No. 24-410

In the Supreme Court of the United States

L.M. a minor by and through his father and step-mother 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 FOR PARENTS DEFENDING EDUCATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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November 12, 2024 *Attorneys for Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[*]

Parents Defending Education is a national, nonprofit, grassroots association. Its members include many parents with school-aged children. Launched in 2021, it uses advocacy, disclosure, and litigation to combat the increasing politicization and indoctrination of K-12 education, including government attempts to silence students who express opposing views.

This case directly implicates PDE's mission, and its outcome will have real-world consequences for PDE's members. Students have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The First Circuit's legal errors affect the free-speech rights of students and thus the children of PDE's members. If the First Circuit's decision stands, then K-12 students throughout the circuit can suffer discrimination based on viewpoint on important philosophical, religious, and political topics of our day. *Cf. Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) ("[A] core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys."). PDE's mission is to prevent such outcomes.

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[*] Under Rule 37.2, *amicus curiae* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Public schools in the United States are supposed to be "the nurseries of democracy" and to "protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021). And students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Public schools thus must "ensur[e] 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. Especially for issues of public concern, like gender identity.

Gender identity is a "hot issue" that "has produced a passionate political and social debate" across the country. *Meriwether v. Hartop*, 992 F.3d 492, 508-09 (6th Cir. 2021). One side believes that gender is subjective; the other side believes that sex is immutable. *Id.* at 498. Speech on this matter "lies at the heart of the First Amendment's protection." *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (Alito, J.). But not in the First Circuit. When Middleborough's Nichols Middle School punished student speech expressed by one side of the gender-identity debate—namely, that "there are only two genders" (male and female)—the First Circuit upheld the school's censorship as consistent with the First Amendment.

The First Circuit is wrong, turns *Tinker* on its head, and creates a circuit split. To pass constitutional muster, Middleborough's regulation of L.M.'s speech

must, at a minimum, overcome two obstacles: (1) it must be viewpoint neutral; and (2) it must be consistent with the demanding *Tinker* standard. *See, e.g.*, *Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008). The First Circuit, however, doesn't think viewpoint discrimination—normally the greatest First Amendment sin—matters at all for K-12 students, and it turned *Tinker*'s demanding standard into an easy-to-meet deferential one. Under the right standard, Middleborough falls short of both requirements.

First, Middleborough all but admits that it engaged in viewpoint discrimination. It permitted—indeed, encouraged—speech supporting the idea that there are more than two genders. At the same time, it prohibited L.M.'s speech expressing the opposite view. Thus, Middleborough discriminated against L.M.'s speech based on the viewpoint that the speech conveyed. That error alone warrants this Court's review (and reversal).

Second, to satisfy *Tinker*, Middleborough must put forth "evidence that [the school's censoring is] necessary to avoid material and substantial interference with schoolwork" or "invasion of the rights of others." *Tinker*, 393 U.S. at 511, 513. That is a "demanding standard," which Middleborough did not come close to meeting. *Mahanoy*, 594 U.S. at 193. Middleborough provided no evidence that any student was harmed or would be reasonably expected to be injured beyond the mere discomfort from unpopular speech. But it is well-established that *Tinker* requires far more than hurt feelings or discomfort, even when the speech is deeply offensive or disparaging. *See, e.g.*, *Saxe*, 240 F.3d at

210-17. Nor did Middleborough show that L.M.'s speech targeted a specific individual, even though this Court's precedent require as much. *See Mahanoy*, 594 U.S. at 188 ("serious or severe bullying or harassment targeting particular individuals"). Yet the First Circuit upheld punishing L.M.'s speech by adopting a watered-down *Tinker* standard and reflexively deferring to school administrators.

This Court should grant certiorari and restore public schoolchildren's free-speech rights.

