

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,
Petitioners,

v.

Town of Middleborough, Massachusetts; et al
Respondents.

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

**BRIEF OF AMICI CURIAE
LIFE LEGAL DEFENSE FOUNDATION AND
YOUNG AMERICA'S FOUNDATION
IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICI CURIAE¹

Amicus Life Legal Defense Foundation (“Life Legal”) is a California non-profit corporation that provides legal assistance to pro-life advocates, with a special emphasis on the protection of First Amendment rights.

With the overturning of *Roe v. Wade*, 410 U.S. 113 (1973), and the return of the issue of abortion “to the people and their elected representative in the democratic process” (*Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2310 (2022)), the need to protect the ability of pro-life citizens to exercise their First Amendment rights to persuade their fellow citizens has taken on new urgency. Courts cannot waver on this fundamental right of citizens, including public school students, to freely express their opinions in order to shape public discourse on this and other hot button issues.

Amicus Young America’s Foundation (“YAF”) is a nonprofit organization whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. In part, YAF fulfills its mission through student-led Young Americans for Freedom chapters on campuses and through individual membership. YAF chapters engage in

¹ No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than amicus or its counsel funded it. Pursuant to Rule 37.2, counsel for all parties received notice of intention to file this amicus brief on October 29, 2024, more than 10 days before the due date.

campus activism projects including the De-Transitioners Day of Visibility and by hosting speakers like Chloe Cole and Paula Scanlan who advocate for the protection of women as women. YAF members are consistently berated, penalized, and banned by school actors who label their speech as harmful, hateful, or otherwise problematic.

This case is important to YAF because it presents the court with an opportunity to check viewpoint-based censorship by school officials. School children should not be punished or treated differently for expressing a view that conflicts with the common orthodoxy of their classmates or teachers. If the government is permitted to regulate speech based on viewpoint classrooms will miss out on profitable discussions and individual students will self-censor for fear of reprisal. In adulthood, these students will find it hard to fully participate in, or even believe in the American experiment because government actors will have stripped them of fundamental freedoms in their formative years.

SUMMARY OF ARGUMENT

This case has far-reaching implications for the future health of our democratic institutions. Because public schools are tasked with the responsibility of preparing the next generation to function in a civil democracy, maintaining the free speech of students is critical to the educational mission of public schools and to the future of our republic. If the First Circuit's opinion is allowed to stand, then school boards and officials will have a near unfettered right to impose their preferred ideologies on the next generation, allowing no

student dissent in the face of indoctrination by the school system. The “nurseries of democracy” (*Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021)) that the public schools are supposed to represent are in danger of becoming “enclaves of totalitarianism,” forbidden by this Court’s precedent. *Tinker v. Des Moines*, 393 U.S. 503, 511 (1969).

The Supreme Court has held that the First Amendment protects the free speech rights of public-school students even when the thoughts they express might prove offensive to some listeners, provided the speech does not cause a substantial disruption of school functioning. *Id.* at 509.

Nevertheless, the Supreme Court has allowed censorship of some non-disruptive student speech under a variety of rationales, e.g., avoiding the appearance of endorsement by the school itself, discouraging the use of illegal drugs, and preventing minors from being exposed to profane sexual innuendo.

But in no case has censorship of student speech been permitted where a school presses one view of a controversial topic on students and a student expresses a different view.

In the instant case, L.M.’s school engaged in a pervasive campaign of promotion and celebration of the highly controversial and hotly debated issues of non-heterosexual orientations and gender fluidity, a campaign unrelated to the educational mission of the school. When L.M. expressed a different viewpoint, he was censored. Petition for a Writ of Certiorari 4-6 (“Pet. Cert.”).

Cloaked in the guise of concern over student safety and the avoidance of substantial disruption of

educational activities, the school's actions were nothing less than the muscle-flexing of an aspiring totalitarian system over those under its control.

The petition for certiorari should be granted, the opinion of the First Circuit reversed, and a preliminary injunction issued to prevent any further abrogation of L.M.'s constitutional right to freedom of expression.

ARGUMENT

I. **Public schools in America are meant to be “nurseries of democracy,” not “enclaves of totalitarianism.”**

Approximately 49.6 million, or 90%, of American elementary and secondary school students attended public school in the fall of 2022.² One of the main reasons parents choose public schools over private is the cost of the latter, which can be “daunting” for many, if not most, Americans, who often need some form of financial aid in order to send their children to private schools.³ And overwhelmingly, thanks to compulsory education laws, to some school every child must go.

