United States Court of Appeals

for the

Third Circuit

Case No. 24-3278

CHRISTIN HEAPS,

Appellant,

– v. –

DELAWARE VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION; SCOTT MCKINNEY, individually and in his official capacity as Superintendent of Schools; ASHLEY MIRANDA, individually and in her official capacity as school counselor; ANGELICA ALLEN-MCMILLAN, in her official capacity as Acting Commissioner of the New Jersey Department of Education; JOHN ROES 1-10, said names being fictitious, individually and in their official capacities; MATTHEW J. PLATKIN, in his official capacity as Attorney General of the State of New Jersey.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF *AMICI CURIAE* NC VALUES INSTITUTE AND LIBERTY, LIFE, AND LAW FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT
FRAP 26.1

NC Values Institute is a nonprofit, tax-exempt organization that does not issue stock and has no parent corporation.

Liberty, Life, and Law Foundation is a nonprofit, tax-exempt organization that does not issue stock and has no parent corporation.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

NC Values Institute is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including parental rights. See https://ncvi.org. NCVI is engaged in fighting policies like the one challenged here.

Liberty, Life, and Law Foundation is a North Carolina nonprofit corporation established to defend fundamental constitutional liberties, including religion, speech, and parental rights. LLLF's founder is the author of a book, *Death of a Christian Nation* (2010), and many *amicus curiae* briefs in the U.S. Supreme Court and the federal circuits.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Transgender ideology is invading American life at an alarming rate. In addition to the massive intrusion on parental rights, the Delaware Valley Regional High School Board of Education has created and implemented a policy (the "Policy") that turns parental rights jurisprudence on its head and jeopardizes First Amendment rights by allowing students to unilaterally assert a gender identity that the school must honor: "*The school district shall accept a student's asserted gender*

[1] No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae* and its counsel made any monetary contribution to fund the preparation or submission of this brief. Plaintiff and the School District parties consent to the filing of this brief, and the State Defendants do not oppose it.

identity; parental consent is not required." *Doe v. Del. Valley Reg'l High Sch. Bd. of Educ*., 2024 U.S. Dist. LEXIS 221194, *4 (D.N.J. Nov. 27, 2024), quoting Board Policy 5756, titled "Transgender Students." The Board thus demands the use of a minor child's preferred name and pronouns, not only without parental consent or knowledge—but under a policy that intentionally deceives a child's parents or defies their instructions if they do not affirm the *child*'s life-altering decision to transition to the opposite sex. Here, Plaintiff "expressly denied his consent" to his daughter's transition and "demanded that the administration stop "facilitating [his daughter's] use of a male identity at school without parental notice or consent." *Doe v. Del. Valley Reg'l*, 2024 U.S. Dist. LEXIS 221194, *7 (D.N.J. Nov. 27, 2024). Amazingly, the school's legal counsel notified Plaintiff that "the school district would continue to accept Jane's 'asserted gender identity' and would honor her 'request to be called by a name or pronoun other than that which she was assigned at birth.'" *Ibid*. The Board, either surreptitiously or in bold defiance of a parent's instructions, facilitates a major life decision that is virtually guaranteed to cause irreparable harm extending well beyond a child's school years. The school's continued use of a female student's preferred male name and pronouns, in direct defiance of her father's contrary instructions to the school, absolutely does "strike at the heart of parental decision-making authority on matters of the greatest importance." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005). It is difficult to imagine a more life-altering

decision than transitioning to the opposite sex. This case is a paradigmatic "example of the arrogation of the parental role by a school." *Gruenke v. Seip*, 225 F.3d 290, 306 (3d Cir. 2000). The Board's unconscionable policy turns family structure on its head and raises serious constitutional questions—not only about parental rights, but also the speech, conscience, and religious rights of those enlisted to perpetrate this fraud on unsuspecting and/or unwilling parents.