REASONS FOR GRANTING THE PETITION

I. Middleborough has joined the growing trend of schools punishing student speech on controversial subjects.

Debates about biological sex and gender identity are raging across the country. While society has long referred to males and females by sex-specific pronouns (*e.g.*, "he," "his," or "she," "her"), many individuals—including students in secondary schools—now identify as "transgender" or "non-binary" and adopt other pronouns that correlate with their "gender identity" rather than their biological sex. *See, e.g.*, *United States v. Varner*, 948 F.3d 250, 257 (5th Cir. 2020); *List of School District Transgender-Gender Nonconforming Student Policies*, PDE, perma.cc/5X7P-XDV7 (identifying 1,086 school districts in the United States with policies excluding parents from decisions on their child's "gender identity). According to transgender and non-binary advocates—and the courts below—asserting that one cannot identify contrary to the per-

son's biological sex is a form of "bullying," "discrimination," and "harassment." CA1-Middleborough-Br. (Doc. 00118077270) at 16, 24, 26, 29.

On the other hand, many others believe that people are either male or female, biological sex is immutable, and sex does not change based on someone's internal feelings. *See Meriwether*, 992 F.3d at 508-09; *Varner*, 948 F.3d at 257; *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 807 (11th Cir. 2022) (en banc) (discussing "the Supreme Court's longstanding recognition that 'sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth'" (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))). Many individuals on this side of the debate ground their positions in scientific, "religious," or "philosophical beliefs." *Meriwether*, 992 F.3d at 509.

In sum, "gender identity" is a "sensitive political topi[c]" that is "undoubtedly [a] matte[r] of profound value and concern to the public." *Janus v. AFSCME*, 585 U.S. 878, 914 (2018) (cleaned up); *accord Green v. Miss USA, LLC*, 52 F.4th 773, 785 n.12 (9th Cir. 2022); *Meriwether*, 992 F.3d at 508 ("[S]peech about 'race, gender, and power conflicts' addresses matters of public concern."). The First Amendment gives both sides the freedom to promote their beliefs in the marketplace of ideas, without the government tipping the scales. "[L]earning how to tolerate speech … of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538 (2022). Indeed, "tolerance, not coercion, is our

Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023). This is especially true where, as here, the "speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Janus*, 585 U.S. at 914 (cleaned up).

Yet there is a growing trend of schools picking one side of the debate over the other. Schools are increasingly adopting speech codes regarding controversial speech, particularly gender identity, that forbid students from sharing their deeply held convictions. Speech codes prohibit expression that would be constitutionally protected outside school, punishing students for unpopular speech by labeling it "harassment," "bullying," "hate speech," or "incivility." *See Spotlight on Speech Codes 2021*, Foundation for Individual Rights in Education (FIRE) at 10, perma.cc/S22E-76Q3. These policies—imposing overbroad and often viewpoint-based restrictions on speech—are unconstitutional. Schools use speech codes to effectively shut down all discussion or debate on important issues, like gender identity. *See, e.g.*, *FIRE Spotlight* at 24; *Saxe*, 240 F.3d at 215-16 (K-12 speech policy punishing "harassment" was overbroad

because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech").[1]

Schools around the country have used these speech codes to censor speech on one side of the issue. To give a few examples:

- A student was reprimanded for wearing clothes that said, "Let's Go Brandon." *See D.A. v. Tri. Cnty. Area Sch.*, 2024 WL 3924723 (W.D. Mich. Aug. 23), *appeal filed*, No. 24-1769 (6th Cir.) (not First Amendment violation); *Students Sue After Michigan School District Forces Them to Remove 'Let's Go Brandon' Sweatshirts*, FIRE (Apr. 25, 2023), perma.cc/J3MJ-5AV8.

- A student was punished for promoting the view "All Lives Matter." *See B.B. v. Capistrano Unified Sch. Dist.*, 2024 WL 1121819 (C.D. Cal. Feb. 22), *appeal filed*,

[1] *See also, e.g.*, *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668-69 (8th Cir. 2023) (K-12 policy prohibiting "intentional and/or persistent refusal ... to respect a student's gender identity" was unconstitutional); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 701-04 (W.D. Pa. 2003) (speech policy prohibiting "abusive," "inappropriate," and "offen[sive]" language was overbroad); *Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987, 990, 995 (E.D. Mich. 2003) (speech policy prohibiting "verbal assault" was overbroad because it allowed "curtailment of speech that questions the wisdom or judgment of school administrators and their policies, or challenges the viewpoints of [other] students"); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (school policy allowing only "responsible" speech was likely unconstitutional).