Consequently, public schools wield tremendous influence over formation of the nation's

² *Fast Facts -- Back to School Statistics*, Institute of Education Sciences National Center for Education Statistics, <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Nov. 5, 2024).

³ Emily Pierce & Cole Claybourn, *Private School v. Public School*, U.S. News & World Report (Aug. 29, 2023), <https://www.usnews.com/education/k12/articles/private-school-vs-public-school>.

youth, de facto captives of the public school system. At its best, the system forms students into citizens who, once reaching maturity, are ready to take on the rights and responsibilities of participating in the nation's democratic system of government. But precisely because they have so much influence, public schools cannot be allowed unreviewable control over student speech, with no guardrails to ensure that they are indeed preparing students properly for democracy, rather than authoritarianism.

A. As “nurseries of democracy”, public schools must vigorously protect the free speech rights of students.

Educational reformer John Dewey envisioned public schools as places where students would learn how to function as adults in the community. He saw schools as an “embryonic community life . . . that reflect[s] the life of the larger society.”⁴ Dewey wanted to introduce activities in school that would encourage students’ self-expression, self-direction and active participation in the study of nature and art.⁵ That “larger society” to be served by these changes included the political system of democracy in America. Dewey was a firm supporter of democracy and believed that democratic ideas should be applied in the educational context. His “ideas of democracy” include freedom of speech as

⁴ John Dewey, *The School and Society* 27 (2d ed. 1915), available at <https://www.gutenberg.org/cache/epub/74376/pg74376-images.html>.

⁵ *Id.*

“the lifeblood of any democracy,”⁶ the rule of law as opposed to the whims of dictators,⁷ and majority rule coupled with the protection of minority rights,⁸ among other values.

Dewey’s ideals are still reflected in modern discussions on the purpose of public education. At an education summit sponsored by the Reagan Foundation in 2018, then Senate Committee on Health, Education, Labor and Pensions Chair Lamar Alexander (R-TN) stated that—in addition to reading, writing and arithmetic—teaching students what it means to be an American citizen is one of the main purposes of public education. Rep. Danny Davis (D-IL) lamented that public schools were failing to effectively accomplish this purpose. Condoleezza Rice, former Secretary of State under President George W. Bush, observed that education has a role in exposing people to other beliefs and opinions and having intelligent dialogue about those differences.⁹

This educational purpose of preparing students to be functioning members of a democracy

⁶ *Principles of Democracy, Freedom of Speech*, Bureau of International Information Programs, U.S. Department of State, available at

<https://www.principlesofdemocracy.org/speech-dem>.

⁷ *Principles of Democracy, The Rule of Law*, Bureau of International Information Programs, U.S. Department of State, available at

<https://www.principlesofdemocracy.org/law>.

⁸ *Principles of Democracy, Majority Rule, Minority Rights*, Bureau of International Information Programs, U.S. Department of State, available at

<https://www.principlesofdemocracy.org/majority>.

⁹ Autumn A. Arnett, *What Is the Role of Public Education in the US?*, Higher Dive (Apr. 17, 2018).

by fostering freedom of speech and the protection of minority rights has been echoed by this Court:

America's public schools are the *nurseries of democracy*. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. *That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, 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."*

Mahanoy 594 U.S. at 190 (2021) (emphasis added) (holding that a public high school violated a student's First Amendment rights by suspending her from the cheerleading team because of off-campus statements criticizing the school and the team).

In light of the power wielded by public school officials over curriculum as well as the daily lives of students, it is imperative that the courts carefully watch over any attempts by school officials to censor student speech in violation of the First Amendment. Failure to do so emboldens school boards to establish the "enclaves of totalitarianism" *Tinker* warned against.

As Justice Alito noted in a more recent case involving student speech:

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school’s ‘educational mission.’ [S]ome public schools have defined their educational missions as including *the inculcation of whatever political and social views are held by the members of these groups.* . . .

. . . *The ‘educational mission’ argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.”*

Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J. concurring) (emphasis added) (holding that a school could censor student speech (“BONG HiTS 4 JESUS”) that could be reasonably understood to advocate illegal drug use). This quote from *Morse* pinpoints the core problem with the First Circuit opinion. The school is inculcating students on a political/social issue and suppressing dissent.