Pronouns are an integral part of common, everyday speech, based on objective biological reality concerning another person's sex and often coupled with the belief that each person is created immutably male or female. This aspect of speech touches a matter of intense public concern and debate. Not everyone accepts culturally popular "gender identity" concepts or believes that a person can transition from one sex to the other. The First Amendment safeguards the rights of teachers, students, and parents to speak according to each one's own beliefs on these matters, even in public schools. School personnel and students can respect the dignity of others without sacrificing their own rights to thought, conscience, and speech.

ARGUMENT

I. THE POLICY RAISES SERIOUS FIRST AMENDMENT CONCERNS BY COMPELLING SPEECH ON A CONTENTIOUS TOPIC.

There is hardly a more "dramatic example of authoritarian government and compelled speech" than when King Henry commanded Sir Thomas More to sign a statement blessing the King's divorce and remarriage. Richard F. Duncan, *Article:*

Defense Against the Dark Arts: Justice Jackson, Justice Kennedy, and the No-Compelled Speech Doctrine, 32 Regent U. L. Rev. 265, 292 (2019-2020), citing Robert Bolt, *A Man For All Seasons*: *A Play in Two Acts* (1st ed., Vintage Int'l 1990) (1962). Thomas More, a faithful Catholic, could not sign.

Five centuries later, the Board has created a conundrum that is no less momentous than Thomas More's predicament. The Policy reeks of viewpoint-based compelled speech because the transition cannot be executed without the cooperation of school personnel and even students. As in *Barnette*, there is "probably no deeper division" than a conflict provoked by the choice of "what doctrine . . . public educational officials shall compel youth to unite in embracing." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 292, citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There are deep divisions over how public schools should respond to transgender ideology and other contentious matters. These divisions impact the speech of parents, teachers, students, and others. The Board goes far beyond merely teaching transgender ideology and actively facilitates sex transitions they *know* the child's family opposes.

Compelled speech is abhorrent to the First Amendment, particularly where government mandates conformity to its preferred viewpoint. *Barnette*, *Wooley*, and *NIFLA* are "eloquent and powerful opinions" that stand as "landmarks of liberty and strong shields against an authoritarian government's tyrannical attempts to coerce

ideological orthodoxy." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 266; *Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Nat'l Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018).

A. Transgender ideology is a matter of intense public concern.

Speech on matters of public concern merits heightened constitutional protection. There is hardly a more contentious "matter of public concern" than gender identity, "a controversial [and] sensitive political topic[] . . . of profound value and concern to the public." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up). Every person has a right to speak on this matter. The school uses mandatory speech—names and pronouns—to "communicate a message" many believe is false—that "[p]eople can have a gender identity inconsistent with their sex at birth." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). "Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id*. at 508. It is not the business of *any* government official in *any* position to coerce *any* person's chosen perspective on this matter—including public school personnel, students, and parents.

B. Schools can affirm the dignity of every student without sacrificing the constitutional liberties of other persons.

The Policy is designed to recognize and respect "an individual student's preferred name and pronouns." *Doe*, at *34. But in exalting the unilateral demands

of a child in this sensitive area, the Policy threatens to erase the First Amendment rights of parents, teachers, and/or other students.

It is a "critical part of a [teacher's] job" to "affirm[] the equal dignity of every student," so as to create the best environment for learning. Erica Goldberg, *"Good Orthodoxy" and the Legacy of Barnette*, 13 FIU L. Rev. 639, 666 (2019). But "students need to tolerate views that upset them, or even disturb them to their core, especially from other students, and perhaps even from professors." *Id*. Students must learn to endure speech that is offensive or even false as "part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Indeed, public school students attending required classes are exposed to "ideas they find distasteful or immoral or absurd or all of these." *Id*. at 591. Transgender students are not exempt but must learn to tolerate the views of those who disagree with them.

Public schools have a role in "educat[ing] youth in the values of a democratic, pluralistic society." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378 (6th Cir. 1999). Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so as not to "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. Our Nation's deep commitment to "safeguarding academic freedom" is "a special concern of the First Amendment,

which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Meriwether*, 992 F.3d at 504-505, 509, quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Teachers are asked "to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens" but "[t]hey cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). That "community" includes students, faculty, and *parents*.

