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, all in their official capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, PENDLETON DIVISION IN CASE NO. 2:25-CV-00865-HL HONORABLE ANDREW HALLMAN, MAGISTRATE JUDGE

BRIEF OF YOUNG AMERICA'S FOUNDATION, ADVANCING AMERICAN FREEDOM AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Young America's Foundation (YAF) states that it is a Tennessee nonprofit corporation with its principal place of business in Virginia. YAF does not have any parent companies, subsidiaries, or affiliates and does not issue any shares to the public. Southeastern Legal Foundation (SLF) is a Georgia nonprofit corporation. SLF does not have any parent companies, subsidiaries, or affiliates and does not issue any shares to the public. Advancing American Freedom (AAF) is a nonprofit corporation. AAF does not have any parent companies, subsidiaries, or affiliates and does not issue any shares to the public.

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INTEREST OF AMICI CURIAE[1]

Pursuant to Fed. R. App. P. 29(a)(4)(D), Young America's Foundation (YAF) states that it is a 501(c)(3) nonprofit organization whose mission is to educate and inspire increasing numbers of young Americans with the ideas of individual freedom, free enterprise, a strong national defense, and traditional values. One way that YAF fulfills its mission is through student-led YAF chapters on campuses of public high schools, colleges, and universities across the nation. Unfortunately, as school administrations have grown almost monolithically left-leaning, YAF members (YAFers) face censorship from school officials who are enslaved to a biased worldview and are thus unwilling or unable to treat students fairly. YAFers have been, and continue to be, outspoken on gender ideology. Further, as YAFers graduate and enter the workforce, YAF seeks to support each graduate's right to practice his or her chosen profession without sacrificing fundamental beliefs. Accordingly, YAF takes a keen interest in free speech issues, such a school counselor's right to be free from viewpoint discrimination at the behest of a heckler's veto on a matter of public concern, i.e., gender ideology.

[1] Pursuant to Fed. R. App. P. 29(E), amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power. AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation," and believes American prosperity depends on ordered liberty and self-government. AAF files this brief on behalf of its 25,189 members in the Ninth Circuit.

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization. Its mission is to rebuild the American Republic by reclaiming civil liberties, protecting free speech, securing property rights, and restoring constitutional balance. Since 1976, SLF has set lasting precedent both in and out of the courtroom to preserve and protect Americans' rights under our Constitution through both legal action against the government and vital constitutional programs to educate and equip Americans. This case concerns SLF because it has an abiding interest in the protection of our constitutional freedoms and civil liberties. This is especially true when a school suppresses the speech and expression of students, teachers, and staff. SLF educates and advocates on behalf of the free speech rights of students and staff in public schools and is committed to defending their freedom of speech and freedom of expression.

CONSENT TO AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(a)(2), Amici state that they endeavored to obtain consent of all parties to file their brief. Plaintiff-appellant's counsel consented. Counsel for defendants/appellees communicated that they did not object or took no position. Amici therefore has filed a motion for leave to file this brief.

SUMMARY OF ARGUMENT

Rod Theis ("Rod") expressed his sincerely held convictions in traditional conceptions of sex and gender by placing books in his office (the "Books"). Other employees of InterMountain ("InterMountain") had long decorated their workspaces with expressions of personal convictions contra to Rod's beliefs, such as that sex is a spectrum or that gender "expansiveness" should be affirmed. Further, InterMountain had permitted employees to use décor that distinguished between boys and girls. It wasn't until an employee expressed chagrin over how the Books conflicted with her conception of transgender ideology that InterMountain engaged in suppression by ordering Rod to remove his décor. Yet InterMountain continued to permit the counter-expressive décor to remain. The only difference is that an InterMountain employee (the "complainant") had complained about Rod's expression.

This is a heckler's veto, plain and simple. The complainant took personal dislike to Rod's expressed convictions, and InterMountain did the complainant's

bidding by censoring Rod's expression. But the First Amendment has never allowed for censorship because some people complain about the views expressed. Rather, the Supreme Court has consistently, and recently, affirmed First Amendment protections in the school context in the face of opposing viewpoints.

For instance, in *Kennedy v. Bremerton School Dist.*, the Court affirmed that the First Amendment "does not include anything like a modified heckler's veto, in which . . . religious activity can be proscribed based on 'perceptions' or 'discomfort.'" 597 U.S. 507, 534 (2022) (cleaned up). And in *Mahmoud v. Taylor*, the Court affirmed that school officials cannot compel individuals connected with the school to ascribe to the official narrative on gender ideology. 145 S. Ct. 2332 (2025).