B. The “tyranny of the majority” results in an “enclave of totalitarianism.”

Tinker was decided in 1969, less than twenty-five years after the fall of the authoritarian Third Reich in World War II. The Cold War was well underway, and the rise of Soviet Union totalitarianism was perceived as a real threat to democracy worldwide. The reference in *Tinker* to “enclaves of totalitarianism” in the public schools was, therefore, not made in a vacuum. Both regimes used the public school system to indoctrinate students and create loyal followers of their totalitarian ideologies. They not only engaged in indoctrination, but also in suppression of opposing viewpoints.

Starting in the 1920s, the Nazi Party targeted youth with its propaganda.

Education in the Third Reich served to indoctrinate students with the National Socialist world view. Nazi scholars and educators glorified Nordic and other “Aryan” races, while labeling Jews and other so-called inferior peoples as parasitic “bastard races” incapable of creating culture or civilization.¹⁰

¹⁰ United States Holocaust Memorial Museum, *Shaping the Future: Indoctrinating Youth*, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/indoctrinating-youth> (last visited Oct. 21, 2024).

The aim was to produce “race-conscious, obedient, self-sacrificing Germans who would be willing to die for Führer and Fatherland.”¹¹ The tactics included removal of some books from schools and introducing new books that furthered the aims and beliefs of the Nazi Party.¹²

The program to indoctrinate youth was hugely successful. The Hitler Youth, the Nazi-organized youth movement which consisted of German boys and girls aged 10-18, rose from 100,000 members in 1933 to 7.2 million in 1940. “Enthusiasm, peer pressure, and coercion” caused a significant increase in membership.¹³ Starting in 1933, the Nazis also engaged in suppression of other perspectives and youth groups that competed with the Hitler Youth. By 1939, the Hitler Youth was the only legal youth organization in Germany and membership was mandatory. These indoctrinated youth comprised Hitler’s war effort in World War II. The Nazification of Germany was a process that began in childhood and continued into adulthood, with the German army dealing with any dissenters that remained.¹⁴ The Nazi’s program of indoctrinating youth thus served a critical role in cementing Adolf Hitler’s control over Germany.

The Soviet Union followed a similar path of control over the public schools as a means of indoctrinating youth into communist ideals. “From the viewpoint of Soviet Marxists . . . [e]ducation was,

¹¹ *Id.*

¹² *Id.*

¹³ United States Holocaust Memorial Museum, *Hitler Youth*, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/hitler-youth-2> (last visited Oct. 21, 2024).

¹⁴ *Id.*; *Indoctrinating Youth*, *supra* note 10.

by definition, ideological . . . The Soviet school must train Soviet citizens, freed from the prejudices of religion and understanding the meaning of class war, the legitimacy of the revolution and the goals of the Soviet state.”¹⁵ During the 1940s the educational system, under the rigid control of the party and state administration, was devoted to the inculcation of communist discipline and Soviet patriotism.¹⁶ Hence, propaganda permeated the curriculum, including the sciences and the humanities. Even the play *Hamlet* was portrayed as the “exposure of a decadent court aristocracy.”¹⁷

Like Nazi Germany, the Soviet Union had youth organizations—the Pioneers for youth ages 9-14 and the Komsomol (Communist Youth League) for youth ages 14-28. The purpose of these organizations was to spread Communist teachings and prepare children to become future members of the Communist Party.¹⁸

Communist Russia also used peer pressure to produce conformity; “[c]hildren of arrested parents were liable to be expelled from university and even from high school after a ritual public humiliation by

¹⁵ Sheila Fitzpatrick, *Education and Social Mobility in the Soviet Union 1921 – 1934*, 18 (1979)

¹⁶ Henri-Irene Marrou & J.J. Chambliss, *Revolutionary Patterns of Education*, Encyclopedia Britannica, <https://www.britannica.com/topic/education/Revolutionary-patterns-of-education> (last visited Oct. 21, 2024).

¹⁷ *Soviet Education*, The Atlantic (Apr. 1953), <https://www.theatlantic.com/magazine/archive/1953/04/soviet-education/640302/>.

¹⁸ *Komsomol*, Encyclopedia Britannica, <https://www.britannica.com/topic/Komsomol> (last visited Oct. 21, 2024).

their peers.”¹⁹ This practice continued in the broader society, with family members and close associates publicly denouncing anyone accused of deviating from the Party in words or actions.