II. COMPELLED SPEECH AND VIEWPOINT DISCRIMINATION ARE UNIQUELY PERNICIOUS VIOLATIONS OF THE FREE SPEECH CLAUSE.

Plaintiff's daughter informed a school counselor of her desire to transition from female to male at school, but she asked that it not be reported to her father because "she did not want to cause issues in the home." *Doe*, at *2-3. That transition implicated the speech of virtually everyone in the public school system—demanding they echo a lie about the child's sex. The Policy *requires* that staff "should continue to refer to the student in accordance with the student's chosen name and pronoun at school" over a parent's known objections. *Doe*, at *5. There is no apparent provision to accommodate conscientious objections.

The "proudest boast" of America's free speech jurisprudence is that we safeguard "the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Gender identity may be "embraced and advocated by increasing numbers of people," but that is "all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000). Our law also protects the right to remain silent—to *not* express viewpoints a speaker hates. Compelled expression is even worse than compelled silence because it affirmatively associates the speaker with a viewpoint he does not hold.

The Policy "[m]andates speech" many faculty, students, and parents "would not otherwise make" and "exacts a penalty" for refusal to comply. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Policy requires the use of *male* pronouns for a biological *female* or *female* pronouns for a biological *male*, based entirely on the command of a gender-confused child. "When the law strikes at free speech it hits human dignity . . . *when the law compels a person to say that which he believes to be untrue, the blade cuts deeper* because it requires the person to be untrue to himself, perhaps even untrue to God." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope*

Media, 99 Neb. L. Rev. 58, 59 (2020) (emphasis added). The Policy combines the worst of two worlds—compelled speech and viewpoint discrimination.

The Policy's speech requirements are obviously *content*-based. Worse yet, the Policy is *viewpoint*-based because it demands endorsement of transgender ideology regardless of conscience or religious faith. Furthermore, the Policy transgresses freedom of thought, the "indispensable condition" of "nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937)), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969). The freedom of thought that undergirds the First Amendment merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These two are "complementary components" of the "individual freedom of mind." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 637. Together they guard "both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633-634; *id.*, at 645 (Murphy, J., concurring). A system that protects the right to promote ideological causes "must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714; Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63.

A government edict that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S.

Ct. at 2464, citing *Barnette*, 319 U.S. at 633 (internal quotation marks omitted). Even a legitimate and substantial government purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Wooley*, 430 U.S. at 716-717, citing *Shelton v. Tucker*, 364 U.S. at 488. The Policy cannot jump this hurdle.

A. The Policy facilitates speech decrees that violate liberties of religion and conscience.

The Policy forces school staff and others to become "instrument[s] for fostering . . . an ideological point of view" that many find "morally objectionable." *Wooley*, 430 U.S. at 714-715. This glaring viewpoint discrimination assaults religious liberty and conscience.

Convictions about sexuality are integrally intertwined with religion. Many faith traditions have strong teachings about sexual morality, marriage, and the distinction between male and female. Compelled speech—that a boy is a girl or a girl is a boy—tramples these deeply held convictions. Religious speech is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted).

B. The Policy ushers in an Orwellian system that destroys liberty of thought.

"The possibility of enforcing not only complete obedience to the will of the State, but *complete uniformity of opinion* on all subjects, now existed for the first time." George Orwell, "1984" 206 (Penguin Group 1977) (1949) (emphasis added). As Justice Kennedy cautioned, "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal*., 535 U.S. 234, 253 (2002); *see* Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 265. The Policy imperils these liberties.

"[T]he history of authoritarian government . . . shows how relentless authoritarian regimes are in their attempts to stifle free speech." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). There is "no such thing as good orthodoxy" under a Constitution that safeguards thought, speech, conscience, and religion, even when the government pursues seemingly benign purposes like national allegiance (*Barnette*), equality, or tolerance. Goldberg, *"Good Orthodoxy"*, 13 FIU L. Rev. at 643. "Even commendable public values can furnish the spark for the dynamic that Jackson insists leads to the 'unanimity of the graveyard.'" Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. Rev. 689, 723 (2019).