No. 24-1770 (9th Cir.) (not a First Amendment violation); Schow, *First Grader Punished After Drawing 'BLM' With 'Any Life' Underneath*, DailyWire (Mar. 21, 2024), perma.cc/KU3X-PGZK.

- A student was prohibited from wearing a sweatshirt that contained a picture of an AR-15 firearm with the word "Essential" written underneath, which expressed his view on the Second Amendment. *See C.G. v. Oak Hills Loc. Sch. Dist.*, 2023 WL 4763458 (S.D. Ohio Jul. 26) (no First Amendment violation).

- A student was reprimanded for having a "Don't Tread on Me" patch on his backpack. *See* Griffin, *Colorado Middle-Schooler Kicked Out of Class for 'Don't Tread on Me' Patch That Teacher Claims Originated with Slavery*, N.Y. Post (Aug. 30, 2023), perma.cc/5NA9-PGF3.

- And many more students have been punished for expressing views on topics of public concern. *E.g.*, Gstalter, *Principal Told Teen to Remove Trump 'MAGA' Apparel on School's 'America Pride Day*,' The Hill (Apr. 13, 2019), perma.cc/7X3M-D2PJ; Luca, *Colusa Teacher Threatens to Kick Student Out of Virtual Class Over 'Trump 2020' Flag*, ABC10 (Sept. 23, 2020), perma.cc/BKR4-658R; Daley, *High School Cheerleaders on Probation for Holding MAGA Sign at Football Game*, WCNC

(Sept. 16, 2019), perma.cc/D46Y-ZKAL; Passoth, *Clark County School District Sued by Pro-Life Students Over Alleged First Amendment Violations*, Fox5 (Oct. 4, 2022), perma.cc/99M7-SUHZ.

Middleborough is part of this unfortunate trend. According to Middleborough, it is fine to express views promoting the idea that gender is fluid and that students can be a gender inconsistent with their biological sex, but it violates its speech code to express the view that there are only two sexes and students cannot change their sex. In short, Middleborough has shut down one side of the debate, preventing all meaningful discussion on gender identity.

II. The First Circuit grievously erred in concluding that Middleborough didn't unconstitutionally suppress L.M.'s speech.

Middleborough violated the First Amendment by forbidding L.M. to wear clothing that said, "there are only two genders." The framers designed the Free Speech Clause of the First Amendment to "protect the 'freedom to think as you will and to speak as you think.'" *303 Creative*, 600 U.S. at 584. They did so because "they saw the freedom of speech 'both as an end and as a means.'" *Id.* "An end because the freedom to think and speak is among our inalienable human rights," and "[a] means because the freedom of thought and speech is indispensable to the discovery and spread of political truth." *Id.* (cleaned up). "'[I]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with an uninhibited marketplace of ideas."

Id. at 584-85 (brackets omitted; quoting *W.V. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)). The First Amendment thus protects "an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided, and likely to cause anguish or incalculable grief." *Id.* at 586 (cleaned up).

Students, too, have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker*, 393 U.S. at 506. America's public schools are "the nurseries of democracy," and "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190. Schools must "ensur[e] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Given these bedrock principles, this Court has recognized only four "specific categories of speech that schools may regulate in certain circumstances," *id.* at 187:

> (1) "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds," *id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986));
>
> (2) "speech, uttered during a class trip, that promotes 'illegal drug use,'" *id.* at 187-88 (quoting *Morse v. Frederick*, 551 U.S. 393, 408 (2007));

> (3) "speech that others may reasonably perceive as 'bearing the imprimatur of the school,' such as that appearing in a school-sponsored newspaper," *id.* at 188 (alteration omitted) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); and
>
> (4) on-campus and some off-campus speech that "'materially disrupts class-work or involves substantial disorder or invasion of the rights of others,'" *id.* (quoting *Tinker*, 393 U.S. at 513).

