NO. _____

IN THE

Supreme Court of the United States

L.M. a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison,

Petitioner,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS; MIDDLEBOROUGH SCHOOL COMMITTEE; CAROLYN J. LYONS, Superintendent, Middleborough Public Schools, in her official capacity; HEATHER TUCKER, Acting Principal, Nichols Middle School, in her official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

L.M. is a student whose public school promoted the viewpoint that sex and gender are limitless, based on personal identity, and have no biological foundation. The school invited students to voice their support for this view. But L.M. disagreed and responded by wearing a t-shirt to class that said "There are only two genders." After the school censored him, he wore a protest t-shirt that said "There are [censored] genders." Despite no past or present disruption, the school district prohibited both t-shirts.

The district court upheld this censorship based on the rights-of-others prong in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). The First Circuit affirmed based on *Tinker*'s substantial-disruption prong, though it said L.M.'s t-shirts likely failed the rights-of-others prong too, applying a novel test for ideological speech alleged to demean characteristics of personal identity.

The First Circuit's novel legal standard and analysis conflicts with this Court's decisions and those of ten other circuits in a multitude of ways. The question presented is:

Whether school officials may presume substantial disruption or a violation of the rights of others from a student's silent, passive, and untargeted ideological speech simply because that speech relates to matters of personal identity, even when the speech responds to the school's opposing views, actions, or policies.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is L.M., a minor by and through his father and stepmother, Christopher and Susan Morrison—natural persons with no parent corporations or stockholders.

Respondents are Town of Middleborough, Massachusetts; Middleborough School Committee, Carolyn J. Lyons, Superintendent, Middleborough Public Schools, in her official capacity; and Heather Tucker, Acting Principal, Nichols Middle School, in her official capacity—government entities or officials.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the First Circuit, Nos. 23-1535, 23-1645, *L.M.* v. *Town of Middleborough*, judgment entered June 9, 2024.

U.S. District Court for the District of Massachusetts, No. 1:23-cv-11111, preliminary injunction denied June 16, 2023, summary judgment granted and final judgment entered July 19, 2023.

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The First Circuit's decision affirming summary judgment is reported at 103 F.4th 854 (1st Cir. 2024), and reprinted at App.1a–63a.

STATEMENT OF JURISDICTION

The First Circuit entered judgment on June 9, 2024. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. On August 13, 2024, Justice Jackson extended the time to file this petition until October 9, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

INTRODUCTION

The First Circuit takes the remarkable position that a school may flood its halls with its views on a matter of public concern—here, gender identity—and encourage students to join in, then bar students from responding with different views. Its ruling "give[s] public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed" and "strikes at the very heart of the First Amendment." *Morse* v. *Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

Middleborough bombarded L.M., a middle-school student, with messages promoting its view that sex and gender are self-defined, limitless, and unmoored from biology. Seeing these ideas as false and harmful, L.M. responded by donning a "There are only two genders" t-shirt expressing his differing view and, after Middleborough suppressed that shirt, wearing a "There are [censored] genders" t-shirt protesting censorship, which Middleborough banned too.

The First Circuit agreed that L.M. expressed his ideological views "passively, silently, and without mentioning any specific students." App.4a. It also conceded that L.M.'s t-shirts caused no actual disruption, App.35a–36a, and that "Middleborough was not aware of any prior incidents or problems caused by [his] specific message" or comparable speech. App.52a. That should have spelled the end of Middleborough's censorship under the First Amendment and *Tinker*. Instead, the First Circuit sidelined *Tinker* and adopted a novel test for speech that "assertedly demeans characteristics of personal identity." App.4a.

The court of appeals gave near-total deference to the school's determination of what speech demeans protected characteristics and substantially disrupts its operations. And the court deepened longstanding circuit splits by allowing viewpoint discrimination and a heckler's veto. What's more, the court contravened basic free-speech principles by endorsing other students' (but not L.M.'s) right to be free "from psychological attacks," App.24a (quotation omitted), and opining that L.M.'s passive, untargeted, and purely ideological message likely violated *Tinker's* rights-of-others prong too.

The lower court's ruling is irreconcilable with this Court's decisions and students' First Amendment right "to freedom of expression of their views" "on controversial subjects like" gender identity. *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511, 513 (1969). And the sheer number of circuit conflicts the decision creates shows what an outlier it is.

L.M. sought to participate in his school's marketplace of ideas and address sociopolitical matters in a passive, silent, and untargeted way. This Court's review is urgently needed to reaffirm that *Tinker* protects "unpopular ideas," *Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021), public schools can't establish what is "orthodox in … matters of opinion," *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), and students aren't "confined to the expression of … sentiments that are officially approved," *Tinker*, 393 U.S. at 511.

STATEMENT OF THE CASE

I. Factual background

A. Middleborough Public Schools speaks on the topic of gender identity.

Petitioner L.M. was an honors student at Nichols Middle School in Middleborough, Massachusetts.[1] App.92a–93a, 97a, 125a. Respondent Middleborough Public Schools has strong views that sex and gender have no biological foundation, are limitless, and are based on personal identity. App.98a, 125a–26a. The school promotes this view in curriculum, events, and speech, including GLSEN-sponsored posters stating, "Rise Up to Protect Trans and GNC [gender non-conforming] Students," App.101a; rainbow flags and signs declaring "Proud friend/ally of LGBTQ+," App.102a; and school-sponsored celebrations of "Pride Spirit Week" to foster an "outlook that bolsters … LGBT rights movements," App.119a.

Middleborough invites students to adopt and support its views by donning rainbow colors and "[w]ear-[ing] … Pride gear to celebrate Pride Month." App.118a–19a. Students often wear t-shirts and other apparel with messages the district approves. App.100a–01a.

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[1] Due in part to Middleborough's adverse treatment of L.M., he now attends school in a neighboring county. This Court has jurisdiction because L.M.'s complaint states a free-speech claim for actual and nominal damages. App.110a–13a, 115a; *Memphis Light, Gas, & Water Div.* v. *Craft*, 436 U.S. 1, 8 (1978) (actual damages); *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 800–02 (2021) (nominal damages).

Middleborough Students with a differing view of human identity, sex, and gender normally remain silent due to school officials' influence, popular culture, and peer pressure. App.99a–100a, 126a. L.M., then a seventh-grade student, was the exception. He decided to share his view that gender and sex are identical, and there are only two sexes—male and female. App.99a, 126a. L.M. hoped to start a meaningful conversation on gender ideology, a matter of public concern; protect other students against ideas that L.M. considers false and harmful; and show them compassionate people can believe that sex is binary. App.99a–100a, 126a–27a.

L.M. decided to further these goals by wearing a black t-shirt to school that said in black and white letters "There are only two genders." App.91a, 100a, 127a.

B. L.M. wears his only-two-genders t-shirt, and Middleborough censors his speech.

In March 2023, L.M. wore his t-shirt to his first class, Physical Education. App.100a, 102a, 127a. This ideological statement summarized L.M.'s views on sex and gender in general terms without criticizing opposing views or those who hold them. L.M. didn't engage individual students in discourse, chant, or distribute literature. He participated in class as usual. App.102a, 127a.

No student became visibly upset or objected to L.M.'s message, and the t-shirt caused no disruption. App.103a, 127a. But L.M.'s teacher reported the t-shirt to administrators out of concern for L.M.'s and other students' "physical safety" and "potential[ ] disrupt[ion]" by "members of the LGBTQ+ population." CA1JointApp.85–86. The acting principal, Respondent Heather Tucker, pulled L.M. from class, citing complaints, and gave him the choice of removing the shirt or more dialogue. L.M. opted for discussion, which took place in a room with a school counselor. App.102a–03a, 127a.

Tucker said that some students complained the t-shirt made them upset, and she demanded that L.M. could return to class only if he removed it. But L.M. couldn't change the shirt in good conscience, a decision his father supported, so he was forced to go home and miss classes that day. App.103a, 127a–28a.

L.M.'s father emailed Middleborough's superintendent, Respondent Carolyn Lyons, asking what rule L.M. broke, since the t-shirt's message wasn't "directed to any particular person" and addressed "a political hot topic … being discussed in social media, schools, and churches all across our country." App.121a. Acknowledging L.M. "was articulate in his position and respectful in his statements to [Tucker]," Lyons said his t-shirt violated "the [school] dress code" because its "content … targeted students of a protected class; namely in the area of gender identity," and "students and staff … complained about this shirt." App.122a. Lyons primarily based her "support" for Tucker's censorship, App.122a, on a dress-code provision that says "[c]lothing must not state, imply, or depict hate speech or imagery that target groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification," App.132a–33a.

Middleborough never explained how L.M.'s ideological statement "targeted" a group based on gender identity. The school's own handbook—where the dress code resides—contains similar sex-binary language, referring to education being "fully open and available to members of *both sexes*," App.130a (emphasis added), and sexual harassment involving "written materials or pictures derogatory to *either gender*," App.133a–34a (emphasis added). If L.M.'s message is "hate speech," so is Middleborough's handbook.

C. Middleborough rebuffs L.M.'s school-committee appeal and counsel's letter.

L.M.'s last recourse was appealing to the school committee, which he did in person at a public meeting. "There are only two genders," L.M. said, is a statement of his beliefs that is neither "harmful" nor "threatening." App.104a–05a (quoting *There Are Only Two Genders*, YouTube (May 3, 2023), https://perma.cc/V74R-EBAR). L.M. recounted that "[n]ot one person, staff, or student, told [him] that they were bothered by what [he] was wearing," "stormed out of class," or had an emotional outburst; quite the opposite, "[s]everal kids told [L.M.] that they supported [his] actions." *There Are Only Two Genders* at 1:13–1:31. L.M. urged the committee to reject a double standard under which he is barraged with "'pride flags' and 'diversity posters'" that conflict with his opinions while he is silenced from expressing an "opposing view." App.105a (quoting *There Are Only Two Genders* at 1:01–1:12).

The committee did nothing, endorsing officials' censorship by default. So L.M.'s father contacted a nonprofit attorney who sent Middleborough a letter explaining the lack of any basis for suppressing L.M.'s t-shirt under *Tinker*. App.135a–42a. "[N]o one," the attorney said, can "simply shut down speech that makes them upset," and he asked for confirmation that Middleborough would allow L.M. "to wear the shirt." App.140a, 142a.

Middleborough's response mentioned *Tinker* but focused on Massachusetts law, which prohibits "apparel[ ] that may reasonably be considered intimidating, hostile, offensive or unwelcome based on … gender identity." App.144a. Middleborough would ban L.M.'s shirt—and any other apparel—it deems to "suggest[ ]" other students' "sexual orientation, gender identity[,] or expression does not exist or is invalid," though it encourages affirming speech on these topics at school. App.144a.

D. L.M. wears his protest t-shirt, and Middleborough suppresses that too.

In May 2023, L.M. protested the school's censorship by wearing his t-shirt to school with a white piece of tape over the "only two" on which he wrote "censored." App.106a–07a, 128a.

As soon as L.M. arrived at his first class, an official told him to go to the principal's office, even though no student became visibly upset or objected, and there

was no disruption. App.107a–08a, 128a. L.M. took the censorship shirt off on the way because he understood he had been removed because of his t-shirt, and he didn't want to miss another day of school. App.107a, 128a. When L.M. arrived, Tucker asked if she could trust him not to put the shirt back on, and L.M. agreed.[2] App.107a, 128a.

II. Procedural history

A. District-court proceedings

L.M. filed suit in the U.S. District Court for the District of Massachusetts, alleging Middleborough's censorship violated his free-speech rights. He requested injunctive and declaratory relief and actual and nominal damages. App.110a–16a. The next day L.M. requested a TRO, which the court denied on non-substantive grounds. Dist.Ct.Docs.5, 12; App.87a.

Five days later, the district court denied L.M.'s motion for preliminary injunction based on *Tinker*'s rights-of-others language and deference to Middleborough's view of what created "an unhealthy and potentially unsafe learning environment." App.79a. L.M.'s "There are only two genders" t-shirt, the court said, violated some students' right "to a safe and secure educational environment" because it "may communicate that only two gender identities—male and female—are valid[ ] and any others are invalid or nonexistent." App.177a.

