APPEAL NO. 25-5641
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODERICK E. THEIS, II,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
Case No. 2:25-cv-00865-HL

BRIEF OF MONTANA FIRST AMENDMENT SOCIETY, 1776 FOUNDATION, AND MONTANA PUBLIC POLICY CENTER AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND THE REVERSAL OF THE DISTRICT COURT'S PARTIAL DENIAL OF PLAINTIFF-APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION

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CORPORATE DISCLOSURE STATEMENT

Montana First Amendment Society, 1776 Foundation, and Montana Public Policy Center are Montana non-profit corporations with no parent corporations or stockholders.

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INTEREST OF AMICI CURIAE

Montana First Amendment Society is a Montana nonprofit corporation that exists to promote, educate on, defend, and preserve the rights and liberties guaranteed by the First Amendment of the United States Constitution. 1776 Foundation is a Montana nonprofit corporation that exists to inform and equip the people of Montana to better evaluate policy options that uphold traditional American values, historic civil liberties, the Montana Constitution and the Constitution of the United States of America. Montana Public Policy Center is a Montana nonprofit corporation that exists to promote public policy solutions that provide increased access to economic opportunities, greater individual freedoms, and encourage great participation on public matters. Montana First Amendment Society, 1776 Foundation, and Montana Public Policy Center have an interest in ensuring that the First Amendment's protection of free speech is upheld throughout the country, and that government employees are not subjected to unconstitutional restrictions on their protected speech.

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *Amici Curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *Amici Curiae*, have made a monetary contribution to its preparation or submission. Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

SUMMARY OF ARGUMENT

Appellant Roderick Theis ("Theis") is a licensed clinical social worker employed by Intermountain Education Service District ("IMESD") as an Education Specialist. IMESD is an education service district that provides services to school districts in the areas of special education, technology, school improvement, and administrative services. Theis has three offices within the district. At one office, he displayed in a windowsill two books titled *He is He* and *She is She*. At his other two offices he displayed a book on his desk titled *Johnny the Walrus*. The books support a binary view of gender.

An employee of La Grande School District ("LGSD") filed a Complaint with IMESD alleging the display of *He is He* and *She is She* violated IMESD's Every Student Belongs Policy ("ESB Policy") and Bias Incident Policy (collectively, IMESD's "Speech Policy"). After an investigation, IMESD determined that the display of *He is He*, *She is She*, and *Johnny the Walrus* amounted to a bias incident under the IMESD's Speech Policy because it constituted "a hostile expression of animus toward another person relating to their actual or perceived gender identity" and issued a Letter of Directive to Theis. 1-ER-010. IMESD informed Theis that if he continued to display the books, he could be subject to discipline up to and including termination of his employment.

Theis exhausted his administrative appeals and filed suit, seeking a preliminary injunction to enjoin IMESD from enforcing the Speech Policy to prohibit Theis from displaying the books or similar messages in the workplace and to remove any reference to IMESD's findings and related investigations from Theis's employment records. The District Court granted in part and denied in part Theis's Motion for Preliminary Injunction, holding that IMESD was enjoined from taking disciplinary action against Theis if he choose to resume displaying the books *He is He*, *She is She*, or *Johnny the Walrus* in any of his offices within the IMESD service area while the children that he serves are not present in those office spaces. The District Court declined to grant Theis's request that the Letter of Directive be removed from his personnel file "because it was based, at least in part, on his display of the books when students were present." 1-ER-034.

The District Court abused its discretion and erred in partially denying Theis's Motion for Preliminary Injunction because IMESD's Speech Policy does not prohibit Theis's display of the books, which is protected speech under the First Amendment, regardless of whether students are present.

IMESD presented no evidence that Theis made any hostile expressions of animus. In fact, the evidence affirmatively refuted any such finding. The District Court erred in allowing the Letter of Directive to remain effective and permitting IMESD's censorship of Theis's display of *He is He*, *She is She*, and *Johnny the*

Walrus in the presence of IMESD students despite this contrary evidence and IMESD's disingenuous application of the policy.

Additionally, the District Court erred in concluding that Theis's display of *He is He*, *She is She*, and *Johnny the Walrus* in the presence of IMESD students amounted to unprotected government speech because, in accordance with *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), it cannot reasonably be attributable to the government. To account for the complexity associated with the interplay between free speech rights and government employment, the United States Supreme Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968), *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and related cases suggest proceeding in two steps. *Kennedy*, 597 U.S. at 527-528 (citing *Pickering* 391 U.S. 563 and *Garcetti*, 547 U.S. 410). The first step involves a threshold inquiry into the nature of the speech at issue. *Id*. If a public employee speaks pursuant to official duties, the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is the government's own speech for constitutional purposes. However, when an employee speaks as a citizen addressing a matter of public concern, the First Amendment may be implicated and courts should proceed to a second step. *Id*. At this second step, courts should attempt to engage in a delicate balancing of the competing interests surrounding the speech and its consequences. *Id*. (internal quotations and citations

omitted). Among other things, courts at this second step have sometimes considered whether an employee's speech interests are outweighed by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id*. (internal quotations and citations omitted). Neither displaying the books in his office nor discussing their contents with others were part of Theis's official duties. Theis's speech was that of a private citizen speaking on a matter of public concern subject to the second step of the *Pickering-Garcetti* analysis, which the District Court improperly neglected to apply in this case.

Finally, the District Court erred by allowing IMESD to silence Theis based on nothing more than its desire to evade the unavoidable tension that necessarily attends civic discourse. This motivation is insufficient to warrant infringement on Theis's First Amendment liberties under *Pickering*. Instead, the District Court permitted a heckler's veto to deprive Theis of his First Amendment rights in violation of clearly established constitutional principles.

For these reasons, the District Court's partial denial of Theis's Motion for Preliminary Injunction must be reversed.

ARGUMENT

I. THEIS'S DISPLAY OF THE BOOKS DID NOT CONSTITUTE A BIAS INCIDENT UNDER IMESD'S SPEECH POLICY BECAUSE IT WAS NOT A HOSTILE EXPRESSION OF ANIMUS.

Or. Rev. Stat. § 659.850(2) mandates that persons may not be subject to discrimination in public schools funded by the Legislature. 1-ER-004-005. Additionally, Or. Rev. Stat. § 339.347 defines bias incidents and requires that education providers adopt policies to address bias incidents. 1-ER-004-005. IMESD adopted the Speech Policy to comply with these statutes. 1-ER-004-005. The "ESB Policy mirrors the statutory definition under Or. Rev. Stat. § 339.347(1)(a)(A), which provides that a "'[b]ias incident' means a person's hostile expression of animus toward another person, relating to the other person's perceived race, color, religion, gender identity, sexual orientation, disability or national origin, of which criminal investigation or prosecution is impossible or inappropriate.'" 1-ER-004-005. Therefore, a bias incident properly actionable under IMESD's Speech Policy and its corresponding statute must, by definition, constitute a hostile expression of animus.

At the beginning of October 2024, Theis began displaying *He is He* and *She is She* by Ryan and Bethany Bomberger on the windowsill behind his desk in his office at La Grande Middle School ("LGMS") according to the office decoration custom embraced by many IMESD employees. 1-ER-006. Not a single IMESD student "asked about those books or commented on them," was "visibly upset or

distracted by them," or "handled or read either of them." 1-ER-006. (internal quotations and citations omitted).) Later that month, LGMS Principal Chris Wagner informed Theis that another LGSD employee had complained about Theis's display of the books. 1-ER-007. Principal Wagner did not find anything offensive or inappropriate about the books but nevertheless instructed Theis to place the books out of sight or remove them. 1-ER-007-008.

Theis was subsequently notified by Aimee VanNice, IMESD's Assistant Superintendent and Director of Human Resources that an LGSD employee had filed a bias incident complaint against him because of his display of *He is He* and *She is She*. The complaint was subsequently investigated, and IMESD discovered that Theis had also previously displayed *Johnny the Walrus* by Matt Walsh at his other offices at Elgin School District and Union School District. 1-ER-007. VanNice asked Theis "whether he believed displaying the books constituted a hostile expression of animus," and Theis responded by stating that "'he has no ill will towards anyone, that he wished no harm to anybody,' and that he did not believe that the books contained 'messages of ill will or hostility.'" 1-ER-009 (internal citations omitted). Following the investigation, IMESD issued a Letter of Directive to Theis detailing its findings and warning Theis that his continued display of the books could result in his termination. 1-ER-010.

While the District Court acknowledged that Theis disputed whether his display of the books constituted a bias incident, it declined to analyze this issue and instead adopted IMESD's finding that Theis's speech amounted to a bias incident notwithstanding the contrary evidence presented to it. IMESD's finding of a bias incident was predicated upon Theis's "admission that if [he] knew a transgender student were visiting [his] office [he] might set the books aside" since that admission apparently "connotes that "[he] underst[ood] the impact the books displayed may have on certain students based upon their actual or perceived gender identity." 1-ER-010. No reasonable person could equate Theis's recognition of certain topics as controversial or his willingness to be overly sensitive to the viewpoints of others with a hostile expression of animus. Theis's sensitivity demonstrates a lack of hostility or ill will. IMESD's logic is flawed and the District Court erred in accepting this rationale as an appropriate basis for the Letter of Directive and permitting IMESD to prohibit Theis from displaying the books in the presence of students. Nothing in IMESD's Speech Policy can properly serve as a basis for any of the adverse actions IMESD took against Theis or for any restrictions IMESD is attempting to place on Theis's free speech because the policies cannot be reasonably read to condemn Theis's actions, which were not motivated by ill will or hostility.

In *Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117 (9th Cir. 2025) this Court considered whether the plaintiffs, Rachel Sager (née Damiano) and Katie

Medart, who were terminated from their employment by Grants Pass School District No. 7 as an assistant middle school principal and middle school science and health teacher, respectively, suffered unlawful retaliation for engaging in protected speech and discrimination on the basis of their religion and viewpoint. *Damiano*, 140 F.4th 1117. Sager and Medart had created the "I Resolve" campaign, which included a website and video expressing their views on gender identity, parental rights, and education policy based on their philosophical and Christian religious beliefs. *Id*. The "I Resolve" campaign conveyed a similar message to that conveyed by *He is He*, *She is She*, and *Johnny the Walrus* with respect to gender identity. *Id*.; 1-ER-010. Grants Pass Sch. Dist. No. 7 ("GPSD") did not endorse or support the message conveyed by the "I Resolve" campaign and terminated Sager and Medart for their involvement with the campaign. *Damiano*, 140 F.4th at 1134-1135. Prior to their termination, their activities were investigated by an independent investigator following a series of complaints from other district employees. *Id*. The investigator attempted to determine whether the campaign constituted a bias incident as that term is defined by Or. Rev. Stat. § 339.347(1)(a)(A) and ultimately declined to sustain the allegation that either Sager or Medart violated district policy because it was not clear whether "I Resolve" was a hostile expression of animus toward those who use a different gender identity. *Id.* at 1135. The investigator in *Damiano* was right to question the application of GPSD's bias incident policy to Sager and Medart's

activities. Similarly, this Court correctly concluded that there were genuine factual disputes about the extent to which Sager and Medart engaged in "I Resolve" activities in a manner prohibited by GPSD policy. *Id*. at 1142.

Here, the District Court failed to address the critical question of whether Theis's conduct was properly actionable under the Speech Policy and accepted IMESD's absurd determination instead. This illogical outcome is compounded by the fact that the District Court declined to acknowledge that Theis's Due Process rights had been violated on the grounds that "the ESB policy gave [him] fair notice of what was prohibited," and a "person of ordinary intelligence would understand that bias incidents were expressions of ill will directed toward another person based on their protected characteristics." 1-ER-030. This position is ironic. The District Court deemed Theis adequately informed of what conduct was prohibited by the policy while permitting IMESD to enforce an untenable interpretation of the policy to suppress an opposing viewpoint. However, if the policy is clear enough to disallow Theis's Due Process violation claim, it cannot support IMESD's perversion of its plain meaning.

Although IMESD may be allowed to place some restrictions on Theis's speech within the parameters dictated by the *Pickering*-*Garcetti* framework, as discussed below, that framework does not give IMESD the right to indulge in such a gross misapplication of its own policies. The District Court erred in permitting IMESD to

censor Theis's speech and allowing adverse employment actions to be sustained against him during the pendency of this litigation on the basis of IMESD's disingenuous application of its Speech Policy. Accordingly, the District Court's partial denial of Theis's Motion for Preliminary Injunction must be reversed.

