Docket No. 25-5641

In the

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, in their official capacity and AIMEE VANNICE,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Oregon, No. 2:25-cv-00865-HL · Honorable Andrew D. Hallman

AMICUS CURIAE BRIEF OF NC VALUES INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

NC Values Institute is a nonprofit, tax-exempt organization that has no parent entity and issues no stock.

Dated: October 24, 2025

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INTEREST OF AMICUS CURIAE[1]

NC Values Institute, as *amicus curiae*, respectfully urges this Court to reverse the district court ruling.

NC Values Institute ("NCVI"), formerly known as The Institute for Faith and Family, is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including speech and religion. See https://ncvi.org.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Public schools are not a haven where educators can ignore the First Amendment with impunity. 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). Intermountain Education Service District ("IMESD") impermissibly censors the protected speech of Roderick Theis, a licensed clinical social worker employed as an Education Specialist to assess the educational support needs of students in the school districts served by IMESD. *Theis v. Intermountain Educ. Serv. Bd. of Dirs*., 2025 U.S. Dist. LEXIS 161571, *2 (D. Ore. 2025).

[1] This brief is accompanied by a Motion for Leave to File. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

IMESD has adopted certain policies that lead to this impermissible censorship—the Every Student Belongs Policy ("ESB Policy") and the Bias Incident Complaint Procedure Policy ("Bias Incident Policy"). *Id*. at *3. These policies are based on Oregon state law, Ore. Rev. Stat. ("ORS") §§ 659.850(2) (prohibiting discrimination) and ORS § 339.347 (defining "bias incident"). *Id*. at *3-4. Both the statutes and the policies are highly *biased* and *discriminate* against people of faith who object to the prevailing transgender ideology. Under the Policy and under ORS § 339.347(1)(a)(A), a "bias incident" is defined as "a person's hostile expression of animus toward another person, relating to the other person's perceived . . . religion, gender identity, sexual orientation. . . ." *Id*. at *4. IMESD determined that Theis' passive display of three personal books, including *He is He* and *She is She*, "constituted a bias incident under the ESB policy." *Id*. at 13.

ARGUMENT

The "central question" here is whether Theis' display of three personal books in his office constitute "his private speech" or "government speech attributable to IMESD." *Theis*, at *21-22. The district court's split decision characterized the display as private speech "outside the presence of students" but government speech if children were present and could see the books. *Id*. at *22, 26-27. This conclusion places an official seal of approval on a disturbing censorship that attempts to mandate the government's preferred viewpoint on one of the most hotly debated

topics in American history—transgender ideology. The decision cannot stand and must be overturned.

I. THEIS' BOOK DISPLAY IS NOT GOVERNMENT SPEECH ATTRIBUTABLE TO IMESD.

Public employees do not surrender their First Amendment rights as a condition of employment, even in public education. Theis' book display is private speech that does not fall within the scope of his official employment duties. The books are unrelated to classroom instruction or other interaction with students. *Garcetti v. Ceballos* acknowledged that "expression related to . . . classroom instruction" might not fall within "customary employee-speech jurisprudence." 547 U.S. 410, 425 (2006); *see Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021). Theis does not assign any of his three books to students to read or otherwise use them in classroom instruction.

Government (public) speech occurs where a public employee speaks in his/her official capacity 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 individuals—including public school employees—own and read books on both sides of the ongoing public debate over transgender ideology.

Under *Garcetti*, the "critical question" is whether a public employee's speech is "ordinarily within the scope of [his] duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014). "[W]hen 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). That inquiry should be undertaken "practical[ly]" (*Garcetti*, 547 U.S. at 424) rather than with "a blinkered focus on the terms of some formal and capacious written job description" (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529 (2022)). To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protections. *Garcetti*, 547 U.S. at 424. In *Garcetti*, the government "itself ha[d] commissioned or created" the employee's speech, which he delivered in the course of performing his duties. *Id*. at 422. But even under these circumstances, the employee's 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). Here, Theis' personal views about biological sex are "embedded within" his privately owned books, but the books are not within the scope of his duties as a traveling social worker who assesses the educational support needs of students and conducts standardized testing.

It is critical to examine whether the "government itself" is speaking. Multiple precedents confirm that the government may adopt policies, endorse views, and "speak" for itself. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009); *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000).

When speaking for itself, the government is "not barred by the Free Speech Clause" and may determine the content. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015); *Summum*, 555 U.S. at 467. Theis book display, unrelated to classroom activities, is not a case where the "government *itself*" is speaking.

In *Shurtleff v. City of Boston*, three Justices offered a succinct definition of "government speech," which "occurs if—but only if—a *government purposefully expresses a message of its own through persons authorized to speak on its behalf*, and in doing so, does not rely on a means that abridges private speech." 596 U.S. 243, 267 (2022) (Alito, Gorsuch, Thomas, J.J., concurring in the judgment) (emphasis added). In *Bremerton*, the coach who prayed after the games "did not speak pursuant to government policy" and "was not seeking to convey a government-created message." 597 U.S. at 429. Here, there is no indication that IMESD is purposefully expressing its own message or that Theis purported to speak for his public employer.

A. The government speech doctrine must not be used to mask censorship.

There is a heightened risk of censorship or mixed messages when private speech occurs in a context involving the government. The government may be subject to the First Amendment if – although literally "speaking" – it infringes on private expression. *Shurtlett*, 596 U.S. at 269 (Alito, Gorsuch, Thomas, J.J.,

concurring in the judgment). The government speech doctrine must be restrained to prevent the power and machinery of government from being used to stifle private expression—which is precisely what occurred here. Even a public employee speaking on public property is not necessarily engaged in "government speech" with every word he utters. In *Bremerton*, the football coach who prayed on the field "was not seeking to convey a government-created message." 597 U.S. at 529. Here, as in *Bremerton*, the private character of the speech should be evident. Theis' book display does not "convey a government-created message." Recasting the display as "government speech" is no more than a ploy to shut down private speech.

As concurring Justices warned in *Shurtleff*, "courts must be very careful when a government claims that speech by one or more *private* speakers is actually *government* speech." 596 U.S. at 262 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment) (emphasis added). The government speech doctrine becomes "susceptible to dangerous misuse." *Ibid*., citing *Matal v. Tam*, 582 U.S. 218, 235 (2017). That is exactly what happened here. IMESD neither "purposefully express[ed] a message of its own" nor spoke "through persons authorized to speak on its behalf." *Shurtleff,* 596 U.S. at 267 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment).

B. The risk of censorship escalates in cases of religious speech.

Convictions about sexuality are integrally intertwined with conscience and the teachings of many faith traditions. Compelling an ideological viewpoint—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).

The Free Exercise Clause protects "not only the right to harbor religious beliefs inwardly and secretly" but also "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Bremerton*, 597 U.S. at 624. Such protection extends to "the performance of (or abstention from) physical acts." *Ibid*., quoting *Employment Div.*, *Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877 (1990). That "daily life" includes religious expression in the workplace that does not disrupt the employer's business. Theis' *passive* book display, unrelated to his duties as a social worker, is hardly the sort of disruption that would justify encroaching on his rights to speech and religious expression. On the contrary, "[t]hat arrangement is typical for IMESD employees in their assigned schools," who "commonly decorate their offices with paintings, personal photos . . . posters,

inspirational quotes, books, and other items." *Theis*, at *5-6. The determination of potential offensiveness was based on one other employee's opinion that the books "could be considered offensive to transgender students." *Id*. at *8.

IMESD violates its own anti-bias policy which defines a "bias incident" in terms of "hostile expression of animus toward another person, relating to the other person's perceived . . . *religion*, gender identity . . . ." *Theis*, at *4, citing ORS § 339.347(1)(a)(A) (emphasis added). Considering the typical allowance for IMESD employees to display a wide range of personal items, the disciplinary action against Theis is tantamount to a "hostile expression of animus" related to his religion. The U.S. Supreme Court has condemned policies accompanied by "official expressions of hostility" to religion, and in such cases has "set aside" such policies "without further inquiry." *Bremerton*, 597 U.S. at 525 n. 1, citing *Masterpiece Cakeshop*, *Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. 618 (2018). "[IMESD's] hostility [i]s inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Id*. at 640.

The official expression of hostility evident in this case does not transform Theis' *private* book display into *government* speech.

C. Theis' book display is not "attributable to IMESD."

In *Bremerton*, the School District "issued an ultimatum" against "any overt actions" that might even *appear* to endorse the Coach Kennedy's prayer (597 U.S.

at 517-518), allowing his prayers only at a "private location" (*id*. at 519). As one judge observed in the lower court proceedings, "[n]o case law requires that a high school teacher must be out of sight of students or jump into the nearest broom closet in order to engage in private prayer." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1024 (9th Cir. 2021) (Christen, J., concurring). The Supreme Court rejected this paranoid approach to the First Amendment, but now, similarly, the lower court's ruling allows Plaintiff to display his books *only if* no students are present—the equivalent of "jump[ing] into the nearest broom closet."