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[2] Middleborough allowed L.M. to wear t-shirts that expressed other sociopolitical views, such as "Don't tread on me" and "First Amendment rights." CA1JointApp.86.

The district court recognized that "a message protesting censorship would not invade the rights of others." App.80a. But it upheld suppressing L.M.'s protest t-shirt because "administrators could reasonably conclude that [it] did not merely protest censorship but conveyed the 'censored' message and thus invaded the rights of the other students." App.80a.

L.M. filed a notice of interlocutory appeal. Dist.Ct.Doc.53.

The district court wasn't inclined to stay the case in light of L.M.'s appeal. Dist.Ct.Doc.58. So the parties filed a joint motion asking the court to convert its preliminary-injunction ruling into a final judgment based on the preliminary-injunction record, without prejudice to L.M.'s right to appeal. Dist.Ct.Docs.60–61. The court granted that request and entered a final judgment in Middleborough's favor. App.85a–86a.

L.M. filed a notice of appeal. Dist.Ct.Doc.64.

B. Appellate proceedings

The parties jointly moved the First Circuit to consolidate L.M.'s preliminary-injunction and final-judgment appeals. The court granted that request.

Under *Tinker*, L.M. argued there was no actual disruption and no evidence supported a reasonable forecast of material disruption as to either t-shirt, and he insisted that Middleborough couldn't suppress his speech for viewpoint-based reasons or implement a heckler's veto. Appellant'sOpeningBr.20–51.

Middleborough responded that L.M.'s shirts "derogat[ed] [other] students['] gender identity" and "those students" would likely "respon[d] by" causing "a substantial disruption." AppelleesBr.34. It also claimed that L.M.'s speech violated other students' right to "feel, safe, fully supported[,] and fully included at school," branding his passive ideological statements as "bullying," "discrimination," and "harassment." AppelleesBr.16, 24, 26, 29.

At oral argument, one judge went further, persuading Middleborough's counsel to denigrate L.M.'s views on sex and gender—shared by millions of Americans—as "vile." Oral Argument at 29:06–29:35, *L.M.* v. *Town of Middleborough*, No. 23-1535 (1st Cir. Feb. 8, 2024), https://bit.ly/3MYlZ8h.

C. The First Circuit's decision

The First Circuit affirmed on "different grounds." App.5a. The legal standard, it said, was a matter of first impression because this Court hadn't "addressed the vexing question of when (if ever) public school students' First Amendment rights must give way to school administrators' authority to regulate speech that (though expressed passively, silently, and without mentioning any specific students) assertedly demeans characteristics of personal identity, such as race, sex, religion, or sexual orientation." App.4a.

The court adopted a new test based on dicta from Judge Posner, holding that schools may censor passive ideological speech if:

> (1) the expression is reasonably interpreted to demean one of those characteristics of personal identity, given the common understanding that

> such characteristics are "unalterable or otherwise deeply rooted" and that demeaning them "strike[s] a person at the core of his being[ ]" …; and (2) the demeaning message is reasonably forecasted to "poison the educational atmosphere" due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to "symptoms of a sick school—symptoms therefore of substantial disruption." [App.34a–35a (quoting *Nuxoll ex rel. Nuxoll* v. *Indian Prairie Sch. Dist.*, 523 F.3d 668, 671, 674, 676 (7th Cir. 2008)).]

Under the novel test's first prong, the lower court deferred to Middleborough's claim that L.M.'s only-two-genders t-shirt was more than "'tepidly negative'" because he suggested "that students with different beliefs about the nature of their existence are wrong." App.47a–48a (cleaned up). The court then "agree[d]" with Middleborough that L.M.'s message was "reasonably understood" as implying that those "who do not identify as either male or female have no gender with which they may identify." App.48a.

As to the second prong, the court deferred to the school's mere "forecast of material disruption" and speculated that L.M.'s only-two-genders t-shirt *might* have "negative psychological impact on transgender and gender non-conforming students," "impact [their] ability to concentrate on their classroom work," and "poison the educational atmosphere." App.49a–50a, 53a–54a. The court regarded t-shirt messages as disruptive because they "confront any student proximate … throughout the school day." App.52a.

Notably, the court required no concrete evidence supporting Middleborough's forecast of substantial disruption, saying it was enough for the school to reference a general awareness of "serious … struggles, including suicidal ideation, that some … students had experienced related to their … gender identities," "the effect those struggles could have on [their] ability to learn," and Respondent Tucker's experience "recommending out-of-district placements" based on gender identity when she worked elsewhere. App.52a–53a.

The court fretted that L.M.'s message might "so negatively affect the psychology of young students" that their "academic performance" would "decline[ ]" and their "absences from school" would "increase[ ]." App.54a. In the court's view, these fears weren't "abstract" because (1) "there was the *potential* for the back-and-forth of negative comments and slogans" between students, (2) L.M.'s teacher worried that LGBTQ+ students would be offended and "*potentially* disrupt classes," and (3) some of L.M.'s peers mentioned in a past survey their generic "concerns about how the LGBTQ+ population was treated." App.53a (cleaned up; emphasis added). Plus, the court said that schools may discriminate based on viewpoint, App.54a–55a & n.9, 61a n.11, and *Tinker*'s right-of-others prong likely justified barring L.M.'s views, App.46a, 55a.

Turning to L.M.'s protest shirt, the court's "analysis [was] largely the same." App.56a. It said Middleborough "reasonably concluded that, given the attention [the original shirt] garnered, other students would know the words written" (*i.e.*, "only two"), even though they "were covered up." App.56a.

ARGUMENT

I. The First Circuit's new substantial-disruption test for passive ideological speech in schools contradicts this Court's precedent and creates a split with other circuits.

The First Circuit's new substantial-disruption test for students' passive ideological expression sidelines *Tinker* and conflicts with the approach of nine other circuits. It's tailor-made "to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Morse*, 551 U.S. at 423 (Alito, J., concurring). This Court's review is needed to resolve these conflicts and "protect the 'marketplace of ideas'" in public schools necessary for "[o]ur representative democracy" to "work[ ]." *Mahanoy*, 594 U.S. at 190.

A. The First Circuit's novel standard conflicts with *Tinker* and its progeny.

"[T]he parties agree[d] *Tinker* governs this dispute[.]" App.19a. Yet the First Circuit went its own way and invented a new variant for ideological student expression that, though passive, silent, and not targeted at individuals, "assertedly demeans characteristics of personal identity." App.4a.

That novel test reads like version 2.0 of *Harper ex rel. Harper* v. *Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), in which the Ninth Circuit upheld a school's ban of a t-shirt stating "Homosexuality is shameful." Accord App.24a–25a, 35a n.7, 38a, 45a, 55a. This Court vacated *Harper* to "clear the path for future relitigation of the issues" involved. 549 U.S. 1262 (2007) (cleaned up). Like the defunct *Harper*

test, the First Circuit's approach here rests solely on the allegedly "negative psychological impact" of otherwise protected speech and substitutes nonexistent "symptoms of a sick school" for substantial disruption. App.35a.

In contrast, this Court holds that speech on sociopolitical issues falls under *Tinker*—regardless of its content, viewpoint, or psychological effect. *E.g.*, *Mahanoy*, 594 U.S. at 187–88; *Morse*, 551 U.S. at 422–23 (Alito, J., concurring). That includes L.M.'s speech on "gender identity," a matter of public concern that "occupies the highest rung … of First Amendment values" and "merits special protection." *Janus* v. *Am. Fed'n of State Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (cleaned up).

Tinker involved students wearing black armbands (symbols of mourning) to protest the Vietnam War, a "highly emotional subject," 393 U.S. at 518 (Black, J., dissenting), made more jarring by the ongoing draft and combat death of "[a] former student" who had "friends … still in school," *id.* at 509–10 nn.3–4 (majority opinion). This Court held that "an urgent wish to avoid the controversy which might result from the expression" didn't justify censoring the students' armbands, *even if* their "unpopular viewpoint" resulted in "fear" or psychological "discomfort and unpleasantness" for other students. *Id.* at 508–10.

Instead, this Court upheld students' right to "express [their] opinions, even on controversial subjects like the conflict in Vietnam, if [they] do[ ] so without materially and substantially interfering with the requirements of appropriate discipline … and without colliding with the rights of others," *id.* at 513 (cleaned up); particularly, "the rights of other students to be secure and to be let alone[,]" *id.* at 508.

Ever since, *Tinker* has been this Court's default rule for "whether the First Amendment requires a school to tolerate particular student speech," *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 270 (1988); accord *Mahanoy*, 594 U.S. at 188, though it has carved out exceptions for "vulgar and lewd speech" at school, *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986), "school-sponsored expressive activities[,]" *Hazelwood*, 484 U.S. at 273, and speech "promoting illegal drug use" at school events, *Morse*, 551 U.S. at 409. None of those exceptions apply here. But all this Court's post-*Tinker* student-speech cases agree with *Tinker* in four critical respects.

First, students have "undoubted freedom to advocate unpopular and controversial views in schools[,]" *Bethel*, 478 U.S. at 681, especially those related "to any political … or religious viewpoint," *Mahanoy*, 594 U.S. at 215 (Thomas, J., dissenting) (quoting *Bethel*, 478 U.S. at 685).

Second, students' "political and religious speech" is protected even if "perceived as offensive to some[,]" so ideological "offens[e]" is not a valid reason for censorship. *Morse*, 551 U.S. at 409.

Third, public schools must protect "unpopular ideas" and teach students to "disapprove of what [others] say," while "defend[ing] … [their] right to say it." *Mahanoy*, 594 U.S. at 190 (quotations omitted); accord *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 538, 541 (2022) (students must learn to live in a "pluralistic society" (quotation omitted)). Schools cannot suppress speech "just because it expresses thoughts or sentiments that others find upsetting[.]" *Mahanoy*, 594 U.S. at 210 (Alito, J., concurring).

Finally, this Court considers the time, place, and manner of student expression, as well as the type of speech. *Hazelwood*, 484 U.S. at 270–71 & n.3; *Bethel*, 478 U.S. at 683; *Tinker*, 393 U.S. at 513. But the substance of students' "political or religious message" doesn't reduce First Amendment protection. *Morse*, 551 U.S. at 403.

The First Circuit's new standard violates all four principles. It gives schools a blank check to suppress unpopular political or religious views, allows censorship based on "negative psychological impact" or ideological offense, rejects a public school's duty to inculcate tolerance, and lowers free-speech protection for expression that schools say implicates "characteristics of personal identity" in an "assertedly demeaning" way. App.34a–35a, 37a. This flouts *Tinker* and turns the First Amendment on its head.

B. The First Circuit's new test conflicts with rulings by nine other circuits.

The First Circuit's standard for students' passive, ideological speech creates a split with nine other circuits.

Start with the Seventh Circuit, which employed *Tinker* and protected—twice—a student's right to wear a t-shirt saying, "Be Happy, Not Gay." *Zamecnik* v. *Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 882 (7th Cir. 2011); *Nuxoll*, 523 F.3d at 676. Judge Posner's "convoluted" dicta in *Nuxoll* about personal identity and psychological harm may have "fold[ed] in on itself like a Möbius strip." 523 F.3d at 676 (Rovner, J., concurring in the judgment). But that didn't alter the Seventh Circuit's holding that (1) schools lack "a generalized 'hurt feelings' defense[,]" (2) student "anger engendered by" the message "did not give rise to substantial disruption[,]" and (3) students lack "a legal right to prevent criticism of their beliefs or even their way of life." *Zamecnik*, 636 F.3d at 876–77, 880; accord *N.J. ex rel. Jacob* v. *Sonnabend*, 37 F.4th 412, 416 (7th Cir. 2022) ("Tinker provides the legal standard" for firearm t-shirts). These holdings are irreconcilable with the First Circuit's ruling here.