The Chinese modeled their educational system after the Soviet Union, receiving aid and guidance in using the system to propagandize the population.²⁰

Life under a totalitarian regime has been described as one in which every citizen is required to live a lie in order to survive economically and even physically. Vaclav Havel, the Czechoslovakian dissident, in his famous essay *The Power of the Powerless*, described the regime’s ideology as a “secularized religion” which, if accepted, results in the “abdication of one’s own reason, conscience, and responsibility, for an essential aspect of this ideology is the consignment of reason and conscience to a higher authority.”²¹ Regarding the necessary lies told by the regime, Havel says, “[i]ndividuals need not believe all these mystifications, but they must *behave as though they did*, or they must at least *tolerate them in silence*, or get along well with those who work with them. For this reason, however, they

¹⁹ Sheila Fitzpatrick, *Everyday Stalinism – Ordinary Life in Extraordinary Times: Soviet Russia in the 1930s* (2000), available at <https://dokumen.pub/everyday-stalinism-ordinary-life-in-extraordinary-times-soviet-russia-in-the-1930s-9780198021698-0198021690.html>.

²⁰ S.N. Mukerji & Robert F. Arno, *Education Under Communism*, Encyclopedia Britannica, <https://www.britannica.com/topic/education/Education-under-communism> (last visited Oct. 21, 2024).

²¹ Vaclav Havel, *The Power of the Powerless* 3-4 (Oct. 1978), available at <https://www.nonviolent-conflict.org/wp-content/uploads/1979/01/the-power-of-the-powerless.pdf>.

must live within a lie.”²² Perpetuation of the system relies on individuals living within the lies told by the regime.

Alexander Solzhenitsyn, the famous Soviet dissident, addressed the solution to this state of affairs found in totalitarian regimes in his essay, “Live Not by Lies,” in which he encouraged Soviet citizens to oppose the regime. He said, “For violence has nothing to cover itself with but lies It demands of us only . . . a daily participation in deceit. . . . And therein we find . . . the simplest, the most accessible key to our liberation: a personal nonparticipation in lies!”²³

It is no answer to this concern that, since school boards are locally controlled and democratically elected, the dangers of totalitarianism are overblown. Political philosophers for centuries have warned that a majority can exert totalitarian control over minority groups just as easily as a tyrant can. Alexis de Tocqueville, in his seminal work *Democracy in America* coined the phrase “tyranny of the majority” and described it in this way: “The very essence of democratic government consists in the *absolute sovereignty of the majority*; for there is nothing in democratic States which is capable of resisting it.”²⁴ He believed that the courts served a critical role in “repress[ing] the excesses of

²² *Id.* at 9 (emphases added).

²³ Alexander Solzhenitsyn, “Live Not by Lies” 2 (1974), available at <https://firstlibertylive.com/wp-content/uploads/2021/10/LivebyNotLies.pdf>.

²⁴ Alexis de Tocqueville, *Democracy in America* 271 (1899) (emphasis added).

democracy” and that they “check and direct the impulses of the majority.”²⁵

John Stuart Mill in *On Liberty* observed that the “tyranny of the majority” is “held in dread” because “society is itself the tyrant” leaving “fewer means of escape, penetrating much more deeply into the details of life, and *enslaving the soul itself*.”²⁶ He affirmed freedom of expression to counter majority opinions as a means of arriving at truth:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.²⁷

Mill believed that human liberty of thought is inseparable from liberty of expression. “The liberty of expressing and publishing opinions . . . being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.”²⁸

²⁵ *Id.* at 322.

²⁶ John Stuart Mill, *On Liberty* 13 (2d ed. 1859) (emphasis added).

²⁷ *Id.* at 33.

²⁸ *Id.* at 26.

This sentiment has been echoed in this Court's opinions. *See, e.g., Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. *The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.*" (emphasis added).)

James Madison also expressed concern for the rights of minorities in the face of a faction consisting of the majority. "When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."²⁹ Madison later became one of the chief proponents of the Bill of Rights and guided it through Congress to its passage until it was finally ratified by all the states in 1791.

These effects of the "tyranny of the majority" – suppression of individual thought and conscience, enslavement of the soul – are no different from the conditions created in the totalitarian states described by Havel and Solzhenitsyn. The latter described the control of the state as creating "a universal spiritual demise" and asserted that, in cooperating with it, Russians had ceded their humanity for fear of "stray[ing] from the herd."³⁰ The ability to speak one's mind, the "nonparticipation in lies" as Solzhenitsyn referred to it, is the first protection against this spiritual

²⁹ The Federalist No. 10 (James Madison).