Importantly, the fourth category requires schools to meet a "demanding standard." *Id.* at 193. To justify barring speech, a school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

Moreover, even if a school's policy passes *Tinker*, the speech regulation may still violate the First Amendment for another reason. Regardless of whether the speech is disruptive or invades the right of another under *Tinker*, public schools cannot engage in "viewpoint discrimination." *Barr*, 538 F.3d at 571. In short, a school seeking to regulate student speech must show, at a minimum, that its regulations are (1) viewpoint neutral and (2) satisfy the demanding standard under *Tinker*. Here, contra the First Circuit,

precedent requires both these conditions and Middleborough flunks both requirements.

A. Middleborough engaged in impermissible viewpoint discrimination.

1. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). At all times, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of UVA*, 515 U.S. 819, 829 (1995). Time and again, the Supreme Court has reaffirmed that speech restrictions "based on viewpoint are prohibited." *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 11 (2018); *see, e.g.*, *Matal v. Tam*, 582 U.S. 218, 223 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend."); *Shurtleff v. Boston*, 596 U.S. 243, 258 (2022) (viewpoint discrimination prohibited). This is "a core postulate of free speech law." *Iancu*, 588 U.S. at 393.

The First Amendment's prohibition on viewpoint discrimination applies no differently in the public-school setting. As many circuits have held, even if a school's regulation is "consistent with … the *Tinker* standard," it will still be unconstitutional if it fails this Court's "prohibition on viewpoint discrimination." *Barr*, 538 F.3d at 571; *e.g.*, *Speech First v. Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) ("[E]ven if

[the school] could (per *Tinker*) restrict harassing speech that disrupts the school's functions, it couldn't do so, as it has here, based on the viewpoint of that speech."); *Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004) ("[T]his fundamental prohibition against viewpoint-based discrimination extends to public schoolchildren."); *contra B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 740 (8th Cir. 2009) (disagreeing and creating circuit split).

This makes sense. After all, viewpoint discrimination is an "'egregious form of content discrimination.'" *Iancu*, 588 U.S. at 393. It's "poison to a free society." *Id.* at 399 (Alito, J., concurring). For this reason, this Court "has consistently held that the government may not regulate on the basis of viewpoint *even within a category of otherwise proscribable speech*." *Cartwright*, 32 F.4th at 1127 n.6 (emphasis added) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 383-90 (1992)). So "regardless of whether [a student's] expression [i]s constitutionally protected in itself," the student still "has the First Amendment right to be free of viewpoint-based discrimination and punishment." *Hollman*, 370 F.3d at 1265. *Tinker* thus "doesn't apply to viewpoint-based restrictions." *Cartwright*, 32 F.4th at 1127 n.6; *see, e.g.*, *Barr*, 538 F.3d at 571; *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001).

The First Circuit disagreed, rejecting that the viewpoint-discrimination test used for every other area of free-speech precedent applies to public schoolchildren. *See L.M. v. Middleborough*, 103 F.4th 854,

883 n.9 & 886 n.11 (1st Cir. 2024). It provided no reason why it deepened a circuit split, except to say that this Court's cases applying the bar on viewpoint discrimination have not yet involved K-12 students. But that doesn't mean the logic of this Court's opinions doesn't apply to the K-12 school setting. It does. Even if speech meets the four categories recognized by this Court, and hence is potentially proscribable speech, students still have a right against viewpoint discrimination. That's the lesson of this Court's decision in *R.A.V.*, as several circuit courts have understood. *See, e.g.*, *Cartwright*, 32 F.4th at 1127 n.6. As the Eleventh Circuit put it: Though a school official "has the authority under the *Tinke[r]* standard to proscribe student expression that materially and substantially disrupts the class," the official "may not punish such expression based on the fact that she disagrees with it" because "[e]ven when engaging in speech that is not directly constitutionally protected, [the K-12 student] still has the First Amendment right to be free from viewpoint discrimination." *Holloman*, 370 F.3d at 1281.