Eight more circuits agree that *Tinker*'s familiar test does not change simply because a school subjectively considers student speech to have a potential "negative psychological impact" or that the speech may cause ideological offense. *Doninger* v. *Niehoff*, 642 F.3d 334, 351 (2d Cir. 2011) ("[a]pplying *Tinker*" to student-election shirts); *B.H. ex rel. Hawk* v. *Easton Area Sch. Dist.*, 725 F.3d 293, 320–21 (3d Cir. 2013) (en banc) (applying "*Tinker*'s general rule" to bracelets addressing "a social or political issue"); *Hardwick ex rel. Hardwick* v. *Heyward*, 711 F.3d 426, 437 (4th Cir. 2013) (Confederate-flag shirts "governed by *Tinker*"); *A.M. ex rel. McAllum* v. *Cash*, 585 F.3d 214, 222–24 (5th Cir. 2009) (assessing Confederate-flag purses under *Tinker*); *Barr* v. *Lafon*, 538 F.3d

554, 564 (6th Cir. 2008) ("*Tinker* governs" Confederate-flag shirts); *B.W.A.* v. *Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741 (8th Cir. 2009) ("apply[ing] *Tinker*" to Confederate-flag shirts); *Dariano* v. *Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 776 (9th Cir. 2014) ("*Tinker* guides … analysis" of American-flag shirts); *Holloman ex rel. Holloman* v. *Harland*, 370 F.3d 1252, 1273 (11th Cir. 2004) (applying "*Tinker-Burnside*" to a silent raised fist).

The First Circuit here relied on the Ninth Circuit's defunct holding in *Harper* and Seventh Circuit dicta from *Nuxoll*. App.24a–29a, 34a–35a & n.7. As just noted, the Ninth Circuit's analysis of the "Homosexuality Is Shameful" t-shirt is no longer good law, 445 F.3d at 1171, since this Court granted certiorari, vacated the judgment, and ordered that case dismissed as moot, 549 U.S. at 1262. And the Seventh Circuit's *holding* in *Nuxoll* squarely conflicts with the First Circuit's here in every way possible.

The First Circuit's novel test for student speech alleged "to demean … characteristics of personal identity" stands alone. App.34a. This Court's review is warranted to resolve the 9-1 conflict between the circuits and ensure that students in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico have the same right to speak on political and religious topics as students who happen to live outside the First Circuit.

C. The First Circuit's new test fails on its own terms, since no case supports labeling L.M.'s speech "demeaning."

The First Circuit devised a test for passive, silent, and untargeted student speech that "assertedly demeans characteristics of personal identity." App.4a. But no precedent supports classifying L.M.'s only-two-genders t-shirt as "demeaning." So the court's variant test fails on its own terms.

According to this Court, "[s]peech that demeans on" protected grounds is expression that is "hateful[,]" *Matal* v. *Tam*, 582 U.S. 218, 246 (2017) (plurality opinion), "critic[al]," or "condemn[ing]," *id.* at 249 (Kennedy, J., concurring in part and concurring in the judgment). And the circuits consider demeaning speech to include "racial slurs," *Barr*, 538 F.3d at 566, or "particularly mean-spirited and hateful" expression used to "harass[ ] and bully[ ]," *Kowalski* v. *Berkeley Cnty. Schs.*, 652 F.3d 565, 576 (4th Cir. 2011); accord *Saxe* v. *State Coll. Area Sch.*, 240 F.3d 200, 203, 218 (3d Cir. 2001) (Alito, J.) (considering "demeaning comments" in harassment context).

L.M.'s t-shirt is none of these things. It states L.M.'s ideological position without criticizing other views or attacking those who hold them. In fact, the First Circuit effectively conceded that L.M.'s message wasn't bullying or harassing, App.21a–22a, nor could it be legally classified as either, *Saxe*, 240 F.3d at 206–17.

The closest analogy is the "Be Happy, Not Gay" t-shirt that the Seventh Circuit said—twice—was "only tepidly negative" and not "'demeaning,'" a "characterization" the court deemed unwarranted and "too strong[.]" *Zamecnik*, 636 F.3d at 876–77 (quotations omitted); *Nuxoll*, 523 F.3d at 676. If telling other students "not to be gay" isn't demeaning, neither is saying "only two genders" exist. This is especially true given that the school's own handbook speaks in terms of "both sexes" and "either gender," App.130a, 134a, messages very similar to that of L.M.'s t-shirt that there are only two genders.

The First Circuit's contrary ruling defies logic. Many transgender students identify as male or female, so L.M.'s message doesn't contradict their beliefs. And while gender-nonconforming students may disagree with L.M.'s view that there are only two genders, that view isn't hateful, mean-spirited, or condemning—certainly not more so than Middleborough's speech condemning L.M.'s opinions as vile. So there's no "demeaning speech" predicate, and the First Circuit's test falters out of the gate.

II. The First Circuit's application of *Tinker's* substantial-disruption prong conflicts with this Court's precedent and creates or deepens multiple circuit splits.

From beginning to end, the lower court's substantial-disruption analysis conflicts with this Court's decisions and creates or deepens circuit splits that are almost too numerous to list. The Court should grant review and reject the lower court's rewrite of *Tinker*. The First Circuit gives public schools a blank check to silence dissenting political and religious views on matters of public concern.

A. The First Circuit's near-total deference to schools contradicts this Court's precedent and creates a split with six other circuits.

The First Circuit viewed "[t]he question" presented by this case as "not whether [L.M.'s] t-shirts should have been barred" but "who should decide whether to bar them—educators or federal judges." App.62a. It bequeathed that power to educators, giving school districts near-total deference on key free-speech questions, including whether L.M.'s message demeaned other students' characteristics and whether Middleborough's mere forecast of material and substantial disruption was reasonable. App.47a–49a, 50a, 54a.

In stark contrast, this Court says that "[t]he Fourteenth Amendment … protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *Barnette*, 319 U.S. at 637. Schools are firmly "within the limits of the Bill of Rights." *Ibid.*; accord *Morse*, 551 U.S. at 424 (Alito, J.,

concurring). Hence, *Tinker* requires courts to "*independent[ly] examin[e]* … the record" to "vigilant[ly] protect[ ]" free speech. 393 U.S. at 509, 512 (cleaned up, emphasis added).

Morse is no exception, as this Court carefully studied the banner's words and surrounding context—including that the student ascribed no meaning to his message—before deciding that the principal reasonably viewed the banner as promoting illegal drug use. 551 U.S. at 402–03. So *Morse*'s deference to an educator wasn't "abandonment or abdication of judicial review," *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 217 (2023) (quotation omitted), which is exactly what the First Circuit did.

Lower courts agree that *Tinker* forbids near-total deference to public schools. Once more, the First Circuit cited *Nuxoll*. App.47a–49a. But Judge Posner's dicta promoting "[a] judicial policy of hands off (within reason)" of student speech regulation was qualified and distinct from what the Seventh Circuit *did*, which was to order "a preliminary injunction" allowing the "Be Happy, Not Gay" t-shirt because "[t]he school … failed to justify the ban." *Nuxoll*, 523 F.3d at 671, 676. Similarly, in *Zamecnik*, the Seventh Circuit said schools have "discretion" in setting "the line between hurt feelings and substantial disruption[,]" 636 F.3d at 877–78, but rejected the school's judgment based on the lack of relevant evidence, *id.* at 879–82. The Seventh Circuit did *not* defer to educators' assumptions or predictions but searched the record for something more than *ipse dixit* and found the evidence lacking.

Three other circuits agree that *Tinker* rejects deference to public schools that censor speech based on mere speculation. *James* v. *Bd. of Educ. of Cent. Dist. No. 1* v. *James*, 461 F.2d 566, 575 (2d Cir. 1972) (courts must thoroughly search[ ] the record" for a sound constitutional basis for" a school's decision); *Shanley* v. *Ne. Indep. Sch. Dist.*, 462 F.2d 960, 970 (5th Cir. 1972) ("the board cannot rely on *ipse dixit*" to suppress speech); *Holloman*, 370 F.3d at 1271 ("we cannot simply defer to the *specter* of disruption or the *mere possibility* of discord") (emphasis added).

The Court should grant review to resolve the 4-1 split over whether *Tinker* allows near-total deference to public schools.

B. The First Circuit's approval of censorship grounded on personal-characteristic-based offense flouts this Court's precedent and widens a 2-1-2 circuit split.

The First Circuit's analysis turned on the supposedly "negative psychological impact" of ideological speech touching on "characteristics of personal identity," despite the lack of relevant evidence. App.45a. But this Court rejects censorship based on ideological offense—no matter the cause. *Tinker*, 393 U.S. at 509 (no censorship based on "discomfort and unpleasantness" caused by "unpopular view[s]"). It is "a bedrock First Amendment principle" that "[s]peech may not be banned" because "it expresses ideas that offend." *Matal*, 582 U.S. at 223 (plurality opinion).

So public officials cannot "prescribe what shall be offensive." *Masterpiece Cakeshop* v. *Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018). Instead, freedom

of speech includes "the right to tell people what they do not want to hear." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 602 (2023) (quotation omitted). There's no exception for speech that purportedly "strike[s] [others] at the core of [their] being." App.45a (cleaned up).

Lower courts generally agree that *Tinker*'s substantial-disruption prong requires more than "mere offense." App.31a. Yet they disagree on whether personal-characteristic-based offense is "something more." App.38a. The First Circuit said it is and assumed a "serious negative psychological impact." App.35a, 41a. This dovetails with the Sixth Circuit's recent ruling that schools may punish student speech based on the supposedly "dehumanizing and humiliating effects of non-preferred pronouns" possibly "creat[ing] a substantial disruption." *Parents Defending Educ.* v. *Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 464 (6th Cir. 2024) (cleaned up), *pet. for reh'g en banc filed* No. 23-3630 (6th Cir. Aug. 26, 2024).

The Seventh Circuit straddles the fence, expressing concern about "kids' sensitivity" and "wrenching debates over issues of personal identity," *Nuxoll*, 523 F.3d at 675–76, while rejecting "a generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students," *Zamecnik*, 636 F.3d at 877, and rebuffing offense-based evidence of disruption, *id.* at 879–80.

In contrast, the Third Circuit holds that schools cannot "constitutionally ban any unwelcome verbal conduct [*i.e.*, speech] which offends an individual because of some enumerated personal characteristics." *Saxe*, 240 F.3d at 215 (right to speak about sexual orientation); accord *DeJohn* v. *Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008) (women in combat). The Fifth Circuit agrees, holding that speech touching on "personal characteristics," "even if highly offensive, may very well be at the core of protected speech." *Esfeller* v. *O'Keefe*, 391 F. App'x 337, 341 (5th Cir. 2010) (per curiam).

The Third and Fifth Circuits must be right. Otherwise, a school could ban a t-shirt stating, "Black Lives Matter" because the shirt might cause race-based offense. This Court should resolve the 2-1-2 split and confirm that personal-characteristic-based offense doesn't justify censoring students' ideological views.

C. The First Circuit's refusal to require particular evidence supporting a forecast of substantial disruption defies *Tinker* and exacerbates a 9-2 circuit split.

Eschewing the need for any evidence of substantial disruption, the First Circuit said it sufficed that Middleborough pointed to transgender students' generic struggles, Respondent Tucker's experience in other school districts, one teacher's foreboding about LGBTQ+ students' reaction, and past survey results expressing concern about those students' treatment at school. App.52a–53a. The court also relied on the inherently disruptive nature of expressive t-shirts. App.51a–52a.

That ruling violates this Court's admonition that "expressive apparel" is "'nondisruptive.'" *Minn. Voters All.* v. *Mansky*, 585 U.S. 1, 15 (2018); accord *Bd. of Airport Comm'rs of the City of L.A.* v. *Jews for Jesus, Inc.,* 482 U.S. 569, 576 (1987) ("wearing of a T-shirt or button that contains a political message" is "nondisruptive"). Indeed, five other circuits agree that expressive apparel is a nondisruptive manner of expression. *Newsom ex rel. Newsom* v. *Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 259 (4th Cir. 2003) (same); *Butts* v. *Dallas Indep. Sch. Dist.*, 436 F.2d 728, 731 (5th Cir. 1971); *Lowry ex rel. Crow* v. *Watson Chapel Sch. Dist.*, 540 F.3d 752, 760 (8th Cir. 2008); *Chandler* v. *McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992); *Taylor* v. *Roswell Indep. Sch. Dist.*, 713 F.3d 25, 38 (10th Cir. 2013).