Compelled speech "invades the private space of one's mind and beliefs." Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 275. While

"ordinary authoritarians" merely demand silence, prohibiting people from saying what they believe is true, "[t]otalitarians insist on forcing people to say things they know or believe to be untrue." *Id*., quoting Robert P. George.[2] The Policy adopts a totalitarian mode by dictating a distorted view of reality that aligns with whatever "gender identity" a child demands. Many cannot in good conscience comply.

Every speaker must decide "what to say and what to leave unsaid." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), quoting *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original). An individual's "intellectual autonomy" is the freedom to say what that person believes is true and to refrain from saying what is false. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 85. A speaker's choice "not to propound a particular point of view" is simply "beyond the government's power to control," regardless of the speaker's reasons for remaining silent. *Hurley*, 515 U.S. at 575. There is "no more certain antithesis" to the Free Speech Clause than a government mandate imposed to produce "orthodox expression." *Id*. at 579. Such a restriction "grates on the First Amendment." *Id*. "Only a tyrannical government"—*or public school board*—"requires one to say that which he believes is not true," e.g., that

[2] Robert P. George, Facebook (Aug. 2, 2017), Professor of Jurisprudence at Princeton, https://www.facebook.com/ RobertPGeorge/posts/10155417655377906.

"two plus two make five." *Id*. Here, the Policy requires false statements about a child's sex.

The Supreme Court has *never* upheld a viewpoint-based mandate compelling "an unwilling speaker to express a message that takes a particular ideological position on a particular subject." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 78. But that is precisely what the Policy requires, darkening the "fixed star in our constitutional constellation" that forbids any government official, "high or petty," from prescribing "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Regardless of how acceptable transgender ideology is in the current culture, the Board's interest in disseminating that ideology "cannot outweigh [any person's] First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. *Barnette* and *Wooley* solidify the principle that government lacks the "power to compel a person to speak, compose, create, or disseminate a message on any matter of political, ideological, religious, or public concern." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 63-64. The Policy is even more intrusive than in *Wooley*, where the state did not "require an individual to speak any words, affirm any beliefs, or create or compose any expressive message," but rather to serve as a "mobile billboard" for an ideological message obviously

attributable to the state. *Id.* at 63. But even this passive display violated the First Amendment because it "usurp[ed] speaker autonomy." *Id*. at 76.

C. Viewpoint-based compelled speech stifles debate and attacks the dignity of those who disagree with the prevailing state orthodoxy.

Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995). It creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). This is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464.

The government may not regulate speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. The Policy is "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). The Policy's viewpoint-based compulsion to speak seeks not only to control content (names and pronouns) but also to promote an ideology unacceptable to many. "Freedom of thought, belief, and speech are fundamental to the dignity of the human person." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59.

The Policy contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where the government must respect a wide range of diverse viewpoints. The government itself may adopt a viewpoint but may never "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley,* 515 U.S. at 579.

The Board attempts to enhance the dignity of some students by attacking the dignity of others, i.e., censoring their protected expression or compelling them to regurgitate the Board's preferred message. This purpose is "insufficient to override First Amendment concerns." Goldberg, *"Good Orthodoxy"*, 13 FIU L. Rev. at 664. Even when it is appropriate to regulate harmful discriminatory conduct, the Board may not require that some persons "communicate a message of tolerance that affirms the dignity of others." *Id*. Dignity is an interest "so amorphous as to invite viewpoint-based discrimination, antithetical to our viewpoint-neutral free speech regime, by courts and legislatures." *Id*. at 665.