2. Middleborough effectively concedes that it banned L.M.'s shirt because of the viewpoint it expressed. *See, e.g.*, D.Ct.Docs.11-7, 11-9. The district court did as well. *See* App.77a ("School administrators were well within their discretion to conclude that the statement 'THERE ARE ONLY TWO GENDERS' may communicate that only two gender identities—male and female—are valid, and any others are invalid or nonexistent, and to conclude that students who identify differently, whether they do so openly or not, have a right to attend school without being confronted

by messages attacking their identities." (footnote omitted)). This alone dooms Middleborough's conduct. Regardless, the record leaves no room for doubt that Middleborough censored L.M.'s speech because of the message he conveyed.

To start, Middleborough has permitted and even encouraged in-school discussion of sexual orientation and gender identity. The school observes "Pride Month" and other events "in support of the 'LGBTQ+ community.'" D.Ct.Doc.46 ¶27; App.66a. It has a Gay Straight Alliance Club to support "'students who are part of the LGBTQ+ community.'" *Id.* And it "promotes messages commonly associated with 'LGBTQ Pride.'" *Id.*

Seeking to participate in his school's ongoing discussion of gender identity, L.M. wore a shirt asserting that there are only two genders. App.91a, 100a. Middleborough admits it censored L.M.'s speech because his shirt's message could suggest to "gender nonconforming" students that "'their sexual orientation, gender identity or expression does not exist or is invalid,'" and the school was concerned that the shirt "'would cause students in the LGBTQ+ community to feel unsafe.'" App.144a. Indeed, Middleborough has said that it censored L.M. because "staff and students … found his shirt upsetting," App.120a; because the message is "likely to be considered discriminatory, harassing and/or bullying to others, including those who are gender nonconforming by suggesting that their … gender identity or expression does not exist or is invalid," App.144a; and because of "concerns that other students would also attempt to wear clothing with the

same or similar messages," D.Ct.Doc.36 at 3. And Middleborough used its prohibition on "hate speech" to restrict L.M.'s speech. App.132a-33a.

That is textbook viewpoint discrimination. After encouraging in-school conversations on a controversial topic, Middleborough promoted one side of the debate and silenced the other. Rather than allow both sides to speak and letting the best idea win, Middleborough chose to impose a viewpoint-specific ban on some clothing with "divisive [messages] and not others." *Defoe v. Spiva*, 625 F.3d 324, 336 (6th Cir. 2010) (cleaned up). But the government cannot license one side to speak freely while muzzling the other. *See R.A.V.*, 505 U.S. at 392; *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) ("[A] school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality."). Thus, by prohibiting opinions about biological sex that Middleborough disfavors, Middleborough imposed a "'viewpoint-discriminatory restrictio[n].'" *Saxe*, 240 F.3d at 206.

It's irrelevant that Middleborough claims to have acted to prevent L.M. from offending other students. That's because "[g]iving offense is a viewpoint," and silencing speech because it could offend "is viewpoint discrimination." *Matal*, 582 U.S. at 243; *see, e.g.*, *Iancu*, 588 U.S. at 393 ("the government cannot discriminate against 'ideas that offend'"); *Texas*, 491 U.S. at 414 ("the government may not prohibit the expression of an idea simply because society finds the idea itself offensive"); *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514,

527 (3d Cir. 2004) (Alito, J.) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint."). Even if the lower courts found the school's motivation admirable, that motivation does not excuse the school from adhering to the First Amendment's requirement of viewpoint neutrality. *See, e.g.*, *Holloman*, 370 F.3d at 1281.

In short, contra the First Circuit, Middleborough cannot impose its preferred viewpoint (*e.g.*, gender can be fluid) over another (*e.g.*, sex is binary and immutable). "To hold differently would be to treat religious [or traditionally conservative] expression as second-class speech and eviscerate th[e] [Supreme] Court's repeated promise that [students] do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Kennedy*, 597 U.S. at 531 (quoting *Tinker*, 393 U.S. at 506).

B. Middleborough failed to meet its burden under *Tinker*.

Middleborough's regulation of L.M.'s speech also violates *Tinker*. To pass *Tinker*, Middleborough must put forth "evidence that [the school's policy] is necessary to avoid material and substantial interference with schoolwork" or "invasion of the rights of others." *Tinker*, 393 U.S. at 511, 513. *Tinker* is a "demanding standard." *Mahanoy*, 594 U.S. at 193.