Schools will always have weak and generalized—or even counterproductive—evidence of this sort. Accepting it as dispositive turns "*Tinker*'s demanding standard" for censorship into an empty shell. *Mahanoy*, 594 U.S. at 193. That's incompatible with *Tinker*, which requires schools to make "a *specific showing* of constitutionally valid reasons to regulate [student] speech" and "*demonstrate … facts* which [could] reasonably have led school authorities to forecast substantial disruption" when no actual disruption occurred. 393 U.S. at 511, 514 (emphasis added).

Tinker didn't deter the First Circuit from accepting "Middleborough's assessment that there was the requisite basis for the forecast of material disruption here." App.50a. It did so despite the lack of actual disruption when L.M. wore his t-shirts to school and the dearth of evidence supporting a forecast of

material and substantial disruption. Likewise, the Sixth Circuit "do[es] not require substantial evidentiary support" for censorship when schools make "common-sense conclusions based on human experience." *Olentangy*, 109 F.4th at 464 (quoting *Lowery* v. *Euverard*, 497 F.3d 584, 594 (6th Cir. 2007)).

But nine other circuits require specific evidence justifying a forecast of material and substantial disruption. *James*, 461 F.2d at 571 (requiring "reasonable inferences flowing from concrete facts and not abstractions"); *Saxe*, 240 F.3d at 211–12 ("*Tinker* requires a specific and significant" or "well-founded expectation of disruption"); *Newsom*, 354 F.3d at 255 (same); *A.M.*, 585 F.3d at 221–22 ("[o]fficials must base their decisions on fact, not intuition" (quotation omitted)); *N.J.*, 37 F.4th at 426 ("mere speculation won't do"); *B.W.A.*, 554 F.3d at 739 (relying on "substantial race-related events" to ban the Confederate flag); *Dariano*, 767 F.3d at 779 ("specific events" and "pattern of … events … made it reasonable for school officials to [forecast] violent disturbance"); *C1.G ex rel. C.G.* v. *Siegfried*, 38 F.4th 1270, 1278 (10th Cir. 2022) (requiring "facts" that "support a reasonable forecast of substantial disruption"); *Holloman*, 370 F.3d at 1273 ("demonstrable factors" must "give rise to any reasonable forecast … of substantial and material disruption" (quotation omitted)).

Only this Court can resolve the 9-2 split and limit schools' suppression of student speech to "carefully restricted circumstances." *Tinker*, 393 U.S. at 513.

D. The First Circuit's endorsement of viewpoint discrimination disregards this Court's precedent, deepens a 3-3 circuit conflict, and creates a new 6-1 split.

Tinker said that schools cannot "prohibit[ ] … a particular expression of opinion … to avoid the discomfort and unpleasantness that always accompany an *unpopular viewpoint*." 393 U.S. at 509 (emphasis added); accord *Morse*, 551 U.S. at 423 (Alito, J., concurring). But it also said that "the prohibition of expression of one particular opinion, at least without evidence that it is *necessary to avoid material and substantial interference* with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511 (emphasis added).

These statements have split lower courts over whether *Tinker* categorically forbids viewpoint discrimination. Compare *Kristoffersson* v. *Port Jefferson Union Free Sch. Dist.*, No. 23-7232, 2024 WL 3385137, at *3 (2d Cir. July 12, 2024) (*Tinker* forbids viewpoint discrimination); *Barr*, 538 F.3d at 571 (same); *Speech First, Inc.* v. *Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) (same); with *Morgan* v. *Swanson*, 659 F.3d 359, 379 (5th Cir. 2011) (en banc) (holding the opposite); *B.W.A.*, 554 F.3d at 740 (same).

This Court offered clarity in *Matal*. The plurality and concurrence agreed that, under *Tinker*, government officials can't prohibit the expression of ideological viewpoints because others deem them offensive. *Matal*, 582 U.S. at 244 (plurality opinion) (citing *Tinker*, 393 U.S. at 509–14); *id.* at 250 (Kennedy, J., concurring) (citing "ante, at 1763–1764," including the plurality's reliance on *Tinker*).

The First Circuit rejected that guidance and *Iancu* v. *Brunetti*, 588 U.S. 388 (2019), saying the decisions "did not contemplate the special characteristics of the public-school setting." App.55a n.9. The court of appeals sided with the pro-viewpoint-discrimination camp, allowing schools to "discriminate[ ] in viewpoint between 'negative' and 'positive' messages" if they assert that the expression "materially disrupts or invades others' rights." App.61a n.11; accord App.55a.

More particularly, the First Circuit said viewpoint discrimination is allowed even when students' expression "respond[s] to [their school's] asserted views on gender," completely silencing one side of an ideological debate at school. App.55a. And it did so despite Middleborough's universal prohibition on t-shirt messages suggesting anything remotely critical of LGBTQ+ ideology, regardless of any particularized showing of likely material and substantial disruption. App.114a. That violates *Tinker*'s ban on schools making "authoritative selection[s]" regarding "truth," confining students to "sentiments that are officially approved," and rendering students "closed-circuit recipients of" the state's views. 393 U.S. at 511–12 (quotation omitted).

It also conflicts with the six circuits that prohibit schools from allowing only one side of an issue to be discussed. *Sypniewski* v. *Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 265 (3d Cir. 2002) ("genuine political, social or academic discussions … on matters like affirmative action" are protected); *Meriwether* v. *Hartop*, 992 F.3d 492, 507 (6th Cir. 2021) (citing *Barnette* for the proposition that "the state cannot … categorically silence dissenting viewpoints"); *Zam-*

ecnik, 636 F.3d at 876 ("a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality"); *Bystrom ex rel. Bystrom* v. *Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 755 (8th Cir. 1987) (schools can't "suppress … speech simply because they disagree with it, or because it takes a political or social viewpoint different from theirs, or different from that subscribed to by the majority"); *Chen ex rel. Chen* v. *Albany Unified Sch. Dist.*, 56 F.4th 708, 717, 722 (9th Cir. 2022) (schools can't "limit[ ] any political viewpoint or other protected content" and students "remain free to express offensive and other unpopular viewpoints" (quotation omitted)); *Speech First*, 32 F.4th at 1127 ("prohibiting only one perspective … targets particular views … and thereby chooses winners and losers in the marketplace of ideas—which [schools] may not do") (cleaned up).

This Court should grant review, resolve whether *Tinker* forbids viewpoint discrimination, and clarify that schools cannot suppress one side of a political and religious debate.

E. The First Circuit's embrace of a heckler's veto misconstrues *Tinker* and deepens a 3-1-2 circuit split.

The First Circuit endorsed a substantial disruption *forecast* based, in part, on a teacher's "concern[ ] that members of the LGBTQ+ population … would be impacted by the t-shirt's message and potentially disrupt classes." App.53a (cleaned up). That is a heckler's veto—where speakers engaged in "orderly" expression are silenced because "critics might react

with disorder." *Brown* v. *Louisiana*, 383 U.S. 131, 133 n.1 (1966).

Yet *Tinker* says that "hecklers don't get the veto." *Mahanoy*, 594 U.S. at 206 (Alito, J., concurring) (cleaned up); accord *Kennedy*, 597 U.S. at 543 n.8. The Court in *Tinker* focused on the armband wearers' orderly conduct in going "about their ordained rounds in school" and their lack of "interrupt[ion] [of] school activities." *Tinker*, 393 U.S. at 514. And it said that even though the armband wearers' opinion "may inspire fear" in other students—who "may start an argument or cause a disturbance"—the "Constitution says we must take this risk." *Id.* at 508.

So the First Circuit's embrace of a heckler's veto conflicts with *Tinker*. What's more, it exacerbates a 3-1-2 circuit split. Compare *Shanley*, 462 F.2d at 974 (*Tinker* forbids a heckler's veto); *Zamecnik*, 636 F.3d at 879 (same); *Holloman*, 370 F.3d at 1274–76 (same); with *Taylor*, 713 F.3d at 38 n.11 ("the blameworthiness of the speaker" is irrelevant under *Tinker* unless "problematic student disruptions were aimed at stopping plaintiffs' expression"); and with *Dariano*, 767 F.3d at 778 (*Tinker* allows a heckler's veto).

The Court should grant review to settle this established conflict and reject schools' reliance on a potential heckler's veto under *Tinker*.

F. The First Circuit's approval of censoring the protest t-shirt further conflicts with *Mahanoy* and decisions by three circuits.

The First Circuit approved the "There are [censored] genders" t-shirt's suppression on the same grounds as the censorship of the only-two-genders t-shirt. App.56a. So that decision is incorrect for the same reasons, plus the fact that the protest shirt said nothing about gender ideology. Further, the court's protest-shirt ruling conflicts with *Mahanoy*, which generally protects students' "criticism of the rules of a community of which [they] form[ ] a part," 594 U.S. at 190, the only thing the second shirt did.

Three other circuits agree that when students peacefully protest their schools' actions or policies, their speech is typically protected. *Shanley*, 462 F.2d at 972 n.10 ("those governed and regulated should have the right … of commenting upon the actions of their appointed or elected governors and regulators"); *Lowry*, 540 F.3d at 758, 760 ("wearing armbands that protested the school's dress code" protected as "non-disruptive protest of a government policy"); *Chandler*, 978 F.2d at 531 (schools "do not have limitless discretion" to suppress "arguably political speech … directed against the very individuals who seek to suppress" it).

This Court should address the 3-1 conflict and confirm that *Tinker* and *Mahanoy* protect students' peaceful and non-disruptive protest of their schools' actions or rules.

III. The First Circuit's misapprehension of the rights-of-others prong conflicts with *Tinker* and *Mahanoy*, plus rulings by six circuits.

The First Circuit rested its holding on *Tinker*'s substantial-disruption prong but said—repeatedly—that the rights-of-others prong would likely warrant the same result. App.46a, 55a; accord App.35a n.7. This Court's consideration of the rights-of-others prong is appropriate given the district court's ruling, the First Circuit's intention to affirm on those grounds if its substantial-disruption holding is reversed, the lower court's labeling of the "distinction[ ] between" *Tinker*'s two prongs as "more semantic than real," App.34a, and L.M.'s comprehensive arguments below regarding both aspects of *Tinker*, *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002).

Because *Tinker* didn't "elaborate on the contents of the rights of other students to be secure and to be let alone," the First Circuit expressed confusion about *Tinker*'s second prong. App.21a (quotation omitted). It resolved that ambiguity by turning to the "vacated-as-moot Ninth Circuit decision in *Harper*," which said that "being secure" includes "freedom from … psychological attacks" and that schools should ban "shirt[ ] message[s] … injurious to gay and lesbian students" because such expression "interfere[s] with their right to learn." App.24a–25a (cleaned up).

Yet *Harper* was vacated and conflicts with *Tinker*, which rejects psychological "fear" resulting from "[a]ny variation … [of] opinion," 393 U.S. at 508, looking instead for physical "harass[ment] [of] students,"

id. at 505 n.1 (discussing *Blackwell* v. *Issaquena Cnty. Bd. of Educ.*, 363 F.2d 74 (5th Cir. 1966)).

Similarly, *Mahanoy* said that schools can regulate "serious or severe bullying or harassment targeting particular individuals" and "threats aimed at … other students." 594 U.S. at 188. But there is no harassment or bullying here, and neither *Tinker* nor *Mahanoy* supports censoring students' speech "simply because it expresses ideas that are offensive or disagreeable." *Id.* at 205 (Alito, J., concurring) (quotation omitted).

Many circuits say the rights-of-others prong covers coercion, harassment, or otherwise unlawful expression, including "forc[ing] papers on" others or "block[ing] ingress or egress to a building," *Shanley*, 462 F.2d at 971 n.8; "speech which could result in tort liability," *Bystrom*, 822 F.2d at 752 (quotation omitted); "severe targeted harassment," *Chen*, 56 F.4th at 718; "threat of a school shooting," *Wynar* v. *Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013); and "persistent unwanted advances and related insults," *Doe* v. *Valencia Coll.*, 903 F.3d 1220, 1230 (11th Cir. 2018).