II. THEIS'S DISPLAY OF THE BOOKS WAS NOT GOVERNMENT SPEECH AND THEREFORE CANNOT BE RESTRICTED AS SUCH.

With respect to Theis's First Amendment speech-based claims, the District Court concluded that Theis "spoke as a public employee by prominently displaying the books while students were present." 1-ER-021, 1-ER-024. The District Court arrived at this conclusion because Theis displayed the books "*while engaged in speech that IMESD paid him to produce* as an Education Specialist" and because the display of the books "can be reasonably viewed as being promoted by the school or as the efforts of an employee to press his particular views upon students." 1-ER-019-020 (emphasis original).

In reaching these conclusions, the District Court relied heavily on this Court's rationale in *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954 (9th Cir. 2011) and the United States Supreme Court's decision in *Kennedy*. 1-ER-018-021. *Johnson* was decided before *Kennedy*, and while the District Court recognized that "*Johnson* must be reexamined in light of *Kennedy*" it failed to properly apply *Kennedy* and attempted to distinguish this case from *Kennedy* on precarious grounds. 1-ER-018, n.6.

In *Kennedy*, the Supreme Court determined that a high school football coach who lost his job because he knelt at midfield to pray after games had established an infringement of his rights under the Free Speech Clause because his speech was private – not government – speech, as the prayers were not ordinarily within the scope of his duties as a coach. *Kennedy*, 597 U.S. 507. The Court concluded that "when Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech ordinarily within the scope of his duties as a coach" since he "did not speak pursuant to government policy and was not seeking to convey a government-created message," nor was he "instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District *paid him to produce* as a coach." *Id.* at 509 (emphasis added) (internal quotations and citations omitted). In other words, Mr. Kennedy's prayers did not owe their existence to Mr. Kennedy's responsibilities as a public employee. *Id*.

Conversely, in *Johnson*, this Court ruled that Poway Unified School District did not infringe upon Johnson's First Amendment rights when it ordered him not to use his public position to present his own views on the role of God in the nation's history to the students in his mathematics classroom by hanging banners containing certain phrases such as "In God We Trust," "One Nation Under God," "God Bless America," and "God Shed His Grace on Thee." *Johnson*, 658 F.3d 954. Since Johnson's display of religious banners "owe[d] its existence to Johnson's position as

a teacher," this Court concluded that "Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire." *Id.* at 970.

Here, the District Court borrowed language from the *Kennedy* opinion while adhering to the alarming and outdated precedent established by *Johnson*. 1-ER-019-020. Both *Johnson* and the District Court have construed *Garcetti* too broadly. The speech at issue in *Garcetti* involved an allegation of governmental misconduct contained within a memorandum produced pursuant to a prosecutor's ordinary responsibilities. *Garcetti*, 547 U.S. 410. *Garcetti* supplemented the *Pickering* framework by clarifying that "[r]estricting speech that *owes its existence* to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421 (emphasis added).

However, the speech at issue in *Garcetti* is readily distinguishable from a football coach praying after a game or an Education Specialist decorating his office with books supporting a binary view of gender. *Kennedy* respected the often-subtle distinction between a public employee speaking pursuant to his or her duties and a private citizen speaking on a matter of public concern by recognizing that not everything a public-school employee says or does can reasonably be attributable to the government. *Kennedy*, 597 U.S. 507. The District Court did not respect that distinction. The misapplication of *Garcetti* by this Court in Johnson and the District Court in this case is particularly disturbing because in *Garcetti* the Supreme Court

specifically recognized that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence" and declined to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425.

Theis was not paid to counsel students on gender identity. Theis "administers standardized tests to students in a one-on-one format in his offices at various locations within the IMESD service area." 1-ER-019. When "VanNice asked Theis during IMESD's internal investigation how the book could be used to support a transgender student, [Theis] told her that he did not use the books as part of his work with students." 1-ER-009 (internal citation omitted). Neither the books nor their contents have anything to do with Theis's job duties. In displaying the books, Theis was speaking as a private citizen on a matter of public concern. No one could have reasonably construed the books or their message as endorsed by the school or in any way attributable to the government.

Tolerance of certain speech does not necessarily imply its endorsement. Learning 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*, 597 U.S. at 538–539 (internal quotations omitted). Students are mature enough to

understand that a school does not endorse, let alone coerce them to participate in, speech that it merely permits on a nondiscriminatory basis. *Id.* at 538–539 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992) and *Mergens, Bd. of Educ. v. Mergens*, 496 U.S. 226, 231, (1990)). While "some will take offense to certain forms of speech … they are sure to encounter in a society where those activities enjoy such robust constitutional protection … '[o]ffense . . . does not equate to coercion.'" *Id.* (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 567 (2014)).

The District Court disregarded these distinctions. Under *Johnson*, school staff members must necessarily "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" in clear violation of the principle articulated in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) if any communication, however unrelated to their jobs it may be, can apparently be construed as owing its existence to their employment. *Tinker*, 393 U.S. at 506. This abuse is precisely what *Kennedy* and *Garcetti* admonished. *Kennedy,* 597 U.S. at 529; *Garcetti*, 547 U.S. at 425.

The Supreme Court recognized that the students observing Kennedy's prayers could understand the distinction between Kennedy's employer tolerating his prayers and endorsing his prayers. *Kennedy*, 597 U.S. at 538–539. Similarly, students meeting with Theis are sufficiently capable of making that distinction. *Johnson* and the District Court's decision condone viewpoint discrimination based on the

purportedly noble agenda of preventing school employees from taking advantage of their positions to press their particular views upon the impressionable and captive minds before them. *Johnson*, 658 F.3d 954. *Kennedy* appears to condemn this approach when it is not the employee's job to convey a certain message on behalf of the school and there is no coercive element involved in their activities. *Kennedy,* 597 U.S. 507. In this case, it is not Theis's job to convey a certain message regarding gender identity to IMESD students and there is no coercive element at work in him merely displaying *He is He*, *She is She*, or *Johnny the Walrus* in his offices. Classifying his display of the book covers as government speech simply because other students may observe them is absurd. The District Court's logic, which is based on *Johnson*, is flawed.

The District Court permitted Theis to display *He is He*, *She is She*, and *Johnny the Walrus* when no students are present in his office, drawing upon this Court's decision in *Dodge v. Evergreen Sch. Dist. #114,* 56 F.4th 767 (9th Cir. 2022) to validate its approach. 1-ER-018-020. In *Dodge*, this Court affirmed in part and reversed in part a summary judgment entered in favor of a school district in an action brought by a teacher who alleged retaliation in violation of the First Amendment when a school principal told him that he could not bring his Make America Great Again ("MAGA") hat with him to teacher-only trainings on threat of disciplinary action. *Dodge*, 56 F.4th 767. This Court concluded that Dodge was engaged in

speech protected by the First Amendment because his MAGA hat conveyed a message of public concern and he was acting as a private citizen in expressing that message since he had attended a teacher-only training and no students were present. *Id*.

However, the District Court's reliance upon *Dodge* is misplaced because *Dodge* suffers from the same critical shortcoming as *Johnson*. According to the District Court's rationale, Theis has a right to display the books and promote any message he wants as long as students are not present. This reasoning was rejected by *Kennedy* where the Court declined to bifurcate the analysis of Kennedy's job responsibilities based solely on who was present when he performed them. The District Court erred when doing so here. Public schools have ample opportunity through curriculum development to control the messages that they intend to convey to the students they serve without infringing on the First Amendment liberties of their employees. See *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 519-20 (9th Cir. 1994) (teaching creationism over evolutionism).

Theis's display of the books in his office, regardless of whether students are present, is more appropriately considered the speech of a private citizen regarding a matter of public concern rather than government speech. The District Court erred in classifying Theis's display of *He is He*, *She is She*, and *Johnny the Walrus* as unprotected government speech because, like Kennedy's prayers, it falls outside of

Theis's job responsibilities and IMESD's allowance of the display cannot reasonably be construed as IMESD's promotion of their content.

III. IMESD'S ACTIONS AMOUNTED TO AN IMPERMISSIBLE HECKLER'S VETO TO SILENCE THEIS'S VIEWPOINT.

Since the District Court incorrectly concluded that Theis's display of *He is He*, *She is She*, and *Johnny the Walrus* constituted government speech when students were present, it only addressed whether IMESD had an adequate justification for treating Theis differently than members of the public in the context of Theis displaying the books outside the presence of students. It failed to reach the second step of the *Pickering* balancing test with respect to Theis's display of the books in the presence of students. If the District Court had considered this question, it would have been confronted with the reality that prohibiting Theis from displaying the books is not legally permissible.

A heckler's veto is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience. *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007) (citing *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)). The core First Amendment principle of viewpoint neutrality applies in the *Pickering-Garcetti* context as elsewhere. *MacRae v. Mattos*, 145 S. Ct. 2617, 2620 (2025) (Thomas, J. concurring with denial of certiorari) (citing *Rankin v. McPherson,* 483 U.S. 378, 384 (1987)). Protected speech does not readily give way to a heckler's veto. *Kennedy,*

597 U.S. at 543 (citing *Good News Club v. Milford Central School*, 533 U. S. 98, 119 (2001)). Furthermore, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to 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. The prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. *Id.* at 511. It undermines core First Amendment values to allow a government employer to adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee, portray this disagreement as evidence of disruption. *MacRae,* 145 S. Ct. at 2620. Speech that outrages or upsets co-workers without evidence of any actual injury to school operations does not constitute a disruption. *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 513 (9th Cir. 2004).

IMESD has not proffered a shred of evidence that Theis's display of the books caused a material and substantial interference with schoolwork or discipline. IMESD's fears of internal disruption stem from the speculative possibility of a

transgender student seeing the books and feeling unwelcome and unsupported by their school. 1-ER-010-011, 1-ER-027. However, there is no record of a single incident of this happening. 1-ER-006, 1-ER-022. One student asked Theis about *Johnny the Walrus*, and Theis "summarized the book and shared parts of it with the student." 1-ER-007. There was nothing remarkable about that exchange that would justify the restrictions IMESD placed on Theis. Restrictions on speech have been upheld based upon reasonable predictions of disruptions or negative publicity. *Damiano,* 140 F.4th at 1138, 1145 (citing *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 725 (9th Cir. 2022); *Nichols v. Dancer*, 657 F.3d 929, 933 (9th Cir. 2011); *Dible v. City of Chandler*, 515 F.3d 918, 928–29 (9th Cir. 2008); *Moser v. Las Vegas Metro. Police Dep't*, 984 F.3d 900, 905 (9th Cir. 2021)). However, in this case, there is no justifiable rationale for IMESD's censorship because it is based solely on the desire to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

Furthermore, nothing in the record suggests that Theis' perceived beliefs regarding gender and sexuality would in any way impair his ability to carry out his ordinary job responsibilities. While IMESD's Speech Policy aims to guarantee its students an educational environment free from discrimination, no student, regardless of gender identity, has a reasonable expectation of participating in an educational

environment free from controversial ideas and dissenting opinions. With respect to this latter point, the Supreme Court has declared:

> Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. 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. 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.

Tinker, 393 U.S. at 508–509. Theis's First Amendment liberties have been violated in clear contravention of this fundamental principle. The District Court erred in authorizing such an egregious violation of Theis's rights and its decision to allow the Letter of Directive to remain effective and to permit IMESD to improperly restrict Theis's speech when students are present and must be reversed.

CONCLUSION

Theis received a Letter of Directive and was prohibited from displaying *He is He*, *She is She*, and *Johnny the Walrus* in the presence of IMESD students based on a distorted application of IMESD's Speech Policy. The District Court improperly concluded that Theis's display of the books when students were present constituted unprotected government speech because the display of the books cannot reasonably be attributed to IMESD. The District Court failed to properly apply the *Pickering*

balancing test to Theis's speech and instead permitted a heckler's veto to impermissibly censor a controversial viewpoint in violation of Theis's First Amendment rights and fundamental constitutional principles. For these reasons, the District Court's partial denial of Theis's Motion for Preliminary Injunction must be reversed.

DATED this 24th day of October 2025.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) APPEAL NO. 25-5641

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Justin Oliveira **Date** 10/24/2025
*(use "*s/[typed name]*" to sign electronically-filed documents)*