As *Hurley* teaches, the state must guard against "conflation of message with messenger" because "a speaker's objection to speaking or disseminating a particular ideological message is at the core of the no-compelled-speech doctrine." Duncan,

Seeing the No-Compelled-Speech Doctrine Clearly, 99 Neb. L. Rev. at 64. The trial judge in *Hurley* erroneously reasoned that the parade organizer's rejection of a group's *message* was tantamount to "discrimination on the basis of the innate *personhood* of the group's members." *Id.* (emphasis added). The First Amendment guards a speaker's autonomy to "discriminate" by favoring viewpoints he wishes to express and rejecting other viewpoints. *Id*. Rejecting a *message* is not equivalent to rejecting a *person* who prefers that message. Similarly, rejecting transgender ideology that conflicts with biological reality is not tantamount to rejecting a *person* who is confused about his or her gender.

D. The prohibition of viewpoint discrimination, now firmly established by Supreme Court precedent, is a necessary component of the Free Speech Clause.

A century ago, the Supreme Court affirmed a conviction under the Espionage Act, which criminalized publication of "disloyal, scurrilous and abusive language" about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today, no doubt "the statute itself would be invalidated as patent viewpoint discrimination." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21 (2019). The Court shifted gears in *Barnette*, "a forerunner of the more recent viewpoint-discrimination principle." *Id*. *Barnette*'s often-quoted "fixed star" passage was informed by "the fear of government manipulation of the marketplace

of ideas." *Id*. Justice Kennedy echoed the thought: "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . . To permit viewpoint discrimination . . . is to permit Government censorship." *Matal*, 137 S. Ct. at 1767-1768 (Kennedy, J., concurring). Justice Kennedy's comments "explain why viewpoint discrimination is particularly inconsistent with free speech values." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 36.

Since *Barnette*, courts have further refined the concept of viewpoint discrimination. In *Cohen v. California*, Justice Harlan warned that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." 403 U.S. 15, 26 (1971); *see* Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 22. A year later the Court affirmed that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

In the 1980's, both the majority and dissent in *Perry Education Ass'n v. Perry Local Educators' Ass'n* agreed that viewpoint discrimination is impermissible, with the dissent explaining that such discrimination "is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). It became

apparent the Court considered viewpoint regulation an "even more serious threat" to speech than "mere content discrimination." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 23. Three years later, the Court struck down a viewpoint-based regulation based on coerced association with the views of other speakers. *Pacific Gas & Electric*, 475 U.S. at 20-21 (plurality opinion). Later the Court affirmed the "bedrock principle underlying the First Amendment . . . 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).

A key decision in the early 1990's struck down an ordinance that criminalized placing a symbol on private property that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (burning cross). The Supreme Court considered "the anti-viewpoint-discrimination principle . . . so important to free speech jurisprudence that it applied even to speech that was otherwise excluded from First Amendment protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25, citing *R.A.V.*, 505 U.S. at 384-385. The ruling defined viewpoint discrimination as "hostility—or favoritism—towards the underlying message expressed" (*R.A.V.*, 505 U.S. at 385 (citing *Carey v. Brown*, 447 U.S. 455 (1980)), effectively placing the principle "at the very heart of serious free speech protection."

Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25. The government may not "license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

The government may not discriminate against speech solely because of its religious perspective. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) (use of school premises); *Rosenberger*, 515 U.S. at 829 (student newspaper); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001) (after-school Bible club).

Government speech mandates often implicate viewpoint discrimination either by compelling a speaker to express the government's viewpoint (*Wooley*, *NIFLA*) (transgender ideology) or a third party's viewpoint (*Hurley*) (student's unilateral declaration of gender identity). Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 283. Here, the Policy mandates expression of both the Board's transgender ideology and a gender-confused minor child's viewpoint about her sex.