Nothing like that occurred here. And other circuits protect student "speech [that] is merely offensive to some listener," *Saxe*, 240 F.3d at 217, deny "a legal right to prevent criticism of [peers'] beliefs or even their way of life," *Zamecnik*, 636 F.3d at 876, and bar schools from "avoid[ing] the strictures of the First Amendment simply by defining certain [disfavored] speech as 'bullying' or 'harassment,'" *Parents Defending Educ.* v. *Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023).

The First Circuit's incorporation of a subjective, psychological harm standard in *Tinker*'s rights-of-others prong conflicts with these decisions by six circuits. What's more, it allows the "assertion of virtually any 'rights' … [to] eviscerate [free speech] protection[ ]," *J.S. ex rel. Snyder* v. *Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 n.9 (3d Cir. 2011), and presents an intolerable threat to the marketplace of ideas in America's schools. This Court's review is needed to demystify *Tinker*'s rights-of-others prong after 55 years of doubt.

IV. This case is an ideal vehicle to resolve the important question presented.

The Court should take this opportunity to answer the question presented, clarify *Tinker*, and halt public schools from exiling disfavored "political … or religious viewpoint[s]." *Mahanoy*, 594 U.S. at 215 (Thomas, J., dissenting) (quotation omitted).

To begin, the undisputed facts cleanly present the question presented. The First Circuit admitted that L.M. expressed ideological messages "passively, silently, and without mentioning any specific students." App.4a. It's also undisputed that Middleborough promoted a specific viewpoint on gender identity and encouraged students to voice their agreement, while preventing L.M. from respectfully and passively speaking an opposing view at school. AppelleesBr.31 (school targeted "his view [of] gender identity" but permitted it "outside of NMS").

Further, this case is an opportunity to resolve longstanding lower court confusion about whether *Tinker* forbids viewpoint discrimination and a heckler's veto. It also would enable this Court to clarify something that has long vexed the circuits: what *Tinker* meant when mentioning "the rights of others."

What's more, even though the sheer number of circuit splits the First Circuits' ruling created shows that it is an outlier, the opinion establishes a blueprint for other schools to censor minority "political and social views." *Morse*, 551 U.S. at 423 (Alito, J., concurring).

Finally, free-speech rights should not depend on geography. Yet students who live in the First Circuit are trapped "in an intellectual bubble" that would be unthinkable elsewhere. *Zamecnik*, 636 F.3d at 876 (quotation omitted). This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2024

APPENDIX

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United States Court of Appeals
For the First Circuit

Nos. 23-1535, 23-1645

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison,

Plaintiff, Appellant,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS; MIDDLEBOROUGH SCHOOL COMMITTEE; CAROLYN J. LYONS, Superintendent, Middleborough Public Schools, in her official capacity; HEATHER TUCKER, Acting Principal, Nichols Middle School, in her official capacity,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Indira Talwani, U.S. District Judge]

Before

Barron, Chief Judge,
Thompson and Montecalvo, Circuit Judges.

David A. Cortman, with whom Rory T. Gray, Tyson C. Langhofer, P. Logan Spena, John J. Bursch, Andrew D. Beckwith, Samuel J. Whiting, Alliance Defending Freedom, and Massachusetts Family Institute were on brief, for appellant.

J. Michael Connolly, Thomas S. Vaseliou, Rachel L. Daley, and Consovoy McCarthy PLLC on brief for Parents Defending Education, amicus curiae.

Joseph D. Spate, Assistant Deputy Solicitor General of South Carolina, Alan Wilson, Attorney General, Robert Cook, Solicitor General, J. Emory Smith, Jr., Deputy Solicitor General, Thomas T. Hydrick, Assistant Deputy Solicitor General, Steve Marshall, Attorney General of Alabama, Tim Griffin, Attorney General of Arkansas, Christopher M. Carr, Attorney General of Georgia, Raúl Labrador, Attorney General of Idaho, Brenna Bird, Attorney General of Iowa, Daniel Cameron, Attorney General of Kentucky, Jeff Landry, Attorney General of Louisiana, Lynn Fitch, Attorney General of Mississippi, Andrew Bailey, Attorney General of Missouri, Austin Knudsen, Attorney General of Montana, Michael T. Hilgers, Attorney General of Nebraska, Drew Wrigley, Attorney General of North Dakota, Ken Paxton, Attorney General of Texas, Sean Reyes, Attorney General of Utah, and Jason Miyares, Attorney General of Virginia, on brief for South Carolina, Alabama, Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Texas, Utah, and Virginia, amici curiae.

Robert Corn-Revere and Abigail E. Smith on brief for Foundation for Individual Rights and Expression, amicus curiae.

Gary M. Lawkowski and Dhillon Law Group, Inc. on brief for Center for American Liberty, amicus curiae.

James L. Kerwin, William E. Trachman, and Ilya Shapiro on brief for Mountain States Legal Foundation and Manhattan Institute, amici curiae.

Catherine W. Short and Sheila A. Green on brief for Life Legal Defense Foundation and Young America's Foundation, amici curiae.

Gene C. Shaerr, Jennifer C. Braceras, and Schaerr Jaffe LLP on brief for Independent Women's Law Center, amicus curiae.

Deborah J. Dewart on brief for the Institute for Faith and Family, amicus curiae.

Deborah I. Ecker, with whom Gregg J. Corbo and KP Law, P.C. were on brief, for appellees.

Ruth A. Bourquin, Kirsten V. Mayer, and Rachel E. Davidson on brief for the American Civil Liberties Union of Massachusetts, Inc., amicus curiae.

Chris Erchull, Mary L. Bonauto, Gary D. Buseck, Michael J. Long, Kelly T. Gonzalez, and Long, Dipietro, and Gonzalez, LLP on brief for GLBTQ Legal Advocates & Defenders and Massachusetts Association of School Superintendents, amici curiae.

Charles McLaurin, Jin Hee Lee, Avatara Smith-Carrington, Janai S. Nelson, Samuel Spital, Alexsis Johnson, and Colin Burke on brief for NAACP Legal Defense & Educational Fund, Inc., amicus curiae.

Before Barron, Chief Judge, Thompson and Montecalvo, Circuit Judges.

June 9, 2024

BARRON, Chief Judge. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), famously upheld the First Amendment right of public-school students to wear black armbands at school in protest of the country's involvement in the Vietnam War. The Supreme Court was sensitive, however, to the "special characteristics of the school environment" and so took care to explain that there was "no evidence whatever of . . . interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Id. at 506, 508. It also affirmed more generally that "of course" school authorities may restrict student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" or, otherwise put, " 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school' [or] . . . collid[es] with the rights of others." Id. at 513 (citation omitted).

In the more-than-half century since Tinker, the Court has addressed variations of the First Amendment question presented in that landmark case. But it has not addressed the vexing question of when (if ever) public-school students' First Amendment rights must give way to school administrators' authority to regulate speech that (though expressed passively, silently, and without mentioning any specific students) assertedly demeans characteristics of personal identity, such as race, sex, religion, or sexual orientation.

In these consolidated appeals, we confront a dispute that raises that question for the first time in

our Circuit, although other federal courts have confronted it before. The underlying suit, filed in the District of Massachusetts, concerns the "hate speech" provision of a public middle school dress code, which the defendants applied to prohibit a twelve-year-old student first from wearing a t-shirt that read "There Are Only Two Genders" and then from wearing that same t-shirt with the words "Only Two" covered by a piece of tape on which was written "CENSORED."

Relying solely on Tinker's "invasion of the rights of others" limitation, and thus not Tinker's "material disruption" limitation, the District Court denied the student's motion for a preliminary injunction. On that same basis, the District Court granted the defendants final judgment on all the student's claims, which challenged both the dress code's specific applications and two portions of the dress code on their face. We affirm the District Court's rulings, albeit on somewhat different grounds.

I.

A.

1.

John T. Nichols Middle School ("NMS") is a public middle school in Middleborough, Massachusetts. NMS's students are in the sixth through eighth grades and are between ten and fourteen years old.

NMS and the Middleborough Public School System ("MPSS") administrators knew that several NMS students identified as part of the "LGBTQ+ community." In addition, Heather Tucker, the then-interim principal of NMS, who had just started at the

school, was aware that several NMS students identified as "transgender or gender nonconforming."

Prior to coming to NMS, Tucker had educated young students for two decades. During that time, she met with students who had been bullied based on their gender identities and worked closely with students who had self-harmed, contemplated suicide, or attempted to commit suicide "because of their gender identity." Tucker also worked on teams that had recommended out-of-district placements for students "because of [those students'] gender identity and suicidal ideation."

Carolyn Lyons, the superintendent of the MPSS, also knew that several NMS students had "attempted to commit suicide or have had suicidal ideations in the past few years, including members of the LGBTQ+ community." Lyons further stated in an affidavit that "[t]hese situations have frequently cited LQBTQ+ status and treatment as a major factor." Lyons attested that "[s]tudent survey data collected in June 2022, through NMS's platform Panorama, show over 20 individual student[s'] comments about perceived bullying at school, feeling unwelcome at school, and expressing specific concerns about how the LGBTQ+ population is treated at school."

NMS had a student-run organization called the Gay Straight Alliance Club ("GSA"), which was "intended as a space for students who fit under the LGBTQ+ umbrella or are their allies" (cleaned up). The GSA was open to all NMS students, and at any given time "approximately ten to twenty students . . . attend[ed] the GSA['s] [monthly] meetings."

2.

NMS's code of conduct included a dress code ("Dress Code") that was set forth in the "Student & Family Handbook," which was provided to NMS's students and their families. The Dress Code's preface states that the Dress Code is "governed by health, safety[,] and appropriateness" and that, because "an environment conducive to learning is necessary," clothing that "causes distractions and inhibits learning is not allowed." The preface further states that students are "encourage[d] . . . to dress in a neat and presentable manner that reflects pride in themselves and their school."

The Dress Code provides:

- Clothing must be neat and clean.
- Clothing that is excessively revealing . . . will not be allowed.
- Tank tops or basketball shirts must have a t-shirt underneath.
- Chains, chain belts, spikes, studs, and gang-related attire is not allowed.
- Clothing with alcohol, tobacco, vulgar writing, sexual references or controlled substance reference[s] will not be allowed.
- Outer coats, hats, caps, bandanas, sweatshirt hoods, and sunglasses will not be worn in the building without permission of an administrator.
- Wheeled shoes and platform shoes are dangerous on our floors and not allowed. Blankets or other clothing that drapes down or is considered a tripping hazard will not be allowed.
- Clothing must not state, imply, or depict hate speech or imagery that target[s] groups based on

> race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification.
>
> • Any other apparel that the administration determines to be unacceptable to our community standards will not be allowed.

(Emphases added). The Dress Code concludes by stating that should a student "wear something inappropriate to school, [the student] will be asked to call their parent/guardian to request that more appropriate attire be brought to school" and that "[r]epeated violations of the dress code will result in disciplinary action."

3.

In the Spring of 2023, L.M. was a seventh grader at NMS. He held the belief that there are only two biological sexes (male and female), that the word "gender" is synonymous with "sex[,]" and that because there are only two biological sexes there are only two genders.

On March 21, 2023, L.M. wore a black t-shirt to school that displayed, in black capitalized letters with thick white outlines, the words "There Are Only Two Genders" (the "Shirt"). L.M. wore the Shirt both to express his own views, which he understood to be contrary to those NMS espouses on the subject, and to convey his belief that his views are not "inherently hateful."

After L.M. arrived at his first-period class, a teacher contacted Jason Carroll, the assistant principal of NMS, about the Shirt. The teacher expressed concerns about the "physical safety" of L.M.

"as well as other students' safety, citing to multiple members of the LGBTQ+ population at NMS as current students in the building who would be impacted by the t-shirt['s] message and potentially disrupt classes." Carroll then contacted Tucker, who went to L.M.'s class and asked him to meet with her.

