No. 23-1280

IN THE

Supreme Court of the United States

PARENTS PROTECTING OUR CHILDREN, UA,

Petitioner,

v.

EAU CLAIRE AREA SCHOOL DISTRICT, WISCONSIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NC VALUES INSTITUTE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae urges this Court to grant the Petition for Certiorari and reverse the Seventh Circuit's decision.

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

INTRODUCTION AND SUMMARY

Transgender ideology is invading American life at a rapidly escalating rate. One of the most disturbing developments is the growing number of public school policies designed to facilitate sex transitions for minor children—not only without parental consent or notice, but often with intentional secrecy and deceit. This coerced imposition of transgender ideology exacerbates the massive intrusion on parental rights at the heart of this and other similar cases. These policies trigger multiple injuries to multiple persons, spawning legal challenges across the country. Children are grievously and irreparably harmed—physically, emotionally, psychologically, and spiritually.

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1. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. *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 curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Amicus curiae urges this Court to consider the alarming First Amendment violations inherent in these policies, which typically demand the use of a minor child's preferred name and pronouns. Parents, children, and teachers are all faced with threats to free speech and religious liberty. The resulting combination of speech and viewpoint compulsion is a formula for tyranny. In this case, the Eau Claire Area School District ("ECASD") adopted "Administrative Guidance for Gender Identity Support" (the "Policy") that initiates a process for school staff to create a "Gender Support Plan" with a student. The Policy purports to offer parents limited rights to participation and information. *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, *6 (7th Cir. 2024) ("*PPOC II*") (exclusion of parents not mandated). But the Policy nevertheless erodes parental rights and attacks the religious convictions of concerned parents.

ARGUMENT

I. THE EIGHTH CIRCUIT AND THE VIRGINIA SUPREME COURT HAVE RECOGNIZED STANDING BASED ON THE FIRST AMENDMENT CONCERNS INHERENT IN SIMILAR PUBLIC SCHOOL POLICIES.

The district court dismissed Petitioners' case based on the lack of "concrete facts about [the Policy's] implementation." *PPOC II*, 95 F.4th at *10. Yet according to the School District's "Staff Training," "parents are not entitled to know their kids' identities." *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 657 F. Supp. 3d 1161, 1167 (W.D. Wisc. 2023) ("*PPOC I*"). ECASD deliberately withholds the very information that would

allow parents to demonstrate Article III standing—a Catch-22 closely resembling fraudulent concealment.

Parents, students, and teachers all have rights that are seriously threatened by policies like the one here, which is unconstitutional on its face. The most glaring threat is the massive intrusion on time-honored parents' rights to control the upbringing of their children. No public school official has the right to unilaterally usurp the role of a child's parents: "If your parents aren't accepting of your identity, I'm your mom now." *PPOC I*, 657 F. Supp. 3d at 1168. It is both alarming and revealing to observe the emerging litigation against professionals who encouraged procedures causing irreparable harm to children who were too young to understand and consent to the risk.[2] There is an urgent need to establish a solid basis for standing so these dangerous policies can be brought into the light and properly litigated.

One pathway to standing runs through the First Amendment. Free speech and religious liberty issues inescapably infect these policies and lurk in the background even if not raised in the pleadings. Two courts have recently examined the First Amendment harms inherent in school policies and issued rulings that favor standing.

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2. There is a growing number of "detransitioner" lawsuits. In North Carolina, Prisha Mosley recently sued multiple health care professionals, alleging they misled her and her parents about gender identity and the effects of transition procedures. (Mosley v. Emerson, et al., filed 07/17/23 in Gaston County). The state court found her case legally viable. See https://www.ncfamily.org/nc-detransitioners-lawsuit-first-to-proceed-in-court/; https://www.cmppllc.com.

In Iowa, parents raised a pre-enforcement challenge to a policy wherein "intentional and/or persistent refusal . . . to respect a student's gender identity" would be disciplined, alleging that students' speech would be chilled. The court found the parents "likely to succeed" on their claim that this provision is "void for vagueness" and "susceptible to arbitrary enforcement." *Parents Defending Education v. Linn-Marr Sch. Dist.*, 83 F.4th 658, 668-669 (8th Cir. 2023). In Virginia, the state's highest court held that a French teacher, terminated for failing to refer to a female student using male pronouns, had stated legally viable claims based on religious liberty and conscience. *Vlaming v. West Point Sch. Bd.*, 895 S.E.2d 705, 713 (Va. 2023).