In recent years, *Matal* "is the [Supreme] Court's most important decision in the anti-viewpoint-discrimination line of cases." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 29. As this case illustrates, "[g]iving offense [to a transgender child] is a viewpoint." *Matal*, 137 S. Ct. at 1763. The Board may not escape the charge of viewpoint discrimination "by tying censorship to the reaction of [the child's] audience." *Id*. at 1766. Shortly after *Matal*, the Court struck

down a provision forbidding "immoral or scandalous" trademarks because the ban "disfavors certain ideas." *Iancu v. Brunetti*, 139 S. Ct. at 2297. The Court's approach "indicated that governmental viewpoint discrimination is a per se violation of the First Amendment." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 33. The viewpoint-based Policy here is unmistakably a "per se violation of the First Amendment."

III. THE POLICY'S VIEWPOINT-BASED SPEECH MANDATES ARE NOT JUSTIFIED AS APPLIED TO PUBLIC SCHOOL PERSONNEL, MERELY BECAUSE THEY ARE GOVERNMENT EMPLOYEES.

Teachers and other personnel inevitably use pronouns as an integral part of everyday speech at school. They use pronouns for students based on objective biological reality concerning each student's sex, often coupled with a personal belief that each person is created immutably male or female. This aspect of faculty speech is not part of anyone's official duties as a public employee, nor can it be regulated as professional speech. But it does touch a matter of intense public concern. Many do not accept transgender ideology. The First Amendment safeguards the right to speak according to personal beliefs on these matters, even in public schools.

Neither students nor *teachers* "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Students must learn how the Constitution guards their own rights and how to respect the rights of others. School staff can

respect the dignity of each student without sacrificing their own rights to thought, conscience, and speech. Although this case is focused on parental rights, the speech and religious liberty rights of others lurk in the background.

A. Government employees are citizens—not robots.

Even as an employer, *the government is still the government*, subject to constitutional constraints. Even as a government employee, *a citizen is still a citizen*. Government employees "do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The Constitution does not permit the Board to "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id*. at 419; see *Perry v. Sindermann,* 408 U.S. 593, 597 (1972); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

In *Pickering*, the Supreme Court crafted a test that balances "between the [free speech] interests of [a] teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Township High School District 205*, 391 U.S. 563, 568 (1968). *Pickering*'s balancing test does not warrant the compelled expression of any employee's *personal*

agreement on a controversial public issue where citizens are deeply divided. *Janus*, 138 S. Ct. at 2471 ("prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed").

The doctrine of unconstitutional conditions further condemns the Policy. "[A] State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Garcetti*, 547 U.S. at 413; *see Connick*, 461 U.S. at 142; *Keyishian* v, 385 U.S. at 605-606; *Pickering*, 391 U.S. 563; *Perry v. Sindermann*, 408 U.S. at 597; *Branti v. Finkel*, 445 U.S. 507, 515-516 (1980). There was a time when "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Garcetti*, 547 U.S. at 417, quoting *Connick*, 461 U.S. at 143. That theory has been "uniformly rejected." *Pickering*, 391 U.S. at 568; *Keyishian*, 385 U.S. at 605-606. "[P]ublic employees do not renounce their citizenship when they accept employment, and . . . public employers may not condition employment on the relinquishment of constitutional rights." *Lane v. Franks*, 573 U.S. 228, 236 (2014).

B. A school employee's use of pronouns does not constitute *government* speech.

Government speech occurs where a public employee speaks in an official capacity as a public employee and "there is no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 424. There is an

obvious analogue here because pronouns are a common and nearly unavoidable feature of everyday language. Speech in every context, public or private, inevitably includes pronouns.

The line between public and private speech may be fuzzy. "[W]hen public officials deliver public speeches . . . their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). A teacher's view of biological sex is "embedded within" the pronouns spoken. Under *Garcetti*, the "critical question" is whether a public employee's speech is "ordinarily within the scope of [his] duties." *Lane*, 573 U.S. at 240 (2014). *Garcetti* held that "when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes." *Garcetti*, 547 U.S. at 421 (emphasis added). This applies to speech "the employer itself has commissioned or created." *Id*. at 422. But *Garcetti* acknowledged that "expression related to . . . classroom instruction" might not fall within "customary employee-speech jurisprudence." *Id*. at 425; *see Meriwether*, 992 F.3d at 506.