Tucker explained that L.M. could not wear the Shirt at school and could either remove it while at school or discuss the matter further. L.M. requested to discuss the matter further, so Tucker asked him to come with her to another room to continue the discussion.

In the separate room, with the school counselor also present, Tucker explained that some students had "complained" and that L.M. could not return to class if he did not remove the Shirt. When L.M. declined to do so, Tucker called L.M.'s father to explain that L.M. would need to remove the Shirt to return to class.

L.M.'s father stood by L.M.'s decision not to remove the Shirt and thereafter picked L.M. up from school and took him home. School administrators took no other action at that point.

L.M. did not personally witness any noticeable disruption on March 21 or thereafter that resulted from his wearing of the Shirt. L.M. has since worn shirts expressing his views on a range of other topics, which included messages like "Don't Tread on Me" and "First Amendment Rights," none of which he was asked to remove. L.M. has not been disciplined by NMS administrators for wearing the Shirt or any of those shirts or for any views he has expressed while off school grounds.

4.

On April 1, 2023, L.M.'s father sent Lyons an email in which he asked for an explanation of the problem with the Shirt, given that "nothing about [the] shirt . . . was directed to any particular person" and that "[i]t simply stated [L.M.'s] view on a subject that has become a political hot topic . . . that is being discussed . . . all across our country." Lyons responded in an email on April 4, 2023, that stated that L.M. had not been, nor would be, disciplined for having worn the Shirt. Lyons explained that Tucker had been enforcing the Dress Code because the Shirt's contents had been understood to "target[ ] students of a protected class; namely in the area of gender identity."

On April 27, 2023, L.M.'s counsel sent Lyons a letter that asserted NMS had violated L.M.'s free-speech rights under Tinker by prohibiting him from wearing the Shirt and that "the 'hate speech' provision" of the Dress Code was facially unconstitutional. The letter further stated that L.M. intended to wear the Shirt on May 5 and that, if NMS "interfere[d] with [L.M.] doing so again," it "may be necessary" for L.M. to initiate legal action.

MPSS's counsel responded on May 4 with a letter that stated NMS's actions had been justified under applicable legal authorities. The letter stated that state law "provides [students] protection against discrimination, harassment and bullying on the basis of . . . gender identity" and that those protections were against "communications, whether oral, written, . . . or through the wearing of apparel, that may reasonably be considered intimidating, hostile,

offensive or unwelcome based on . . . gender identity . . . and/or may otherwise be reasonably likely to lead to a disruption of [school] operations." The letter further stated that MPSS administrators would prohibit the wearing of t-shirts "likely to be considered discriminatory, harassing and/or bullying . . . by suggesting that [others'] sexual orientation, gender identity or expression does not exist or is invalid."

NMS's actions attracted local and national media coverage. L.M. participated in several interviews with news media about the March 21 incident and became the subject of local and national news coverage.

On April 13, two individuals stood near NMS's bus drop-off area, but off school property, and held signs that read, "there are only two genders" and "keep woke politics out our schools." The next day, counter-protesters standing off school property held signs that read, "trans people belong," "everyone is welcome here," and "we support trans rights." Lyons received complaints from community members about both groups of individuals.

In late April and early May, Lyons, Tucker, NMS, and Middleborough High School received a slew of messages, emails, and phone calls related to the controversy involving the Shirt. Lyons described some of the calls as being "threatening in nature," and Tucker attested that she and other NMS staff received "hateful messages" in emails from individuals both within and without Massachusetts.

On May 1, 2023, NMS received over fifty telephone messages Tucker described as "hateful and

lewd." The calls continued for about two weeks, tapered off, and started up again around May 31.

Lyons found out about a post on the social-media platform "X," formerly known as "Twitter," that listed the NMS staff directory and stated, "if you see these people in public, you know what to do." In response to some of these messages, the Middleborough Police Department provided a police detail to NMS between April 24 and April 28.

5.

L.M. wore the Shirt to school again on May 5. This time he covered the words "Only Two" with a piece of tape on which was written in marker "CENSORED" (the "Taped Shirt"). L.M. wore the Taped Shirt to "speak up about" and protest NMS barring him from wearing the Shirt even though other students, according to L.M., were permitted to express other views on gender.

Soon after arriving at school on May 5, L.M. was brought to Tucker's office. While L.M. was alone in the office, Lyons, Tucker, and school counsel conferred and decided not to allow L.M. to wear the Taped Shirt. L.M. ultimately took the Taped Shirt off and returned to class. He was not disciplined for having worn the Taped Shirt.

On May 9, two other NMS students wore t-shirts to school that read "There Are Only Two Genders." Tucker met with those students and told them they could not wear those shirts. One of the students removed the shirt and returned to class. The other student declined to comply, and their parents were called. Neither student faced discipline.

B.

L.M., by and through his natural guardians, filed suit in the United States District Court for the District of Massachusetts pursuant to 42 U.S.C. § 1983. The complaint alleged violations of L.M.'s rights under the First and Fourteenth Amendments to the U.S. Constitution. The complaint named as defendants the Town of Middleborough, the Middleborough School Committee, superintendent Lyons, and then-interim now-acting principal Tucker (collectively "Middleborough").

L.M.'s complaint alleged that, by barring him from wearing the Shirt and Taped Shirt, Middleborough violated the First Amendment as incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The complaint further alleged that the Dress Code's prohibitions on "hate speech" that "target[s]" groups and on clothing "unacceptable to . . . community standards" are facially unconstitutional because they are impermissible prior restraints, void for vagueness, and overbroad. The complaint sought an injunction prohibiting Middleborough from barring L.M.'s wearing of the Shirt, Taped Shirt, and similar t-shirts; a declaratory judgment that the challenged portions of the Dress Code are unconstitutional, both facially and as applied to L.M.'s t-shirts; and actual and nominal damages.

Soon thereafter, L.M. moved for a temporary restraining order and a preliminary injunction. Middleborough opposed both motions.

Middleborough first noted that Massachusetts law required schools to "develop anti-bullying plans

that recognize the vulnerability of certain students" and prevent bullying or harassment based on gender identity and that Middleborough's actions must be understood in the context of guidance provided by the Massachusetts Board of Elementary and Secondary Education directing schools to "create a culture in which transgender and gender nonconforming students feel safe, supported, and fully included." Middleborough also reviewed the evidence of the school administrators' "specific knowledge of the vulnerability of students who are members of the LGBTQ+ community." Middleborough then invoked out-of-circuit decisions applying Tinker's rights-of-others and material-disruption limitations in assertedly similar contexts. See Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171-72, 1177–83 (9th Cir. 2006) (addressing a t-shirt in the high-school context that displayed "Be ashamed, our school embraced what God has condemned" on the front and "Homosexuality is shameful" on the back), vacated as moot by Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247–49 (11th Cir. 2003) (addressing high-school students' display of a confederate flag on school premises); Sapp v. Sch. Bd. of Alachua Cnty., Fla., No. 09cv242, 2011 WL 5084647, at *1, *4–*5 (N.D. Fla. Sept. 30, 2011) (addressing a t-shirt that displayed "Islam is of the Devil" in the middle- and high-school contexts).

Based on the record and the rulings, Middleborough argued that "it is clear that [its] decision that [L.M.'s] message on the [Shirt] would invade the rights of others, the rights of particularly vulnerable students who are members of the

[LGBTQ+] community (a protected class) to feel safe in school and to be free from harassment and bullying while in school, was reasonable." Middleborough also argued that "[i]t was, likewise, reasonable for [it] to conclude that [L.M.'s] shirt would materially disrupt classwork or involve substantial disorder in the school." Noting the young age of NMS's students and the school's "active LGBTQ+ community," Middleborough further argued that "[t]he level of self-advocacy expressed by this group of students strongly suggests that they would not sit idly by and allow someone to deny their very existence" and that "[i]t was . . . reasonable for the [NMS administrators] to take proactive measure to ensure the integrity of the learning environment in NMS."

Middleborough separately argued that L.M. was not likely to succeed on the merits of his as-applied claim concerning the Taped Shirt. Middleborough contended that, "[a]s with the message on [the Shirt], [administrators] reasonably forecasted that the message on [the Taped Shirt], that merely replaced the [words 'only two'] with the word 'censored,' would not only make the LGBTQ+ students feel unsafe and excluded in the educational environment but would also cause a substantial disruption in the school and was inconsistent with NMS [sic] basic educational mission of inclusivity and creating a safe welcoming environment for all students to learn."

Middleborough emphasized that its decision to bar L.M. from wearing the Taped Shirt on May 5 did not occur "in a vacuum" and followed "the history of disruption caused by [L.M.] wearing the [Shirt]" as well as L.M.'s attorney having "linked the two shirts by making [Middleborough] aware that [L.M.] was

going to wear the same shirt to school on May 5." Middleborough thus argued that it "could reasonably forecast that [the Taped Shirt] would cause disruption and would interfere in the rights of other students under the circumstances."

As to L.M.'s First Amendment-based facial claims, Middleborough first contended that he did not have Article III standing to challenge the Dress Code. Middleborough also contended, in the alternative, that the prohibition on clothing depicting "hate speech that target[s] groups based [on,] among other protected categories, sexual orientation or gender identity," was not overbroad because it "comport[ed] with the laws and regulations that protect[ ] students from discrimination, harassment and bullying." Middleborough separately contended that L.M. was unlikely to succeed on his Due Process-based facial claims because L.M. was never disciplined and did not "articulate . . . what process he claims he is or was due" given that the handbook containing the Dress Code "provides disciplinary guidelines and procedures."

The District Court denied the temporary-restraining-order motion on June 1 and the preliminary-injunction motion on June 16. In denying the latter motion, the District Court reviewed the evidence of what Middleborough knew about students at NMS and those students' vulnerability before turning to the merits.

With respect to the March 21 incident involving the Shirt, the District Court concluded that the "school administrators were well within their discretion to conclude" that the message displayed on

the Shirt "may communicate that only two gender identities -- male and female -- are valid, and any others are invalid or nonexistent." The District Court reasoned Tinker's rights-of-others limitation applied, because "students who identify differently . . . have a right to attend school without being confronted by messages attacking their identities." The District Court thus concluded that L.M. had failed to establish a likelihood of success on the merits because he could not "counter [Middleborough's] showing" that it had enforced the Dress Code on March 21 "to protect [against] the invasion of the rights of other students to a safe and secure educational environment."

With respect to the May 5 incident involving the Taped Shirt, the District Court concluded that the analysis was no different. The District Court concluded that L.M. could not show a likelihood of success, because Middleborough could "reasonably conclude that the Taped Shirt did not merely protest censorship but conveyed the 'censored' message and thus invaded the rights of other students." In a footnote, the District Court explained that, in light of its rulings, it did not need to determine if Tinker's material-disruption limitation would also be applicable to any of L.M.'s claims. The District Court thus did not address the possible relevance of any of the evidence concerning what had occurred at NMS between March 21 and May 5 or thereafter.

Finally, the District Court ruled L.M. had no likelihood of success with respect to his facial challenges. It reasoned that was so because the Dress Code both "does not threaten discipline for a violation . . . that has not been specifically identified by the school as improper" and "provides that if students

wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school" (cleaned up).

L.M. filed a notice of interlocutory appeal of the District Court's ruling on June 23, 2023. On July 17, the parties filed a joint motion for final judgment pursuant to Federal Rules of Civil Procedure 54(a), 56, and 65(a)(2). The parties "agreed that, based on the factual record as established through the preliminary injunction proceedings, judgment as a matter of law [was] appropriate" and asked the District Court to convert its ruling into a final judgment because the "interests of the Parties . . . will be better served by an appeal from a final judgment." The parties clearly expressed that they "continue to dispute the proper legal outcome of [L.M.'s] constitutional claims."

Two days later, the District Court entered final judgment for Middleborough as to all L.M.'s claims, incorporating the reasoning from the preliminary-injunction ruling. L.M. timely appealed, and on August 15, 2023, this Court granted the parties' joint motion to consolidate the appeals.

II.

The parties agree that the factual record needs no further development, and neither party contends that any material facts are in dispute. Our review is de novo. See García-Rubiera v. Calderón, 570 F.3d 443, 455-56 (1st Cir. 2009).

We recognize that "where First Amendment interests are implicated, our review must be more

searching," Mullin v. Town of Fairhaven, 284 F.3d 31, 37 (1st Cir. 2002), as we have an obligation "to independently review the factual record to ensure that the [lower] court's judgment does not unlawfully intrude on free expression," Boy Scouts of America v. Dale, 530 U.S. 640, 648-49 (2000). We note, too, that the parties agree Tinker governs this dispute and "places the burden on the school to justify student speech restrictions." Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 25 (1st Cir. 2020). The parties do not dispute that school administrators "may rely only on the justification originally provided to" L.M. for restricting his speech. Id. at 28.

III.

L.M. contends that the District Court's First Amendment-related rulings on his claims -- both facial and as-applied -- for monetary, declaratory, and injunctive relief conflict with Tinker. But, as we will explain, regardless of whether Tinker's rights-of-others limitation applies here, we conclude that Tinker's material-disruption limitation does.[1] We thus affirm the District Court's Tinker-based rulings on that ground -- save for one of the First Amendment-related facial claims, for which we conclude that L.M. lacks Article III standing. See United States v. George, 886 F.3d 31, 39 (1st Cir. 2018) ("We are at liberty to affirm a district court's

[1] One of the amici argues that Middleborough could not rely on Tinker's rights-of-others limitation as a matter of state law, but "we need not address" that contention "[b]ecause the parties did not raise the issue," Norris, 969 F.3d at 33 n.22, and because we affirm under Tinker's material-disruption limitation.

judgment on any ground made manifest by the record.").

We dive into the details of L.M.'s challenges to the District Court's Tinker-based rulings in Parts IV and V. First, however, we need to set forth the legal framework that, under Tinker, we understand to apply in this context. We thus now explain what that framework is and our reasons for embracing it.[2]

A.

As we noted above, the District Court relied solely on Tinker's rights-of-others limitation in upholding Middleborough's actions. Specifically, the District Court held that "students who identify differently . . . have a right to attend school without being confronted by messages attacking their identities" and that L.M. could not "counter [Middleborough's] showing" that Middleborough had enforced the Dress Code on both days "to protect [against] the invasion of the rights of other students to a safe and secure educational environment."

There is some uncertainty, however, as to when, if ever, the rights-of-others limitation applies to passive and silent expression that does not target any specific student or students but assertedly demeans a

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[2] Our analysis does not address Tinker's application in a post-secondary school setting. Cf. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 267 (3d Cir. 2002) ("[T]he public school setting is fundamentally different from other contexts, including the university setting."); Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 443 (4th Cir. 2013) ("Elementary and secondary schools are undoubtedly different than colleges . . . and this distinction results in different legal standards in some instances.").

personal characteristic like race, sex, religion, or sexual orientation that other students at the school share. Tinker itself had no reason to address how, or whether, such speech implicates that limitation, as the armbands at issue there were not asserted to espouse any message other than opposition to the Vietnam War and did not -- unlike the t-shirts here -- refer to any such personal characteristic. See 393 U.S. at 510-11.

Tinker also did not elaborate on the contents of "the rights of other students to be secure and to be let alone." Id. at 508. The Court did cite approvingly, id. at 513, to a Fifth Circuit decision that upheld school officials' authority to forbid the wearing of "freedom buttons" at school based on evidence that "actions by the students in distributing [the] buttons, pinning [the buttons] on others, and throwing [the buttons] through windows constituted a complete breakdown in school discipline." Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966). But no physically coercive conduct by the speaker is involved here. And while the rights-of-others limitation appears to encompass tortious speech more generally, see Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1375-77 (8th Cir. 1986), rev'd on other grounds by Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), there is no developed contention that speech of that sort is involved here either.

The Supreme Court has recently affirmed schools' authority to regulate "severe bullying and harassment," but the Court did so without specifying whether schools may do so pursuant to the rights-of-others limitation. See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy, 594 U.S. 180, 188 (2021). The Court

merely emphasized that the "special characteristics" of the public-school context afford schools "special leeway when [they] regulate speech that occurs under [their] supervision." Id.

There has been discussion in post-Tinker caselaw about whether the rights-of-others limitation applies only to circumstances in which the speech in question would be independently unlawful and there is no developed contention that the speech involved here is. But the Court has made clear that it has not decided whether the limitation is so limited. See Kuhlmeier, 484 U.S. at 273 n.5.

For our part, we have held that the rights-of-others limitation applies in the case of bullying, even when there is no physical invasion of any kind -- seemingly without regard to whether the state separately makes such bullying a source of tort liability. See Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 507-09 (2021); cf. Norris, 969 F.3d at 29. Beyond that, though, we have not addressed the scope of that limitation. We note that the bullying speech in Doe and Norris was asserted to target a specific student. But there is no contention that L.M.'s speech similarly was, notwithstanding that it addressed in general terms a characteristic of personal identity that other students at the school shared.

At the same time, it is not obvious how passive, silently expressed student speech that targets no specific students but demeans characteristics like those described above relates to the material-disruption limitation. Given the nature of the expression involved in Tinker, the Court there had no occasion to address such a question directly. The

evidence of disruption the Court concluded was missing appeared to relate to "aggressive, disruptive action," "group demonstrations," or "threats or acts of violence on school premises" that would impede a school from carrying out its educational mission and not to the possible negative psychological effects of the speech in question on a subset of students. 393 U.S. at 508.

More recently the Court addressed a school's attempt to regulate off-campus speech under the material-disruption limitation. See Mahanoy, 594 U.S. at 193. In doing so, the Court made clear that the standard for showing the limitation applied was "demanding." Id.

We also have not had occasion to address how or whether the material-disruption limitation is implicated by expression that assertedly demeans a characteristic of personal identity like race, sex, religion, or sexual orientation. So, our precedent, too, does not offer any direct guidance on that score.

There is, however, an extensive body of federal court caselaw that applies Tinker in circumstances -- akin to those present in this case -- involving passive and silently expressed messages by students that do not target specific students but that assertedly demean other students' personal characteristics, like race, sex, religion, or sexual orientation. As we will explain, those rulings address when school authorities may regulate such expression and whether they may do so to prevent a "material[ ] disrupt[ion]" of the classroom, a "collision with the rights of other students to be secure and to be let alone," or both. Tinker, 393 U.S. at 508, 513. We thus

now review those rulings for the guidance that they may offer here.

B.

Two circuit-level rulings in this line have relied on the rights-of-others limitation. The first is the now-vacated-as-moot Ninth Circuit decision in Harper v. Poway Unified School District, 445 F.3d 1166 (9th Cir. 2006), vacated as moot by Harper ex rel. Harper v. Poway Unified School District, 549 U.S. 1262 (2007), which affirmed the denial of a preliminary injunction to prevent public high-school officials from barring a student from wearing a t-shirt that read "Homosexuality is Shameful." Id. at 1178.

Harper reasoned that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth" and that "[t]he 'right to be let alone' " is a " 'recognizable privacy interest . . .' [that is] perhaps most important 'when persons are "powerless to avoid it." ' " Id. (quoting Hill v. Colorado, 530 U.S. 703, 714-16 (2000)). The court explained that speech that strikes at a "core characteristic" of a minority group's identity has a "detrimental" effect on "[the students'] psychological health . . . [and] educational development" and, in so explaining, relied on social-science literature, of which it took judicial notice, that concluded such denigration is "harmful . . . to [those students'] educational performance." Id. at 1178-79.

Harper concluded that the school "had a valid and lawful basis" for barring the t-shirt under the rights-of-others limitation, because the shirt's message "was injurious to gay and lesbian students and interfered

with their right to learn." Id. at 1180. In so holding, Harper appeared to presume that t-shirts could be restricted in a high school pursuant to the rights-of-others limitation whenever their denigrating message was "directed at students' minority status such as race, religion, and sexual orientation." Id. at 1183.

The second rights-of-others ruling is West v. Derby Unified School District No. 260, 206 F.3d 1358, 1362, 1365-68 (10th Cir. 2000), in which the Tenth Circuit rejected a First Amendment challenge to the suspension of a middle-school student for his violating the school district's racial-harassment policy by drawing a confederate flag in class. Notably, however, Derby concluded that the school district "had reason to believe that a student's display of the Confederate flag" would not only "interfere with the rights of other students to be secure and let alone" but also "cause disruption." Id. at 1366. The court did so, moreover, without suggesting that different showings were necessary to trigger each limitation. Id. at 1366.

Unlike Harper, however, Derby neither explained why the rights of other students "to be secure and to be let alone" were implicated nor relied on a presumption about the negative psychological impact on minority students of the expression. The court instead relied on the factual predicate of racial tensions in the school district, which included students spray painting racist and threatening graffiti in school bathrooms, a fight breaking out because a student wore a confederate-flag headband, and students responding to displays of the flag with t-shirts bearing the letter " 'X,' denoting support for the teachings of Malcolm X." Id. at 1362, 1366-67. Derby made clear, though, that administrators had acted

reasonably even with respect to the middle schooler's drawing of the flag, notwithstanding that the more extreme incidents occurred at the high school and "the [racial] tensions were not widespread and involved relatively few students at the middle school." Id. at 1362.

Several rulings in this line have relied on similar logic in invoking the material-disruption limitation to approve of a school's authority to regulate seemingly similar expression. But, in doing so, those rulings have either expressly eschewed reliance on, or simply not mentioned, the rights-of-others limitation.

Nuxoll ex rel. Nuxoll v. Indian Prairie School District #204 is an example. There, the Seventh Circuit addressed a school rule barring " 'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability' " as applied to a t-shirt bearing the message "Be Happy, Not Gay." 523 F.3d 668, 670 (7th Cir. 2008).

The court acknowledged as "prudent" the student's concession that the message "homosexuals go to Hell" could be barred as "fighting words." Id. at 671. But the court made clear that, the "fighting words" category aside, Tinker also permitted school officials to restrict some passive, silent expression of derogatory comments that, by demeaning characteristics of "personal identity" such as those listed in the rule, "strike a person at the core of his being" because of how "unalterable" or "otherwise deeply rooted" those characteristics are. Id. at 671. And that was so, Nuxoll made clear, even if the speech

did not expressly target specific students. Id. at 672, 674.

Like Harper, Nuxoll noted evidence suggesting "that adolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school's expectations." Id. at 671 (collecting social-science literature). The court also observed that it could "foresee" that other students might respond with "negative comments on the Bible" or the religious characteristic of the speaker and thereby "poison the school atmosphere" and "deterior[ate] the school's ability to educate its students." Id. at 671. As the court put it, "[m]utual respect and forbearance enforced by the school may well be essential to the maintenance of a minimally decorous atmosphere for learning." Id.

Nuxoll rejected the school's assertion, however, that the school rule could be upheld against a facial attack under Tinker because "all" it does is "protect the 'rights' of the students against whom derogatory comments are directed." Id. at 672. Nuxoll instead stated the school was "on stronger ground" in contending that, because the rule "strikes a reasonable balance between . . . free speech and ordered learning," the material-disruption limitation justified the rule. Id. at 672-73.

Nuxoll pointed to the "psychological effects" of such expression and reasoned that a "material disruption" under Tinker need not involve violence and could involve "a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school -- symptoms therefore of substantial

disruption." Id. at 671, 674. Nuxoll then indicated that speech demeaning the characteristics of personal identity that the school's rule covered could be prohibited under Tinker's material-disruption limitation if school authorities could reasonably forecast that the speech would have "psychological effects" on students with those characteristics that would yield such "symptoms." Id. at 674.[3]

The court held that, on its face, "Be Happy, Not Gay" was only "tepidly negative" and so would not have "even a slight tendency . . . to poison the educational atmosphere," thereby clarifying that it might matter how "negative" the message was. Id. at 676.[4] Indeed, Nuxoll suggested that a case involving a t-shirt "on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home' " would be different because of the "psychological effects" on students with the demeaned characteristic of that expression. Id. at 674. And, in reversing with instructions to enter a preliminary injunction and remanding for further proceedings, Nuxoll observed that "[t]he district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other

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[3] In context, we understand Nuxoll to have been referring to absenteeism and declining academic performance among the students with the demeaned characteristic suffering the "psychological effects" of being exposed to, and demeaned by, the expression. See id. at 674.

[4] In reasoning that "Be Happy, Not Gay" was only "tepidly negative" -- and not "derogatory" or "demeaning" -- the Seventh Circuit noted that " 'gay' used to be an approximate synonym for 'happy' " and, thus, the message's negative import would not be clear on its face without cultural context. Id. at 675-76.

students and the school's interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity." Id. at 676.

The Seventh Circuit revisited the same expression and school in Zamecnik v. Indian Prairie School District No. 204, 636 F.3d 874 (7th Cir. 2011). Zamecnik acknowledged that "[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission" but still concluded that the high school had failed to adduce sufficient evidence to ground a forecast of future material disruption. Id. at 877-78.

Importantly, Zamecnik held, "the fact that homosexual students and their sympathizers harassed [the plaintiff] because of their disapproval of her message [was] not a permissible ground for banning it" because otherwise protected speech "met by ... unprivileged retaliatory conduct" cannot be suppressed because of that conduct. Id. at 879. But Zamecnik did not question Nuxoll's observation that schools had a legitimate interest in regulating expression that is especially demeaning out of a concern that, if students "attack[ed] each other with wounding words" about one another's personal characteristics, such a "First Amendment free-for-all[ ]" could "poison the school atmosphere," Nuxoll, 523 F.3d at 671-72, 675, or "cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of the youth," Zamecnik, 636 F.3d at 877. "A school has legitimate responsibilities, albeit paternalistic in character, toward the immature captive audience that consists

of its students," the court explained, "including the responsibility of protecting them from being seriously distracted from their studies by offensive speech during school hours." Id. at 879-80. Thus, in holding that "Be Happy, Not Gay" would not "have even a slight tendency to . . . poison the educational atmosphere," the court did not suggest that the outcome would be the same for a more overtly demeaning message and, if anything, indicated the opposite. See id. at 876–78.[5]

The Third Circuit in Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 (3d Cir. 2002), similarly relied on the material-disruption limitation to assess the facial validity of a school district's racial-harassment policy and its application to bar a student from wearing a t-shirt displaying the term "redneck."[6] Sypniewski observed that " '[t]he

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[5] This reasoning in Nuxoll and Zamecnik mirrored the Seventh Circuit's earlier analysis in Muller ex rel. Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996), overruled on other grounds by N.J. by Jacob v. Sonnabend, 37 F.4th 412, 424-25 (7th Cir. 2022), with respect to younger students. "[An adult] Christian can tell the Jew he is going to hell, or the [adult] Jew can tell the Christian he is not one of God's chosen," Muller opined without reference to either Tinker limitation, but "it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate." Id. at 1540. Muller also explained that elementary-school officials could restrict "[r]acist and . . . hateful views" that "could crush a child's sense of self-worth." Id. (emphasis added).

[6] Sypniewski followed the Third Circuit's decision in Saxe v. State College Area School District, which held that a school district's anti-harassment policy could not pass constitutional muster under the material-disruption limitation insofar as the policy barred speech "intended to [cause disruption]" and speech

mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected' " and that the prohibition on written materials that create "ill will" was overbroad under Tinker because it could not be reasonably interpreted to refer to "something more than mere offense." Id. at 264-65 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring)).

At the same time, Sypniewski upheld the portion of the policy prohibiting materials that "create[ ] . . . hatred," because the term "hatred" "implie[d] such strong feelings that a serious possibility of disruption might be inferred." Id. (emphases added). Moreover, Sypniewski upheld the prohibition on "name calling" in part because "[a]lthough mere offense is not a justification for suppression of speech, schools are generally permitted to step in and protect students from abuse." Id. at 264. And, with respect to the as-applied claim, the court seemingly approved the school's authority to bar the confederate flag, given its connection to a student gang known as "the Hicks" and past incidents of racial tension involving its members, but not the "redneck" t-shirt, because of the lack of evidence indicating that students would react to that word in light of the district's past racial disturbances. See id. at 254-57.

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that creates a "hostile environment" without "any threshold showing of severity or pervasiveness[,]" 240 F.3d 200, 216-17 (3d Cir. 2001) (emphasis added). In so holding, Saxe noted that the "precise scope of Tinker's [rights-of-others limitation] is unclear" but that "it is certainly not enough that the speech is merely offensive to some listener." Id. at 217.

Thereafter, the Eleventh Circuit also relied on Tinker's material-disruption limitation in holding that high-school students could be disciplined for displaying confederate flags on school grounds. See Scott, 324 F.3d at 1247-48. "Public school students' First Amendment rights . . . should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve." Id. at 1247. And, in accord with Nuxoll, Scott indicated a school would not need evidence of past violence at the school to deem the expression materially disruptive: "[O]ne only needs to consult the evening news to understand the concern school administrators had regarding the disruption . . . emotional trauma and outright violence which the display of the symbols involved in this case could provoke." Id. (emphasis added). Indeed, the court noted that "[w]ords like 'symbol', 'heritage', 'racism', 'power', 'slavery', and 'white supremacy' are highly emotionally charged" and that it is "constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues." Id. at 1249. Scott reasoned both that "[p]art of a public school's essential mission" is "teach[ing] students of differing races, creeds and colors to engage each other in civil terms rather than in 'terms of debate highly offensive or highly threatening to others' " and that the school had not "attempted to suppress civil debate on racial matters" but only those symbols "[so] associated with racial prejudice [and] so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context." Id. (quoting

Denno v. Sch. Bd. of Volusia Cnty., Fla., 218 F.3d 1267, 1273 (11th Cir. 2000)).

The Sixth Circuit reached a similar conclusion in Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008), which also upheld a school district's ban on displays of the confederate flag. The court first rejected the students' argument that the school board's forecast of future disruption was unreasonable because there was no evidence that the confederate flag itself had caused past disruption on the ground that "Tinker . . . does not require that the banned form of expression itself actually have been the source of past disruptions." Id. at 565. Barr then concluded that the record "belie[d]" the students' arguments that racial tensions at the school were not as high as the board claimed, there was "minimal evidence of prior disruption," and thus there was little basis for anticipating future disruption. Id. at 556-66. To those points, the court observed that "[t]here is no requirement that disruption under Tinker be violent" and that "an increase in absenteeism" is "the epitome of disruption in the educational process." Id. at 566.

More recently, in Sapp v. School Board of Alachua County, Florida, No. 09-cv-242, 2011 WL 5084647 (N.D. Fla. Sept. 30, 2011), a district court in the Eleventh Circuit drew on Scott to uphold a school district's ban on wearing t-shirts at school that read "Islam is of the Devil." The court first pointed to past incidents of disturbance, such as a high-school football game where attendees wearing the t-shirts had been asked to leave after a student became deeply upset and the principal of the elementary school "received disturbing and threatening emails." Id. at *4-5. Sapp then upheld the administrators' actions

under Tinker's material-disruption limitation because administrators had forecasted that, based on their years of experience as educators, the t-shirts' demeaning message would "lead to an unnecessary distraction and a hostile environment." Id. at *5. The court credited determinations by administrators that "the message was offensive and demeaning to [the school's twenty-five] Muslim students . . . and could cause an unsafe environment due to the polarizing effect of the anti-Islamic message," id. at *5 & n.3; that t-shirts that "single[ ] out a group of people and call[ ] them evil" would lead to unnecessary distraction, id. at *5; and that such a message being displayed on a t-shirt would "foster a hostile and intimidating atmosphere for students" and "compromise[ ] the school's ability to provide [an] . . . effective educational setting," id.

C.

The reasoning of these rulings suggests that distinctions between the two Tinker limitations in the context of student speech that assertedly demeans personal characteristics -- like race, sex, religion, or sexual orientation -- may be more semantic than real. Doctrinal labels aside, these courts appear to have converged on the shared understanding -- most fully articulated in Nuxoll -- that school officials may bar passive and silently expressed messages by students at school that target no specific student if: (1) the expression is reasonably interpreted to demean one of those characteristics of personal identity, given the common understanding that such characteristics are "unalterable or otherwise deeply rooted" and that demeaning them "strike[s] a person at the core of his being," Nuxoll, 523 F.3d at 671; cf. Saxe, 240 F.3d at

206 (noting the especially incendiary nature of "disparaging comment[s] directed at an individual's sex, race, or some other personal characteristic" (emphasis added)); and (2) the demeaning message is reasonably forecasted to "poison the educational atmosphere" due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to "symptoms of a sick school -- symptoms therefore of substantial disruption," Nuxoll, 523 F.3d at 674, 676.[7]

Our review of these rulings persuades us that Tinker permits public-school authorities to regulate such expression when they can make the two showings described above. We agree that those showings suffice to ensure that speech is being barred only for reasons Tinker permits and not merely because it is "offensive" in the way that a controversial opinion always may be. See 393 U.S. at 509.

Importantly, although the standard for showing a material disruption is "demanding," Mahanoy, 594 U.S. at 193, a school need not be certain of its forecast. "[T]aking the case law as a whole we don't think a

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[7] Harper is no exception despite holding that the rights-of-others limitation permitted the restriction of such demeaning speech only if it was "directed at students' minority status." 445 F.3d at 1183. Harper left little doubt that Tinker permits the restriction of expression in such circumstances as described above, as it explained that expression demeaning a characteristic of a majority rather than minority group "is more likely to fall under the 'substantial disruption' prong of Tinker" and that its ruling left open "the possibility that some verbal assaults on core characteristics of majority high school students would merit application of [the rights-of-others limitation]." Id. at 1183 n.28.

school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue. That could rarely be proved. . . . It is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.' " Nuxoll, 523 F.3d at 673 (quoting Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827-28 (7th Cir. 1998)) (collecting cases). As the Sixth Circuit explained, "Tinker does not require school officials to wait until the horse has left the barn before closing the door." Lowery v. Euverard, 497 F.3d 584, 591-92 (6th Cir. 2007).

There is also the question whether public schools may regulate student expression based on these two showings pursuant to only one of Tinker's two limitations and, if so, which one. As we earlier explained, there is no clear answer in controlling precedent to that question. Our review of the rulings discussed above also reveals no obvious rationale for concluding that one limitation applies to the exclusion of the other.

Nonetheless, most federal courts in this line of authority have identified the material-disruption limitation as the better fit. And while it may be that -- as Derby appears to have concluded -- the rights-of-others limitation applies, we see no reason to break with that consensus view. The material-disruption limitation has served as a workable doctrinal means of accounting for the concerns that arise in this context and that Tinker requires us to assess. It usefully permits the depth of the expression's disruptive impact on the learning environment to be evaluated in relation to myriad school contexts and

the myriad forms that assertedly demeaning speech may take.

D.

All that said, L.M. does argue that Tinker bars schools from regulating student speech based on the its "subjective psychological intrusion[ ]" on listeners. For that reason, he contends, we may not uphold Middleborough's actions here under Tinker based on a forecast of disruption that is rooted in the psychological effects on other students of expression that is passive, silent, and targets no specific students. But his reasons do not convince us to reject the framework drawn from the long line of authority described above.

L.M. is right that we must be sensitive to Tinker's overarching concern about "punish[ing]" students for "silent, passive expressions of opinion, unaccompanied by any disorder or disturbance on the part of" the speakers themselves. 393 U.S. at 508. Tinker stressed that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression" because the reality is that "[a]ny departure from absolute regimentation may cause trouble." Id. Tinker observed that "[a]ny 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." Id. But, because "our Constitution says that we must take this risk," the Court explained that, for a school "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." Id. at 508-09 (emphases added).

In short, L.M. is right that Tinker establishes that public schools cannot "confine[ ]" students "to the expression of those sentiments that are officially approved," as "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' " Id. at 511 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). Thus, it does not permit a "hurt feelings" exception that any opinion that could cause "offense" may trigger. