQ+ pride, but they are not allowed to wear clothing that expresses a contrary view.

The First Circuit's reasoning collapses when applied consistently. To emphasize the possible negative impacts of L.M.'s message on certain students, the First Circuit said that gender-based "self-conceptions are no less deeply rooted than those based on religion, race, sex, or sexual orientation." Pet. App. 51a. To be consistent, then, the First Circuit would allow student speech expressing "I am a god" but exclude student speech expressing "There is only one God," because the latter denies the existence of the former's religious "self-conception." But that would obviously be an affront to the latter student's

First Amendment free speech and religious freedom rights.

For example, in *Shurtleff* v. *City of Boston*, this Court considered a challenge to Boston's practice of allowing private groups to raise flags on public property while prohibiting a Christian individual from raising a Christian flag. 596 U.S. 243 (2022). Boston "concede[d] that it denied Shurtleff 's request solely because the Christian flag he asked to raise 'promot[ed] a specific religion.'" *Id.* at 258 (internal citations omitted). The Court concluded that Boston's "refusal discriminated based on religious viewpoint and violated the Free Speech Clause." *Id.* at 259.

So too here. Beliefs about gender are deeply rooted. And schools should be the place to freely express beliefs. But not according to the First Circuit, which seeks to insulate some students from beliefs they do not share by suppressing messages that the government does not approve. That's viewpoint discrimination.

C. Viewpoint Discrimination Harms Students.

Undergirding the legal prohibition on viewpoint discrimination in public schools is a concern for student development. As administrators of public education, the States have a particular interest in helping students thrive and grow through their academic journey. And preserving student speech rights is an important way to do that.

Indeed, "[s]tudents' attempts" to express political, religious, and racial speech "can be a particularly important means of developing and preserving

identity." Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 Pepp. L. Rev. 647, 670 (2005). Public schools should be places "where teachers and officials are willing to engage in potentially controversial discussion and listen to unpopular views …." Susannah Barton Tobin, *Divining Hazelwood: The Need for A Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 243 (2004). Such an environment "equips students to analyze problems rationally, voice their opinions articulately and calmly, and utilize appropriate resources to take action or resolve concerns." *Id.*

But when the government steps in to sanction certain viewpoints and stifle others, it frustrates students' search for truth and formation of civic virtues. *Red Lion Broad. Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market").

The First Circuit's ruling allows impermissible viewpoint discrimination in public schools at the expense of the students who engage in the marketplace of ideas there. In a republic, the "sick school" is not the one where students confront ideas they find offensive but the one where students never learn to offer a reasoned response.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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