C. The Policy's speech mandates cannot be justified as "professional" speech.

The Board could not salvage the Policy by characterizing employee speech as "professional." With narrow exceptions not relevant here, the Supreme Court has

explicitly declined to recognize "professional speech" as a separate category entitled to diminished First Amendment protection. *NIFLA*, 138 S. Ct. at 2372. "The dangers associated with content-based regulations of speech are also present in the context of professional speech." *Id*. at 2374. Content-based restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broad. Sys.*, 512 U. S. at 641.

The First Amendment embraces not only the freedom to believe but also "the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 62, 736-737 (2014) (Kennedy, J., concurring). The "larger community" includes a citizen's place of employment.

III. THERE IS NO LEGITIMATE PEDAGOGICAL PURPOSE FOR THE POLICY'S SPEECH RESTRICTIONS AS APPLIED TO STUDENTS.

Students do not sacrifice their constitutional rights as a condition of attending public school. There is nothing "legitimate" or "pedagogical" about the attempt to forcibly alter student speech about the sex of other students. Such compulsion cannot be salvaged by appealing to cases that allow narrowly crafted restrictions of student speech under limited circumstances. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 409 (2007) (speech promoting illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (school-sponsored speech); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (sexually explicit speech). These narrow exceptions are

poles apart from the demand that students set aside their personal convictions and make statements they believe are false. A student's speech and beliefs about sexuality merits constitutional protection no matter how profoundly school officials—or even society generally—might disagree. Although it is not clear that the Policy here explicitly demands compliance by other students, such compliance would likely be necessary to facilitate the transition.

Public schools are not "enclaves of totalitarianism" and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring), quoting *Tinker*, 393 U.S. at 511. Students "cannot be punished merely for expressing their personal views on the school premises." *Hazelwood*, 484 U.S. at 266.

The Board adopts one side of the contentious transgender debate and shuts down further inquiry, demanding ideological compliance. But the Constitution protects unpopular minority viewpoints. *Dale*, 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397 (burning American flag); *Doe v. University of Michigan*, 721 F.Supp.852, 863 (E.D. Mich. 1989) (University could not establish anti-discrimination policy that effectively prohibited speech it disagreed with, nor could it "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people"). This is particularly true in a changing social

environment. "Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957). Even elementary schools may not prohibit speech merely "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

Schools are not a haven where educators can ignore the First Amendment liberties of either faculty or students. It is well settled that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." *Barnette*, 319 U.S. at 633 (no "clear and present danger" presented by allowing students to quietly forego the compulsory flag salute). "[The] Bill of Rights which guards the individual's right to speak his own mind" does not "le[ave] it open to public authorities to compel him to utter what is not in his mind." *Id*. at 634. Such compulsion "invades the sphere of intellect and spirit" which the First Amendment "reserve[s] from all official control." *Id.* at 642.

The Policy threatens to compel students to either dishonestly affirm a belief they do not hold or alter their beliefs under state compulsion. Both alternatives gut the First Amendment. Students who address their transgender peers face compulsion to declare a belief; they are not merely exposed to academic instruction or beliefs that differ from their own. Decades of precedent drive the conclusion that the Board

cannot compel students to affirm the morality of beliefs that collide with their own convictions. *Wooley,* 430 U.S. at 715 ("The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable."); *Pacific Gas & Electric*, 475 U.S. at 16 ([I]f "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."); *Hurley,* 515 U.S. at 575 ("[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control.")

CONCLUSION

This Court should reverse the District Court ruling and grant the Plaintiff's Motion for Preliminary Injunction.

DATED: July 3, 2025

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COMBINED CERTIFICATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(A)(5) and Fed. R. App. P. 32(a)(7)(B) because it 6,448 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

3. Deborah J. Dewart is a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

4. In accordance with L.A.R. 31.1(c), this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, Cortex XDR, Agent version 7.8.1, and is free of viruses according to this program.

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DATED: July 3, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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