Much like past Establishment Clause cases, it is troubling that a constitutional violation hinges on "an observer's potentially mistaken belief that the government has violated the Constitution"—or an anti-bias policy—"rather than on whether the government has *in fact* done so." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1004 n. 7 (2011) (Thomas, J., dissenting from denial of certiorari). The focus on "perception" or "endorsement" easily morphs into phantom violations. Imaginary concerns do not "justify actual violations of an individual's First Amendment rights." *Bremerton*, 597 U.S. at 543.

The real question is whether the government *itself* is speaking, not whether it has endorsed another speaker's message. Even under the now defunct and widely criticized *Lemon* test, "[f]or a law to have forbidden 'effects' . . . it must [have] be[en] fair to say that the *government itself* ha[d] advanced religion through its own

activities and influence." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000), quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 337 (1987). The "government itself" did not advocate the books Theis displayed and his speech is not attributable to IMESD, his public employer.

II. THEIS' PASSIVE BOOK DISPLAY IS CONSTITUTIONALLY PROTECTED PRIVATE SPEECH.

A. Public employees are not robots—they are private citizens who hold the right to "live out their faith" in daily life.

Even as an employer, *the government is still the government*, subject to constitutional constraints. Even as government employees, *citizens are still citizens*, and they "do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417.

The doctrine of unconstitutional conditions strongly condemns IMESD's censorship. "[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 v. Myers*, 461 U.S. 138, 142 (1983); *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering v. Bd. of Educ. of Township High School District 205*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *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. at 236. The Constitution does not permit a public school 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. at 597; *Connick*, 461 U.S. at 147 ("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*, 391 U.S. at 568. This case implicates a matter of intense public concern—transgender ideology—so the burden falls on IMESD to demonstrate that its interests as an employer outweigh Theis' interest in freely speaking on that topic. There is no indication of any disruption sufficient to warrant IMESD's censorship, especially when it censors only one side of this contentious issue.

Theis' display of personal books does not "owe its existence" to his responsibilities as a traveling social worker hired to assess the educational support needs of students. *See Bremerton*, 597 U.S. at 530; *Garcetti*, 547 U. S., at 421; *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011). Like other school employees who decorated their offices with various personal items, Theis did not "speak" as a government employee in his display of personal books.

B. Transgender ideology is a matter of intense public concern that warrants heightened constitutional protection.

Transgender ideology is one of the most polemical matters ever debated by the American public. It has recently reached the U.S. Supreme Court in numerous contexts, e.g., *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (limits on medical interventions for minors); *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025) (school curriculum); pending Petitions for Certiorari in *Foote v. Ludlow Sch. Comm*. (No. 25-77) and *Littlejohn v. Leon County Sch. Bd*. (No. 25-259) (public school sex transition policies); Petitions granted in *Little v. Hecox* (No. 24-38) and *West Virginia v. B.P.J*. (No. 24-43) (women's sports) and *Chiles v. Salazar* (No. 24-539) (professional counseling).

Speech on matters of public concern merits heightened constitutional protection. There has hardly ever been a more divisive "matter of public concern" than gender identity, "a controversial [and] sensitive political topic[] . . . of profound value and concern to the public." *Janus v. AFSCME, Council 31*, 585 U.S. 878, 914

(2018) (cleaned up). Such speech "occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U. S. 443, 452 (2011). Every person has a right to speak on this matter. Theis disagrees with the culturally popular idea that "[p]eople can have a gender identity inconsistent with their sex at birth." *Meriwether*, 992 F.3d at 507. It is not the business of *any* government official in *any* position to either coerce or silence *any* person's chosen perspective on this matter—including public school personnel.

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." 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 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). There are deep divisions over what public schools should teach, particularly about sensitive matters like sexuality. These divisions impact the speech of everyone involved in public education. Many do not accept the culturally popular transgender ideology. The First Amendment safeguards the right to speak according to personal beliefs on this matter, even in public schools. Public school students need to learn not only how the Constitution guards their own rights, but also how to respect the constitutional rights of others, including school personnel.