Though the First Circuit conceded that L.M.'s speech was "passiv[e]," "silen[t]," and didn't "men-

tio[n] any specific students," the First Circuit still upheld Middleborough's application of the school's policy because the shirt met the substantial-interference prong. In its view, Middleborough met this prong because "school officials may bar passive and silently expressed messages by students at school that target no specific student if": (1) "the expression is reasonably interpreted to demean … characteristics of personal identity" and (2) "the demeaning message is reasonably forecasted to poison the educational atmosphere due to its serious negative psychological impact on students with the demeaned characteristic." *L.M.*, 103 F.4th at 873-74 (cleaned up). The First Circuit's reasoning is deeply flawed and would permit schools to censor a great deal of First Amendment-protected speech on a school's mere say-so. The First Amendment requires far more.

The First Circuit's test essentially creates a subjective hate-speech exception to the First Amendment—a test that *Tinker* and its progeny forbid. There is no "generalized 'hurt feelings' defense to a [public] school's violation of the First Amendment rights of its students." *Zamecnik*, 636 F.3d at 877. Nor can schools restrict speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. *Tinker* "requires a specific and significant fear of disruption, not just some remote apprehension." *Saxe*, 240 F.3d at 211. So a contention that otherwise-protected speech might

"strik[e]" some students "at the core" of their "identity"—*i.e.*, speech that merely offends the listener—is insufficient. *L.M.*, 103 F.4th at 873-74.

Holding otherwise, as the First Circuit did, would mean students *do* "shed their constitutional rights … at the schoolhouse gate." *Tinker*, 393 U.S. at 506. "[D]iscomfort and unpleasantness" will "always accompany an unpopular viewpoint." *Id.* at 509. "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance." *Id.* at 508. "But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.* at 508-09 (citation omitted). So courts cannot simply relabel that discomfort as a "material disruption." *L.M.*, 103 F.4th at 874.

Allowing courts to do so—as the First Circuit did here—would eviscerate students' essential First Amendment rights. The First Amendment "must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy*, 594 U.S. at 190. It must provide "scrupulous protection" for students, lest society "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. And courts cannot allow public schools to ignore their duty to expose students to unpopular expression. *See Mahanoy*, 594 U.S. at 190

(schools must "protect the 'marketplace of ideas,'" and "[t]hat protection must include the protection of unpopular ideas"); *id.* at 195 (Alito, J., concurring) ("public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government").

Under the proper substantial-interference standard, Middleborough failed to meet its burden. Middleborough put forth no evidence that any student was meaningfully harmed by the speech, let alone "serious[ly] or severe[ly]." *Mahanoy*, 594 U.S. at 188. At most, Middleborough can point to statements by its officials that a few students may have "complained" that L.M.'s shirt offended them. *See, e.g.*, App.122a. That is not good enough.

Vague statements about minor complaints is wholly insufficient to meet Middleborough's demanding burden. This Court "has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe*, 240 F.3d at 215 (listing Supreme Court cases); *e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978). While "non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause," there is "no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or [gender identity]." *Saxe*, 240 F.3d at 206. Even the "disparaging" nature of the speech cannot justify suppressing the speech. *See Zamecnik*, 636 F.3d at 878 ("There is no

doubt that the slogan ['Be Happy, Not Gay'] is disparaging. But it is not the kind of speech that would materially and substantially interfere with school activities." (cleaned up)).

The First Circuit disagreed, but in doing so, it watered down *Tinker*'s demanding burden and reflexively deferred to school administrators' views. The First Circuit found significant that school administrators said that there were "past incidents in which students in the LGBTQ+ community expressed concern about not being sufficiently protected." *L.M.*, 103 F.4th at 880 (cleaned up). This thin and generic evidence cannot justify punishing speech on a topic of public concern. *Tinker*'s "demanding" standard requires much more evidence, *Mahanoy*, 594 U.S. at 193; it requires the school to provide evidence establishing "a specific and significant fear of disruption," *Saxe*, 240 F.3d at 211.