II. THE POLICY VIOLATES THE FIRST AMENDMENT BY COMPELLING SPEECH.

There is hardly a more "dramatic example of authoritarian government and compelled speech" than when King Henry commanded Sir Thomas More to sign a statement blessing the King's divorce and remarriage. Richard F. Duncan, *Article: Defense Against the Dark Arts: Justice Jackson, Justice Kennedy, and the No-Compelled Speech Doctrine*, 32 Regent U. L. Rev. 265, 292 (2019-2020), citing Robert Bolt, *A Man For All Seasons*: *A Play in Two Acts* (1st ed., Vintage Int'l 1990) (1962). Thomas More, a faithful Catholic, could not sign.

Five centuries later, public schools have created a conundrum that is no less momentous than Thomas More's predicament. Under ECASD's Policy, school staff *must* "avoid terms that make the individual uncomfortable," "respect the right of an individual to be addressed by

a name and pronoun that corresponds to their gender identity," and "to the extent that the district is not legally required to use a student's legal/birth name and gender on other school records or documents, the school *will use* the name and gender preferred by the student." *PPOC I*, 657 F. Supp. 3d at 1166 (emphasis added). Under similar policies, personnel *must* deceive "unsupportive" parents by withholding information and reverting to the child's legal name and correct sex when communicating with them. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 126 (S.D. Md. 2022); *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 637-638 (4th Cir. 2023) (Niemeyer, J., dissenting); *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 684 F.Supp. 3d 684, 689-690 (S.D. Oh. 2023) (appeal pending, 6th Cir. No. 23-3630) (policy threatens to discipline young children for "misgendering" another child); *Littlejohn v. Sch. Bd. of Leon Cnty. Florida*, 647 F.Supp. 3d 1271 (N.D. Fla. 2022) (appeal pending, 11th Cir. No. 23-10385) (parent must have *child*'s permission to attend school meeting about sex transition).

Such policies reek of viewpoint-based compelled speech. As in *Barnette*, there is "probably no deeper division" than a conflict provoked by the choice of "what doctrine . . . public educational officials shall compel youth to unite in embracing." Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 292, citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). "Gender support" policies do not implicate curriculum but do reflect the deep divisions over what position public schools should assume concerning sexuality. These divisions impact the speech of everyone involved in public education.

Compelled speech is anathema to the First Amendment, particularly where government mandates conformity to its preferred viewpoint. *Barnette, Wooley, NIFLA* and other "eloquent and powerful opinions" stand as "landmarks of liberty and strong shields against an authoritarian government's tyrannical attempts to coerce ideological orthodoxy." Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 266; *Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705 (1977); *NationaI Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018). Policies like the one here demand conformity to the government's controversial transgender ideology.

III. COMPELLED SPEECH AND VIEWPOINT DISCRIMINATION ARE UNIQUELY PERNICIOUS CONSTITUTIONAL VIOLATIONS.

"When the law strikes at free speech it hits human dignity . . . *when the law compels a person to say that which he believes to be untrue, the blade cuts deeper* because it requires the person to be untrue to himself, perhaps even untrue to God." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 59 (2020) (emphasis added). ECASD's Policy combines the worst of two worlds—compelled speech *and* viewpoint discrimination. Compelled expression is even worse than compelled silence because it affirmatively associates the speaker with a viewpoint he does not hold.

The "proudest boast" of America's free speech jurisprudence is that we safeguard "the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 582 U.S. 218, 246 (2017) (quoting *United States v. Schwimmer*,

279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Gender identity may be "embraced and advocated by increasing numbers of people," but that is "all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000). Our law also protects "the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 633-34). The government may not compel an individual to "utter what is not in [his] mind about a question of political and religious significance." *303 Creative LLC v. Elenis*, 600 U.S. 570, 578-79, 596 (2023) (cleaned up); *Vlaming*, 895 S.E.2d at 737-738.

The Policy "[m]andates speech" many "would not otherwise make" and "exacts a penalty" for noncompliance. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Policy demands assertions that speakers know are false—*male* pronouns for a biological *female* or *female* pronouns for a biological *male*—all based on the command of a gender-confused child. This viewpoint-based mandate requires endorsement of transgender ideology regardless of conscience or faith. It would not be enough to simply avoid names and pronouns or use the plural "they" instead of singular pronouns. *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 629 F. Supp. 3d 891, 909-910 (S.D. Ia. 2022). Nor is it reasonable to presume "students [or others] will not interact, again, intentionally and unintentionally, with students with whom they fundamentally disagree or whose lifestyles they do not agree with." *Id.* at 910. Such a severe limitation on association flouts "diversity" and "inclusion," creating the very discrimination the Policy purportedly eliminates.

A. The Policy encroaches on freedom of thought.

Compelled speech "invades the private space of one's mind and beliefs." Richard F. Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 275. While "ordinary authoritarians" merely demand silence, "[t]otalitarians insist on forcing people to say things they know or believe to be untrue." *Id.*, quoting Robert P. George.[3] The Policy issues a totalitarian demand to adopt a distorted view of reality that aligns with whatever "gender identity" any child demands.

Freedom of thought is 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). This freedom undergirds the First Amendment and merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The distinction between compelled speech and compelled silence is "without constitutional significance." *Riley*, 487 U.S. at 796. These two are "complementary components" of the "individual freedom of mind." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 637. Together they guard "both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633-634; *id.*, at 645 (Murphy, J., concurring). A system that protects the right to promote ideological causes "must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714; Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 63.

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

B. The Policy transgresses liberties of religion and conscience.

The Virginia Supreme Court recently cited this Court's "cardinal constitutional command" that the government may not compel individuals to "mouth support" for religious, political, or ideological views that they do not believe. *Vlaming*, 895 S.E.2d at 738, citing *Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). In *Vlaming*, a French teacher was allowed to proceed with his claims against the School Board that terminated his employment for failing to use "government-mandated pronouns *in addition to* using [a] student's preferred name." *Vlaming*, 895 S.E.2d at 713. The court explained that "[f]orcing creedal conformity is more pernicious than silencing dissent." *Id.* at 738.

The Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States*, 328 U.S. 61, 68 (1946). "[I]ndividuals cannot be constitutionally 'coerced into betraying their convictions.'" *Vlaming*, 895 S.E.2d at 738, citing *Janus*, 138 S. Ct. at 2463-64. Courts have an affirmative "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). ECASD's Policy assaults liberty of thought and conscience, compelling participants in public education "to contradict [their] most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts"—by affirming the lie that a biological female is a male (or a biological male is a female). *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring); *see* Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 65-66.

The Policy encroaches on religious speech and smacks of constitutionally forbidden hostility toward religion. *See Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2415 (2022). "Staff Training" advises that "religion is not the problem" but rather "the weaponization of religion against queer people," warning school staff against "act[ing] as stand-ins for oppressive ideas/behaviors/attitudes, even and especially if that oppression is coming from parents" who have a "faith-based rejection of their student's queer identity." *PPOC I*, 657 F. Supp. 3d at 1167.

Compelled speech—that a boy is a girl or a girl is a boy—tramples deeply held religious beliefs and attacks conscience. 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) (cleaned up). Convictions about sexuality are integrally intertwined with religion and conscience, as many faith traditions have strong teachings about sexual morality, marriage, and God's creation of each human being as immutably male or female.

Many state constitutions explicitly guarantee rights of conscience alongside religious liberty. The Virginia Supreme Court's extensive discussion in *Vlaming* emphasized "that Article I, Section 16 of the Constitution of Virginia plainly declares that 'all men are equally entitled to the free exercise of religion, according to the dictates of conscience.'" *Vlaming*, 895 S.E.2d at 717. The court noted that the "constitutional guarantees of religious freedom have no deeper roots than in Virginia,

where they originated, and nowhere have they been more scrupulously observed." *Id*. at 716, citing *Reid v. Gholson*, 327 S.E.2d 107, 111-112 (Va. 1985) (footnote omitted). In Wisconsin, where this case arose: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed. . . ." Wis. Const. Art. I, § 18. "Gender support" policies have generated lawsuits across the nation, raising state constitutional law questions in every state where a suit is filed.

C. The Policy exemplifies the blatant viewpoint discrimination characteristic of tyrannical government.

"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). Viewpoint discrimination ushers in an Orwellian system that destroys liberty of thought. 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, *Dark Arts*, 32 Regent U. L. Rev. at 265. The Policy imperils these liberties.

Every speaker must decide "what to say and what to leave unsaid." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), quoting *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original). An individual's "intellectual autonomy" is the freedom to say what that person believes is true and to

refrain from saying what is false. Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 85. A speaker's choice "not to propound a particular point of view" is "beyond the government's power to control," regardless of the speaker's rationale. *Hurley*, 515 U.S. at 575. There is "no more certain antithesis" to free speech than a government mandate imposed to produce "orthodox expression." *Id.* at 579. Such a restriction "grates on the First Amendment." *Ibid.* "Only a tyrannical [School Board]" "requires one to say that which he believes is not true," e.g., that "two plus two make five." *Ibid.* Here, the Policy requires false statements about the sex of gender-confused students.

This Court has *never* upheld a viewpoint-based mandate compelling "an unwilling speaker to express a message that takes a particular ideological position on a particular subject." Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 78; *see 303 Creative*, 143 S. Ct. 2298. But that is precisely what this type of policy demands, darkening the "fixed star in our constitutional constellation" that forbids any government official, "high or petty," from prescribing "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Regardless of the current cultural acceptance of transgenderism, ECASD's interest in disseminating that ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. *Barnette*, *Wooley*, and *303 Creative* all solidify the principle that government lacks the "power to compel a person to speak, compose, create, or disseminate a message on any matter of political, ideological, religious, or public concern." Duncan, *No-Compelled-Speech*, 99

Neb. L. Rev. at 63-64. These policies are even more intrusive than in *Wooley*, where the state did not "require an individual to speak any words, affirm any beliefs, or create or compose any expressive message," but rather to serve as a "mobile billboard" for an ideological message obviously attributable to the state. *Id.* at 63. Even this passive display violated the First Amendment because it "usurp[ed] speaker autonomy." *Id.* at 76.

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

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

Citizens who hold competing views on public issues may use the political process to enact legislation consistent with their views, but under *Barnette* and *303 Creative*, the government may not "insist that the victory of one side, of one creed or value, be memorialized by compelling the defeated side to literally give voice to its submission." Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 278, quoting Paul Horwitz, *A Close Reading of* Barnette, *in Honor of Vincent Blasi*, 13 FIU L. Rev. 689, 723 (2019). "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning." *Janus*, 138 S. Ct. at 2464. Recent opinions of this Court, including *Obergefell*

v. Hodges, 576 U.S. 644 (2015) and *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), do not warrant or even allow coerced acceptance by those who hold conscientious objections to the Court's opinion.

"Generally, the government may not compel a person to speak its own preferred messages." *303 Creative*, 143 S. Ct. at 2312. The government may not regulate speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. ECASD's Policy is "a paradigmatic example of the serious threat presented when government seeks to impose its own message," replacing individual expression. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). The Policy's viewpoint-based compulsion to speak seeks not only to control content (names and pronouns) but also to promote an ideology unacceptable to many parents, students, and school personnel. Such coerced compliance attacks dignity. "Freedom of thought, belief, and speech are fundamental to the dignity of the human person." Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 59. "The framers designed the Free Speech Clause of the First Amendment to protect the freedom to think as you will and to speak as you think." *303 Creative*, 143 S. Ct. at 2310 (cleaned up).

The Policy contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where the government must respect a wide range of diverse viewpoints. The government itself may adopt a viewpoint but may never

"interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

ECASD may not enhance the dignity of transgender students by censoring the protected expression of other persons or compelling regurgitation of the state's preferred message. That is exactly what policies like this attempt, but that purpose is "insufficient to override First Amendment concerns." Erica Goldberg, "*Good Orthodoxy" and the Legacy of Barnette*, 13 FIU L. Rev. 639, 664 (2019). Even when it is appropriate to regulate harmful discriminatory conduct, the state may not require that some citizens—whether parents, personnel, or students—"communicate a message of tolerance that affirms the dignity of others." *Ibid*. Dignity is an interest "so amorphous as to invite viewpoint-based discrimination, antithetical to our viewpoint-neutral free speech regime, by courts and legislatures." *Id*. at 665.

As *Hurley* teaches, the state must guard against "conflation of message with messenger" because "a speaker's objection to speaking or disseminating a particular ideological message is at the core of the no-compelled-speech doctrine." Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 64. The trial judge in *Hurley* erroneously reasoned that the parade organizer's rejection of a group's *message* was tantamount to "discrimination on the basis of the innate *personhood* of the group's members." *Ibid.* (emphasis added). The First Amendment guards a speaker's autonomy to "discriminate" by favoring viewpoints he wishes to express and rejecting other viewpoints. *Ibid*. Rejecting a *message* is not equivalent to

rejecting a *person* who prefers that message. Similarly, rejecting transgender ideology that conflicts with biological reality is not tantamount to rejecting a *person* who questions his or her gender.

E. The prohibition of viewpoint discrimination, now firmly entrenched in this Court's precedent, is a necessary component of the Free Speech Clause.

A century ago, this Court affirmed a conviction under the Espionage Act, which criminalized publication of "disloyal, scurrilous and abusive language" about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today, no doubt "the statute itself would be invalidated as patent viewpoint discrimination." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21 (2019). A few years after *Abrams*, the Court shifted gears in *Barnette*, "a forerunner of the more recent viewpoint-discrimination principle." *Ibid.* *Barnette*'s often-quoted "fixed star" passage was informed by "the fear of government manipulation of the marketplace of ideas." *Ibid.*; *303 Creative*, 143 S. Ct. at 2311. Justice Kennedy echoed the thought: "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . . To permit viewpoint discrimination . . . is to permit Government censorship." *Matal*, 582 U.S. at 252 (Kennedy, J., concurring). Justice Kennedy's comments "explain why viewpoint discrimination is particularly inconsistent with free speech values." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 36.

In the decades following *Barnette*, this Court further refined the principle of viewpoint discrimination and established the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (striking down Texas statute that made it a crime to desecrate a venerated object). As Justice Scalia observed, the government may not "license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

More specifically, this Court has repeatedly held that the government may not discriminate against speech solely because of its religious perspective—a relevant consideration in this case. *See*, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) (policy for use of school premises could not exclude film series based on its religious perspective); *Rosenberger*, 515 U.S. at 829 (invalidating university regulation that prohibited reimbursement of expenses to student newspaper that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality"); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001) (striking down regulation that discriminated against religious speech).

IV. THE POLICY DOES NOT SERVE ANY LEGITIMATE PURPOSE.

"[T]he history of authoritarian government . . . shows how relentless[ly] authoritarian regimes . . . stifle free speech." *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J.,

concurring). There is "no such thing as good orthodoxy" under a Constitution that safeguards thought, speech, conscience, and religion, even when the government pursues seemingly benign purposes like national allegiance (*Barnette*), equality, or tolerance. Goldberg, "*Good Orthodoxy*", 13 FIU L. Rev. at 643. "Even commendable public values can furnish the spark for the dynamic that Jackson insists leads to the 'unanimity of the graveyard.'" Horwitz, *A Close Reading of Barnette*, 13 FIU L. Rev. at 723.

The Policy is a government demand that forces persons involved in public education to become "instrument[s] for fostering . . . an ideological point of view" many find "morally objectionable." *Wooley*, 430 U.S. at 714-715. A government edict that commands "involuntary affirmation" demands "even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464, citing *Barnette*, 319 U.S. at 633 (internal quotation marks omitted). Even a legitimate and substantial government purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Wooley*, 430 U.S. at 716-717, citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The Policy cannot jump this hurdle.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. The First Amendment facilitates the free flow of information and ideas. "The Nation's future depends upon leaders trained through wide exposure" to a "robust exchange of ideas" that "discovers truth out of a multitude of tongues" rather than "authoritative selection." *Keyishian v. Bd. of Regents*,

385 U.S. 589, 603 (1967). "Gender support" policies like this one, facilitating transitions for minor children with little (if any) parental involvement, tramples basic First Amendment liberties and stifles the free flow of ideas about sexuality.

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

There is hardly a more contentious "matter of public concern" than gender identity, "a controversial [and] sensitive political topic[ ] . . . of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up). Speech on such matters occupies the "highest rung of the hierarchy of First Amendment values" and merits "special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); *see Vlaming*, 895 S.E.2d at 740. Every person has a fundamental right to speak on this matter. ECASD's Policy "use[s] pronouns to communicate a message" many believe is false—that "[p]eople can have a gender identity inconsistent with their sex at birth." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). "Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.* at 508.

Pronouns are an integral part of everyday speech based on objective biological reality and often coupled with the belief that each person is created immutably male or female. It is not the business of *any* government official in *any* position to coerce *any* person's chosen perspective on this critical matter. Parents, students, and school personnel do not sacrifice their constitutional rights as a condition of participating in public education. Not everyone accepts transgender ideology or believes

that a person can transition from one sex to the other. The First Amendment safeguards the right to think and speak according to each one's own beliefs and religious convictions, even in public schools.

B. ECASD has no legitimate purpose in suppressing any person's viewpoint about "gender identity" or compelling expression of a view the person does not hold.

Speech and beliefs about sexuality merit constitutional protection no matter how profoundly school officials—or even society generally—might disagree. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. at 414.

In a recent case raising similar issues, the district court concluded that "parents do not have a constitutional right to dictate a public school's curriculum." *John & Jane Parents 1*, 622 F. Supp. 3d at 13. But the controversial "gender support" policies currently being litigated do not implicate a school's choice of curriculum, unlike some prior cases. *See*, *e.g.*, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (school curriculum included books depicting same sex relationships); *Mozert v. Hawkins County Bd. of Education*, 827 F.2d 1058, 1059 (6th Cir. 1987) (textbooks had no coercive effect that operated against plaintiff's religion). These policies are also not about "academic assignments" that educators may require students to complete. *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (Batchelder, J., concurring) (research paper).

ECASD adopts one side of the contentious transgender debate and shuts down further inquiry, demanding compliance with its preferred viewpoint. But the Constitution protects unpopular minority viewpoints. *Dale*, 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397 (burning American flag); *Doe v. University of Michigan*, 721 F.Supp.852, 863 (E.D. Mich. 1989) (University could not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed," nor could it "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people"). Particularly in a rapidly changing social environment, "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Dale*, 530 U.S. at 660. "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).

Schools are not a haven where educators can ignore the First Amendment with impunity. Public schools cannot invade the protected liberties of parents, students, or faculty. It is well settled that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." *Barnette*, 319 U.S. at 633 (allowing students to quietly forego the compulsory flag salute presented no "clear and present danger"). To affirm the Seventh Circuit's ruling, this Court would be "required to say that a Bill of Rights which guards the individual's right

to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. Such compulsion "invades the sphere of intellect and spirit" which the First Amendment "reserve[s] from all official control." *Id.* at 642.

The Policy attempts to compel everyone in the public school system to either dishonestly affirm a belief they do not hold or alter their beliefs under state compulsion. Both alternatives gut the First Amendment. Decades of precedent drive the conclusion that ECASD cannot compel anyone to affirm a viewpoint that collides his or her own convictions. *Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable."); *Pacific Gas & Electric*, 475 U.S. at 16 (if "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next"); *Hurley*, 515 U.S. at 575 ("[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control.")

C. Schools can affirm the dignity of every student without sacrificing the constitutional liberties of others.

It is important to "affirm[ ] the equal dignity of every student," so as to create the best environment for learning. Goldberg, "*Good Orthodoxy*", 13 FIU L. Rev. at 666. At the same time, 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. at 590. Indeed, students attending required classes are exposed to "ideas they find distasteful or immoral or absurd or all of these." *Id.* at 591. Transgender students are not exempt but must learn to tolerate the views of those who disagree with them.

Public schools have a role in "educat[ing] youth in the values of a democratic, pluralistic society." *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378 (6th Cir. 1999). Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so that we do not "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. Our Nation's deep commitment to "safeguarding academic freedom" is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Meriwether*, 992 F.3d at 504-505, 509, quoting *Keyishian*, 385 U.S. at 603.

CONCLUSION

Amicus curiae urges the Court to grant the Petition and reverse the Seventh Circuit ruling.

Respectfully submitted,

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