³⁰ Solzhenitsyn, *supra* note 23, at 1.

demise. “For when people renounce lies, lies simply cease to exist.”³¹

As de Tocqueville stated, the courts serve a critical role in restraining the excesses of the majority and protecting minority rights, in furtherance of the quest for truth.³² This Court itself has made the same observation. *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (“The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights.”); *Johnson v. California*, 543 U.S. 499, 511 (2005) (“[S]earching judicial review of racial classifications is necessary to guard against invidious discrimination.”); *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”).

The First Circuit’s opinion is an abdication of its role to protect the rights of L.M. and other students like him, who hold to a minority view within the context of the relevant power structure, i.e., his public school. As a result, the First Circuit has allowed the “tyranny of the majority” of the school boards and their appointed school administrators to create a monolithic culture that forces students to remain silent and behave as though they have internalized the school’s indoctrination. This is no different from the “daily participation in deceit” that is imposed upon citizens in a totalitarian state.³³ This state of affairs could not be further from the ideal that schools be

³¹ *Id.* at 2.

³² de Tocqueville, *supra* note 24, at 322.

³³ Solzhenitsyn, *supra* note 23, at 2.

“nurseries of democracy” in which students are free to dissent from the reigning orthodoxy in a non-academic matter injected into the school environment.

II. The First Circuit’s errors facilitate the creation of an “enclave of totalitarianism.”

Middleborough public schools have engaged in a pervasive campaign, via curriculum, events, and speech, of promoting and celebrating the highly controversial and hotly debated issues of non-heterosexual orientations and gender fluidity. App. 98a – 99a, 101a – 102a, 118a – 119a. They invite students to participate by expressing support for the school’s views, while discouraging opposition. Pet. Cert. 4. In the face of the school’s public embrace and promotion of transgender ideology, it has given students two options: join in if they agree or be silent if they do not. This is no different from the option of “living within the lie” described by Havel in a totalitarian state. The school has required that L.M. and other similarly dissenting students participate in what they believe to be a lie by remaining silent while the school publicly endorses the ideology that there are more than two genders. In so doing, the school is not teaching students how to engage in civil debate in a democratic society. Rather, it is teaching students like L.M. how to live under tyranny by teaching them to suppress their speech in the face of government words or actions with which they disagree, or else face reprisal from the “regime.”

Not only does this oppressive regime violate the rights of L.M. and other students in the present,

but, as was seen in Nazi Germany and Communist Russia, this “daily participation in deceit” through enforced silence will undoubtedly impact students’ thoughts, words, and actions in the future. It is preparing them for a society which increasingly reinforces the same norms on social media and in the workplace. It is training them to be obedient servants of the “secularized religion” of the state described by Havel.

A. The First Circuit’s view that L.M.’s t-shirt demeaned “characteristics of personal identity” is reminiscent of the public denunciation that occurs in totalitarian states.

One of the means of controlling the words and actions of citizens in totalitarian states is by public denunciation and shaming of anyone who is believed to hold views even mildly contrary to the State. As one such citizen described, “[T]he shameful example of my fall shows that the *slightest* rift with the Party, the *slightest* insincerity towards the Party, the *slightest* hesitation with regard to the leadership . . . is enough to land you in the camp of counterrevolution.”³⁴

The public accusation that L.M. has demeaned the characteristics of personal identity of LGBTQ students (App. 4a) is the functional equivalent, albeit less intense, of the public denunciation and shaming that occurs in

³⁴ Fitzpatrick, *supra* note 19 (emphases added).

totalitarian regimes.³⁵ L.M. did no more than state a biological reality, without using any demeaning language, a reality that was never questioned by mainstream thought until fairly recently and is, in fact, reflected in Middleborough's student handbook (Pet. Cert. 7). But he is now labeled as a purveyor of "hate speech" (App. 5a) and consequently a "hater" according to the school administration. This labeling coerces conformity to the state's preferred ideology by publicly shaming L.M., and anyone who might agree with him, into silence lest they face similar public shaming and possible "disciplinary action." App. 8a. By forcing L.M. to either take his t-shirt off or go home (Pet. Cert. 6-7), the school sent the message to the whole student body that even the *slightest* public dissent, such as what L.M. exhibited, will not be tolerated. Denouncing L.M. publicly for stating an opinion that differed from the school's well-publicized ideology is no different from what authoritarian regimes do.

B. By deferring to the school's judgment without requiring evidence of substantial disruption, the First Circuit empowers the "tyranny of the majority."

The First Circuit opinion decided that it is up to school administrators, not federal courts, to determine whether a message is demeaning or not and whether it will result in a substantial disruption of educational activities. Pet. Cert. 23-25; App. 49a-

³⁵ One of the judges at oral argument in the First Circuit labeled L.M.'s view on gender as "vile." Pet. Cert. 12.

54a. The school administrators need not have actual evidence of disruption, and their judgment need only be “reasonable.” Pet. Cert. 27-29; App. 54a. The court has set a low bar—reasonableness without evidentiary basis—for school administrators to satisfy, making it nearly impossible that any judgment of a school would be second-guessed by a court. This ruling opens the door to arbitrary suppression of students’ views on controversial topics where those views do not align with those of the school administration.

This new standard is an abdication of the judicial responsibility to uphold the Constitutional rights of students. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), this Court enjoined enforcement of a West Virginia regulation requiring students to participate in the flag salute and Pledge of Allegiance. The Court stated that public schools “are educating the young for citizenship” and therefore should exhibit “scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” It is the role of courts to ensure that public officials, including school officials, do this. *Id.*; *Tinker*, 393 U.S. at 511.

C. The First Circuit opinion allows school boards to engage in the same viewpoint discrimination that totalitarian states do.

As noted previously, Middleborough has engaged in a regular pattern of imposing its ideology

regarding LGBTQ issues on the student body and has suppressed the contrary viewpoint, regardless of how passively and respectfully that viewpoint was expressed. Pet. Cert. 37. Indeed, given the school's stance on L.M.'s message, it is difficult, if not impossible, to conceive of a way of publicly disagreeing with the school's propaganda that would not be labeled as "hate speech" by the administration. Merely stating disagreement with the is itself apparently enough to result in censorship

As Havel noted, the views of the authoritarian state comprise a "secularized religion" to which all citizens must bow or be accused of disloyalty and subject to public denunciation, or worse.³⁶ It is also true that the LGBTQ ideology directly contradicts the tenets of various faiths that hold that there are only two genders—male and female—and serves as a secular substitute for many traditional religions. This new "religion" has its own "sins" in the form of "hate speech," and its own forms of temporal punishments.³⁷ The LGBTQ ideology propagated by the school is without doubt a particular viewpoint, one of many on this issue. Viewpoint discrimination on political and social issues "based on disagreement with the viewpoint expressed. . . . strikes at the very heart of the First Amendment." *Morse*, 551 U.S. at 423 (Alito, J., concurring); Pet. Cert. 30-32. Therefore, unless this Court resolves the issue of

³⁶ Havel, *supra* note 21, at 3, 6.

³⁷ It is also interesting that the school takes no account of the fact that its propagandizing marginalizes students who accept the traditional view, in violation of its own handbook which includes "religious affiliation" as one of the characteristics of personal identity. Pet. Cert. 7; App. 132a-33a.

when or if schools can engage in viewpoint discrimination, the First Circuit opinion allows school boards to disregard the First Amendment safeguard against tyranny and regularly suppress contrary viewpoints as any totalitarian state would.

D. The First Circuit’s embrace of the heckler’s veto is similar to the reliance of totalitarian regimes on peer pressure and coercion to force conformity.

It is particularly noteworthy that the school never claimed L.M. was responsible for any kind of disruption. Rather, the school was concerned about potential disruption by LGBTQ students and their allies. Pet. Cert. 6, 12. The First Circuit accepted this alleged fear as adequate justification for suppressing L.M.’s message. Pet. Cert. 32; App. 53a. As noted in the Petition, suppressing speech on the basis of the reaction of the hearers is a classic heckler’s veto. Pet. Cert. 32-33. *See Meinecke v. Seattle*, 99 F.4th 514, 523-24 (9th Cir. 2024) (targeting speech “only once the audience’s hostile reaction manifested . . . is part and parcel of a heckler’s veto” (citation omitted)). The motives and various concerns given by the administration—physical safety of students and potential disruption (Pet. Cert. 6; App. 8a)—cannot justify such a veto. Certainly the potential for disruption existed in *Tinker*, yet the Court focused on the fact that there was no disorder or disturbance on the part of the students wearing the armbands, and thus it rejected suppression of students’ views as a means of

avoiding arguments or disturbances by other students. 393 U.S. at 508.

The school administration's reliance on concerns about disturbances by LGBTQ students and their allies bears a similarity to the use of peer pressure in totalitarian states to enforce conformity and suppress dissent. The Hitler Youth relied on "enthusiasm, peer pressure, and coercion" to bolster their numbers.³⁸ Students of arrested parents in Communist Russia were subject to a "ritual public humiliation by their peers" before being expelled.³⁹ This fear of peer pressure continues into adulthood in such societies in which disagreement with the state can result in public humiliation and loss of livelihood. As Solzhenitsyn described, "We hope only not to stray from the herd, not to set out on our own, and risk suddenly having to make do without the white bread, the hot water heater, a Moscow residency permit."⁴⁰ By empowering the LGBTQ students and allies to be the instruments of stifling opposing speech, the school administration is preparing students to fear the same groups in the broader society on social media, the workplace, and elsewhere. Some students are being conditioned to bow to the mob, others to flex the muscle of the mob. Nothing could be further from the democratic ideal of respectfully discussing opposing viewpoints as a means of arriving at truth.

³⁸ *Hitler Youth*, *supra* note 13.

³⁹ Fitzpatrick, *supra* note 19, at 211-212.

⁴⁰ Solzhenitsyn, *supra* note 23, at 1.

III. There are many examples of schools operating as “enclaves of totalitarianism” in violation of students’ free speech right.

YAF has chapters from junior high through the college level with the purpose of educating and inspiring young Americans with the ideas of individual freedom and traditional values. Frequently, students affiliated with YAF experience censorship from school authorities. The following are a few examples that show L.M.’s situation is not isolated and, in fact, such instances of censorship continue even at the college level:

A student at Buchanan High School in California wanted to display a “Pro-life Timeline,” a YAF project that shows the stages of fetal development. The school blocked her from doing so. School administration stated that the school needed to “stay neutral on controversial topics like this one.” According to the principal, biology was “too controversial.” On the other hand, the school permitted teachers to hang pro-LGBTQ decorations in their classrooms, even though this violated school district rules against “display[s of] personal items reflecting politics, religion, social movements.”

Sebring High School in Florida repeatedly restricted the conservative students’ free speech rights by censoring content. In one instance, administrators punished the conservative students by unilaterally removing their Pro-life Timeline from their approved display, apparently because another student complained. In other words, the school bowed to a heckler’s veto. The school also subjugated the YAF chapter to pre-approval

requirements for speech that it did not apply to other clubs. The school changed course only after legal counsel stepped in.

At Kennedale High School in Texas, a conservative student followed his high school's process to form a YAF chapter, but the principal rejected the club, calling the idea controversial and citing nonexistent school policy that clubs with national affiliations must be approved by the school district's legal team. The school approved the chapter only after YAF wrote a legal demand to the principal and school district pointing out the unlawfulness of this response.⁴¹

Finally, the YAF chapter at Clovis Community College in California faced interference from school administrators when attempting to put up a Ben Shapiro poster display. Administrators told them that, while YAF had followed the rules, rules are “subject to change.” The school also denied the activists' right to put up pro-life posters, initiating a “random” review and relegating YAF to the far-flung so-called “free speech kiosk.” The school also denied YAF's right to promote “Freedom Week,” a project that warns against the dangers of communism—prompting YAF to file a federal lawsuit. YAF prevailed in that suit, and Clovis administrators were required, under the court-approved settlement agreement, to undergo free speech training. *Flores v. Bennett*, 635 F. Supp. 3d 1020 (E.D. Cal 2022), *aff'd*,

⁴¹ Kara Zupkus, *YAF Threatens Texas High School With Litigation for Denying YAF Chapter*, Young America's Foundation (Jul. 19, 2023), <https://yaf.org/news/yaf-threatens-texas-high-school-with-litigation-for-denying-yaf-chapter/>.

No. 22-16762, 2023 U.S. App. LEXIS 20043 (9th Cir. Aug. 3, 2023).

The temptation, or inclination, for school administrators to silence non-conforming students is already pervasive. The First Circuit's decision here is an invitation to even greater censorship.

CONCLUSION

This Court should grant certiorari in order to resolve these important issues respecting the right of captive students to express dissenting opinions civilly, without fear of censorship.

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