The other way Middleborough justified its censorship is even weaker. Per the First Circuit, Middleborough "reasonably concluded that if L.M. was permitted to wear the same shirt, others would follow suit and that disruption would have ensued with a standoff between a group of students wearing the message of the Shirt and those students who are members of the LGBTQ+ community and their allies." *L.M.*, 103 F.4th at 880 (cleaned up). But Middleborough's conclusion contradicts bedrock free-speech principles and has nothing to do with its first purported justification for censoring L.M.'s speech, *i.e.*, how the speech might psychologically affect transgender or non-binary stu-

dents. Middleborough's duty is to "protect the marketplace of ideas." *Mahanoy*, 594 U.S. at 190 (cleaned up). But it violated its duty because it barred L.M.'s speech because other students would speak more in a passive, silent, and an untargeted way. Instead, Middleborough should have encouraged this discussion.

Indeed, "even if [the] speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out." *Mahanoy*, 594 U.S. at 206 (Alito, J., concurring) (cleaned up). The First Amendment doesn't allow the school to reward "the heckler's veto." *Zamecnik*, 636 F.3d at 879. That is especially true when Middleborough itself encouraged conversations on gender identity in the classrooms and throughout the school's halls.

The First Circuit accepted this weak evidence of disruption by reflexively deferring to Middleborough's administrators' judgment. To the First Circuit, the real question was "who should decide whether to bar [otherwise-protected speech]—educators or federal judges." *L.M.*, 103 F.4th at 886. It concluded that educators get to exercise this "sensitive (and potentially consequential) judgment." *Id.* But precedent teaches that courts can't abdicate their duty to decide constitutional issues: This Court has "been unmistakably clear that any deference must exist within constitutionally prescribed limits, and that deference does not imply abandonment or abdication of judicial review." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 217 (2023) (cleaned up). "'[T]rust us'" is not good enough. *Id.* Yet

the lower courts did precisely that. They abandoned judicial review and did not hold Middleborough to the same review as everyone else. If the lower courts had, they would have concluded that Middleborough did not come close to overcoming its demanding burden here. The First Amendment would mean little if protection disappeared based solely on the listener's subjective reaction and school administrators' mere say-so.

In the end, the First Circuit's decision is irreconcilable with *Tinker*. In *Tinker*, the students engaged in "silent, passive expression of opinion." 393 U.S. at 508. They wore black armbands "to exhibit opposition to this Nation's involvement in Vietnam." *Id.* at 510-11. But their view was not shared by everyone: Students who fervently supported the Vietnam War, who planned to enlist in the military, or who had family members serving would have found themselves confronted by messages critical and hurtful of their deepest commitments. In today's language, those students were "confronted by messages attacking" or "invalid[ating]" "the core" of their "identities." *L.M.*, 103 F.4th at 874. Yet the student's expression in *Tinker* was protected. The First Circuit evaded this result by carving out an exception for speech involving "characteristics of personal identity" like "race, sex, or sexual orientation." *Id.* at 879. But that exception is made up and meaningless. Important and consequential speech often implicates "characteristics of personal identity," yet in the First Circuit, the more the speech involves an issue of public concern, the more punishable the speech is. That's anathema to the First Amendment.

All this is not to downplay or dismiss the difficult situations that transgender or non-binary students may face at school. But the lower courts conflated any such struggles with the speech that L.M. expressed or wants to express. There is no evidence that L.M. wishes to bully or harass anyone at school, let alone an entire group. As L.M. explained, he wants to share the viewpoint that there are only two sexes at school because he "hoped to start a meaningful conversation on gender ideology," to "protect other students against ideas that L.M. considers false and harmful," and to "show them compassionate people can believe that sex is binary." Pet.6; *see* App.77 n.3 ("L.M. attests that he does not believe his views about sex and gender to be inherently hateful and does not intend to deny any individual's existence."). The First Amendment at least allows that much.

CONCLUSION

This Court should grant certiorari.

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