C. Theis' speech does not lose its constitutional protection because some find it offensive.

The three books Theis displayed—*He is He*, *She is She*, and *Johnny the Walrus*—allegedly "could be considered offensive to transgender students." *Theis*, at *8. Even if they are, offensiveness never justifies censorship. "Speech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 582 U.S. at 223. The "proudest boast" of American "free speech jurisprudence" is its protection for "the freedom to express 'the thought we hate.'" *Id*. at 246, quoting *United States v. Schwimmer*, 279 U.S. 644, 655, (1929) (Holmes, J., dissenting).

Even in public schools, the "prohibition of a particular expression of opinion" demands "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Mahanoy Area School District v. B.L. ex rel. Levy*, 594 U.S. 180, 193 (2021), quoting *Tinker*, 393 U.S. at 509. But potential offensiveness is all IMESD can cite to justify its censorship. Its anti-bias policy transgresses the "bedrock" First Amendment principle "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); *Snyder*, 562 U.S. at 458.

D. Public school students must learn to tolerate diverse viewpoints.

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. On the contrary, "America's public schools are the nurseries of democracy," where the free exchange of ideas "must include the protection of unpopular ideas," ensuring that students understand "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. Rigorous protection of constitutional liberties prepares 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. The First Amendment will not tolerate "laws that cast a pall of orthodoxy over the classroom." *Meriwether*, 992 F.3d at 504-505, 509, quoting *Keyishian*, 385 U.S. at 603.

It is a "critical part of a [teacher's] job" to "affirm[] the equal dignity of every student," so as to create an optimal learning environment. 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*. (emphasis added). 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). Students attending required public school 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.

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 faculty, students and their parents.

"Respect for religious expressions," wherever it occurs, "is indispensable to life in a free and diverse Republic." *Bremerton*, 597 U.S. at 543. Religious perspectives are not verboten in public education. On the contrary, "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Bremerton*, 597 U.S. at 514. It would "undermine a long constitutional tradition" of "learning how to tolerate diverse expressive activities" for a school to create "[a] rule that the only acceptable government role models for students are those who eschew any visible religious expression." *Bremerton*, 597 U.S. at 510.

III. IMESD USES ITS POLICIES TO CENSOR PRIVATE EXPRESSION THAT DOES NOT ALIGN WITH THE SCHOOL'S VIEWPOINT.

Censorship is abhorrent to the First Amendment, particularly where government directly or indirectly 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*"), 585 U.S. 755 (2018).

IMESD has adopted one side of the contentious transgender debate but may not shut down further inquiry or demand compliance with its ideology by censoring competing expression. The Constitution protects unpopular minority viewpoints. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag). 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.

IMESD's policies contravene "[t]he very purpose of the First Amendment," which is "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 v. Irish-American Gay*, 515 U.S. 557, 579 (1995).

IMESD's censorship of Theis' books is obviously based on *content*. Worse yet, it is viewpoint-based because it implicitly demands endorsement of transgender ideology regardless of conscience or religious faith. IMESD's "gag order" also transgresses freedom of thought, long recognized as 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).

IMESD also engages in blatant viewpoint discrimination, "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). 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." *Ibid*. This 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). That is "poison to a free society." *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring).

A government edict that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus*, 585 U.S. 878 at 893, 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 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. IMESD's policies

imperil these liberties. The "anti-*bias*" policy is *biased* against the viewpoint of those who cannot in good conscience endorse transgender ideology.

"[T]he history of authoritarian government . . . shows how relentless authoritarian regimes are in their attempts to stifle free speech." *NIFLA*, 585 U.S. at 780 (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).

In recent years, *Matal* is this Court's "most important decision in the anti-viewpoint-discrimination line of cases." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 29 (2019). As that case illustrates, "[g]iving offense [to a transgender child] is a viewpoint." *Matal*, 582 U.S. at 243. IMESD may not escape the charge of viewpoint discrimination "by tying censorship to the reaction of the speaker's audience." *Id*. at 250. Shortly after *Matal*, the Court struck down a provision forbidding "immoral or scandalous" trademarks because the ban "disfavors certain ideas." *Iancu v. Brunetti*, 588 U.S. at 390. 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 Guide in this case is unmistakably a "per se violation of the First Amendment."

CONCLUSION

Amicus curiae urges this Court to reverse the district court ruling.

Dated: October 24, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains **4,797 words**, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 24, 2025

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