The bar against a heckler's veto reaches far back in our nation's jurisprudence. The seminal case on school employee speech, *Pickering v. Bd. of Education*, concerned and conclusively dismissed such vetoes. *391 U.S. 563 (1968)*. *Pickering* thus cannot be used as an end-run around the First Amendment because this would violate the case's own text, not to mention the fundamentals of the First Amendment.

InterMountain, and schools across the nation, would like for courts to affirm their self-centric view of the education system: That school officials control all expression in their orbit and can force those around them to change tone or stay silent. This is what the Supreme Court rejected in *Mahmoud*, and *Pickering* and its

progeny show that, even where the law gives government employers the ability to regulate speech, it cannot do so on the basis of mere internal complaints of disagreement. Rather, to overcome the heckler's veto bar and justify banning speech, a public employer must be able to point to a concrete concern of disruption to the educational mission of the school viewed in the context of students or their parents.

As YAF well knows from its presence on campus, conservative faculty—and students—face discrimination at the expense of hecklers all the time. This often causes delays in unpopular expression or leads conservatives to self-censor to avoid retaliation. A finding that mere internal complaints justify censorship would empower ideologues to chill speech, which is detrimental to the marketplace of ideas in the K-12 context and beyond.

ARGUMENT

I. The First Amendment Does Not Allow Public Employers to Turn the *Pickering* Balancing Test into a Heckler's Veto.

The First Amendment has never abided a heckler's veto. "The term 'heckler's veto' is used to describe situations in which the government stifles speech because it is "offensive to some of [its] hearers, or simply because bystanders object to peaceful and orderly demonstrations." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (2014) (quoting *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970)). At its core, the First Amendment protects unpopular speech, and school

actors may not bypass this worthy standard by labeling unpopular speech "disruptive."

The seminal case establishing free speech protections for teachers and students in schools, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, said this about the doctrine: "In order for…[a school official] 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." 393 U.S. 503, 509 (1969). In *Tinker*, the Court found that students who wore black armbands to protest the Vietnam war were not causing a disruption that warranted censorship; thus, making them take the armbands off was viewpoint discrimination.

Permitting a heckler to shout down protected speech would swallow the First Amendment, because, as this Court has recognized, there is always someone willing to disagree with any speaker. "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 . . . ." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't*, 533 F.3d 780, 788 (2008) (quoting *Tinker*). Thus, while a

school actor could always point to, or manufacture, some version of a "disruption," this is not a justification for censorship.

This Court has recognized that these general principles do not dissolve when an individual becomes employed by a public school. "In *Forsyth County v. Nationalist Movement,* the Supreme Court emphasized that '[l]isteners' reaction to speech is not a content-neutral basis for regulation' -- in other words, the First Amendment does not permit a heckler's veto." *Ctr. for Bio-Ethical Reform*, 533 F.3d 780, 788 (internal citation omitted). *Pickering* was intended to resolve the discrete problem of a school's authority to restrict speech where an employee speaks pursuant to his official duties. If *Pickering* could be construed to permit censorship based on a single internal complaint, the heckler's veto would swallow the rights of all public-school employees.

In announcing its rule, the Court held fast to a default position in favor of free speech for school employees, "unequivocally" holding that "teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* at 568. Pickering thus presents a narrow carveout to general First Amendment law and must be narrowly construed against the backdrop of general First Amendment principles, like the ban on a heckler's veto. *Kennedy* furthers *Pickering* by enshrining the bar

against using interschool disagreements with the substance of the expression as an excuse for shutting down speech.

A. *Pickering* Itself Was About a Heckler's Veto and Categorically Prohibits Government Employers from Using Mere Internal Complaints of Disagreement to Justify Censorship.

In *Pickering*, the Supreme Court overruled a state court's deference to a heckler's veto. There, a school board terminated a teacher when he published an op-ed criticizing the defendant school board's handling of a bond issue. In other words, the government fired the teacher because he voiced an opinion that differed from theirs. The *Pickering* defendant, like InterMountain, attempted to cloak that decision in imagined potential "controversy" (would-be third-party hecklers), arguing that the teacher's speech "unjustifiably impugned" board members and school administrators and "would tend to foment 'controversy'." *Id.* at 566-67. The Court sagely saw through this, however, and recognized that, rather than attempting to do good for the educational environment, what the defendant really wanted was to enforce a monolithic culture that fit their narrative. The First Amendment did not abide such suppression.

The Court's bar against equating a controversy of ideas with a justification for censorship applies cleanly here. The *Pickering* holding dismissed the school board's claimed fears that someone might misbehave in the future (i.e., a heckler's veto or hypothetical heckler's veto), and InterMountain hinges its justification on this same

reasoning. One employee complained about Rod's ideas and their hypothetical impact on others. InterMountain thus has not passed *Pickering*'s bar. The Court's broad rejection of the school board's censorship shows that fears of heckling from the public or other backlash in response to speech on a matter of public concern has no place in the analysis.

B. Under *Pickering* and Its Progeny, Mere Internal Complaints, Contrasted with Actual or Probable Disruptions, Can Never Rise Above the Foreclosed Heckler's Veto.

Pickering set the bar for what constitutes a legitimate justification for censorship in the school employment context, and its progeny demonstrate its boundaries. InterMountain has failed to meet that bar and has exceeded its boundaries.

In *Pickering*, the Court contrasted "controversy" with disruption and found the defendant had failed to produce evidence of controversy. The Court pronounced that all the defendant had really shown was that board members disagreed with the teacher. In the Court's estimation, this amounted to a "difference of opinion" not sufficient to override the First Amendment. The fact that the teacher's opinions "anger[ed] the Board" carried no weight. *Id.* at 571. The Court cautioned that to consider a difference of opinion detrimental to the school would be to wrongly "equate the Board members' own interests with that of the schools." *Id.*

The facts here show that this is a heckler's veto case subject to *Pickering*. The chain of events started with a single complaint from a single teacher. As the principal explained to Rod, the complainant had researched the books online and complained that the Books could be considered offensive to transgender identifying students. In other words, the complainant was not offended at the Books' display as such; rather, she became offended when she intentionally engaged with the Books' content, calling his views "transphobic." This internal "difference of opinion" is exactly what *Pickering* forecloses.

If those facts weren't enough, VanNice explicitly labeled this censorship a heckler's veto when she demanded Rod display only "books that don't display a view that might be contrary to someone else's beliefs or views." Opening Br. of Appellant, p.19. The superintendent hammered the label in when he declared Rod's views "unwelcoming." Id. at 21. From bottom up, InterMountain officials characterized Rod's expression as distasteful because it countered their chosen narrative on transgenderism.

In *Pickering*, the school board hypothesized that speech might foment controversy. That is, a third party might read the letter and react to it by becoming angry at the school board. The Court in *Pickering* (and later in *Kennedy*) dismissed such hypothetical heckling. A government actor must point to true disruption concerns and cannot resort to imagined scenarios.

Upon closer consideration of *Pickering*'s facts, one might conceive that the hecklers and the decision-makers were actually the same: The school board disagreed with Pickering, and they made the decision to terminate him, inventing hypothetical, potentially-offended third parties as a justification for their censorship. For Rod, it wasn't just that his expression countered the views of the complainant that that shows this to be a pure heckler's veto. It was also that InterMountain claimed Rod's expression would cause a disruption because his speech might offend other people. In other words, InterMountain shut down the speech because it fears the potential hecklers. It is hiding behind the risk of backlash (whether real or not) as an excuse.

Not every case includes a showing of personal animus by the decisionmakers present here. Often, the decision-makers appear personally neutral on the underlying dispute. They may even express chagrin at the "necessity" of censoring the speaker. The heckler's veto doctrine does not require a showing of animus, however. The Supreme Court put it this way: "A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Feiner v. New York*, 340 U.S. 315, 320 (1951) (quoting *Cantwell v. Conn.*, 310 U.S. 296 (1940)). The word "guise" anticipates that the suppressor's motives may not always be expressed. Whether the decision-maker engages in censorship because she agrees with the heckler or because that seems to her the path

of least resistance is irrelevant under the First Amendment: It is a heckler's veto either way. This must be true because a decision-maker could always, as the principal did here, claim "I don't want to censor you, but I have a duty to maintain harmony in the workplace" or "I don't think you've done anything wrong, but some people might be offended." InterMountain is a combination of *Pickering* animus and the prototypical whitewashed heckler's veto. It started with a single complaint from a coworker, but the decision-makers expressed agreement with the complainant throughout the investigation and disciplinary process. Therefore, whether this Court sees this as a case of one, two, three hecklers, or infinite imaginary hecklers, this type of viewpoint discrimination is exactly what *Pickering* foreclosed.

Many cases carry *Pickering*'s ban on a heckler's veto forward, and the caselaw firmly shows that the First Amendment requires evidence of disruption in the educational process based on the beneficiaries of the education system, i.e., students and parents.

Consider *Kenndy v. Bremerton School Dist*., 597 U.S. 507. There, a school district suspended a high school football coach for praying at midfield after games. *Id.* at 519. The Court held that the district's actions violated the coach's First Amendment rights. *Id.* at 542-44. In doing so, the Court announced firmly that the First Amendment "does not include anything like a modified heckler's veto, in which . . . religious activity can be proscribed based on "'perceptions'" or

"'discomfort.'" *Id.* at 534 (cleaned up). While this case centered mostly on the Establishment clause, the Court did not limit its heckler's veto denouncement. Rather, the Court said that "Nor under our Constitution does protected speech or religious exercise readily give way to a "heckler's veto." *Id.* at 543. Clearly, neither the Constitution nor the Supreme Court will tolerate a heckler's veto for any "protected speech."

Indeed, the justifications the school district in *Kennedy* offered would have amounted to a heckler's veto. There, the defendant school district argued it could suppress religious expression "whenever a reasonable observer could conclude that the government has endorse[d] religion." *Id.* at 533 (cleaned up). The district had to resort to the hypothetical reasonable man test because "no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer." *Id.*

Accepting such a viewpoint-based justification would have effectively allowed a heckler's veto to override a school employee's most basic First Amendment protections. And, as the Supreme Court said, "requiring that people suppress their religious beliefs or practices to avoid offense to others is repugnant to our constitutional values because learning how to tolerate speech or prayer of all kinds is part of learning how to live in a pluralistic society, a trait of character essential to a tolerant citizenry." *Id.* at 538 (cleaned up).

The heckling in *Kennedy* is strikingly similar to the heckling here: No student or parent, or in fact any member of the public, complained against Rod's expression. *Kennedy* thus foreclosed the very justification InterMoutain proffers.

In *Mahmoud*, the Supreme Court rejected a school district's attempt to "impose[] conformity with a view that undermines [the exercise of a fundamental right]." *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2380. While *Mahmoud* focused on the rights of parents rather than employees, it reflects a limitation on a public school's ability to use conformance with ideology as a justification for suppressing First Amendment rights. Considering *Kennedy* and *Mahmoud* together, the veto asserted against Rod is especially suspect.

II. Importing a Heckler's Veto into the *Pickering* Analysis Would Incentivize Schools to Chill Expression Even More Than Is Already Happening, Harming Free Expression Across the Education System.

If schools were permitted to censor speech based on mere internal complaints of disagreement, free speech would effectively disappear for both employees and students. YAF's high school members encounter hecklers commonly, the facts often playing out like this: Student wishes to form a YAF chapter to express his conservative values. Student submits a request to his school's administrators, who say he must obtain a faculty advisor to obtain recognition. The student now faces two problems: First, most of his teachers are on the political left and do not wish to support his expression; Second, the one or two who agree with his politics are afraid

of social and professional ostracization and retaliation if they agree to associate with Student's ideas. Clubs like the Gay Straight Alliance do not face these difficulties because it is popular to support gender ideology. Now, the administration effectively bars Student from forming a YAF chapter because public perception is against him.

This scenario happened to James Thibault.[2] After trying for nearly a year to find a faculty member willing to support formation of his YAF chapter, James finally obtained one in the fall of 2022. Unfortunately, his victory was short-lived: James' would-be faculty advisor dropped out with no explanation. At the same time, the school principal began pressuring James to change his plans and form a "history club" instead of a YAF chapter. The principal's justification was that people were "nervous" about allowing a YAF chapter on campus. James had to obtain legal counsel to gain recognition for his chapter.

While there may be differences between the speech rights of K-12 employees versus college employees, the ban on a heckler's veto applies in both contexts. Therefore, what is happening on the college level may be instructive in considering the consequences of importing a heckler's veto here.

[2] Towfighi, Michaela, *Meet James Thibault: New Hampshire's youngest representative*, Concord Monitor, Dec. 7, 2024, https://www.concordmonitor.com/2024/12/07/james-thibault-youngest-state-representative-elected-franklin-58099619/

Take, for example, the Colleges of the Sequoias (COS).[3] That school derecognized the YAF chapter when the chapter lost its advisor. Recognition is key to leading a successful college club because it gives students access to basic resources, like room reservations.

The trouble started when Chairman Reagan O'Hara and his YAF chapter decided to chalk messages such as "Stop mutilating trans children," "There are only two genders," and Bible verses to promote their ideas. COS had no rule against chalking, and other students had used this medium of expression before. Further, out of an abundance of desire to follow the rules, Reagan had sought clarification about chalking ahead of time, and an administrator had told him she thought it was permissible. This is similar to Rod's situation because both Rod and Reagan observed how similarly situated individuals expressed themselves and followed the rules, but encountered official backlash anyway.

In spite of Reagan's carefulness, COS officials erased the chalk overnight. An administrator even accused Reagan of vandalism and demanded he pay for the cost of cleanup. Sadly, instead of supporting Reagan's exercise of his First Amendment rights, the YAF chapter's advisor sided with the school. She resigned her advisor

[3] Peter Rao, *College of Sequoias removes conservative group's sidewalk chalk, threatens discipline*, The College Fix, Mar. 25, 2025, https://www.thecollegefix.com/college-of-sequoias-removes-conservative-groups-sidewalk-chalk-threatens-discipline/

position, citing Reagan's "disrespectful and defiant actions towards the college." As a result of COS officials' antics and accusations, YAF's advisor no longer wanted to be associated with Reagan or his viewpoint. For whatever reason, she couldn't stand the spotlight when COS expressed its blatant animus against the YAF chapter's message.[4] This is not the first time YAF has seen an advisor abandon a chapter when faced with backlash.

These stories mirror the statistics. A 2024 study by The Foundation for Individual Rights and Expression[5] found that "[n]early half of conservative faculty (47%) report they feel unable to voice their opinions because of how others might react, compared to only a fifth of liberal faculty (19%)."[6] Troublingly, the study also found that "[more than a third] of faculty say they self-censor their written work, nearly four times the number of social scientists who said the same in 1954 at the height of McCarthyism."[7] Clearly, this is a problem that is worsening. Over time,

[4] YAF has encountered this problem repeatedly and consistently reminds students that they are the best defenders of their own rights because, at the end of the day, teachers are usually afraid to lose their jobs. If schools were held accountable for respecting diverse viewpoints, perhaps this advice would not be needed.
[5] Honeycutt, N., *Silence in the Classroom: The 2024 FIRE Faculty Survey Report*, The Foundation for Individual Rights and Expression, 2024, https://www.thefire.org/facultyreport
[6] *FIRE SURVEY: Only 20% of university faculty say a conservative would fit in well in their department*, The Foundation for Individual Rights and Expression, Dec. 12, 2024, https://www.thefire.org/news/fire-survey-only-20-university-faculty-say-conservative-would-fit-well-their-department
[7] Id.

colleges have become more polarized, and a politically left-dominated faculty has frozen out counterviews.

Conservative students and teachers know that speaking out comes with risk. The 2024 study further found that "[a]bout 1 in 7 faculty members (14%) reported being disciplined or threatened with discipline for their teaching, research, academic discussions, or off-campus speech."[8] If schools are allowed to continue punishing disfavored expression, conservative speech will be chilled.

While it is not a court's duty to create a culture of political moderacy on campus, it is a court's duty to require neutrality in a government actor's decision-making. If courts fail to check this kind of censorship when given the opportunity, they will be giving short shrift to their role of providing justice. This Court has the opportunity to protect a counselor's right to viewpoint-neutral decision-making, and it should hold in favor of the First Amendment.

CONCLUSION

The Supreme Court's First Amendment jurisprudence from *Pickering* to 2025 shows that InterMountain was unjustified in censoring Rod's expression. This Court has an opportunity to clarify that school actors do not have carte blanche to decide which personal opinions are allowed in the workplace; rather, such actors are

[8] Id.

constrained by settled constitutional rules. Amici urges the Court to protect Rod's rights against the heckler's veto.

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October 24, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature /s/ Madison Hahn Date: October 24, 2025

(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: October 24, 2025

/s/Madison Hahn
Madison Hahn
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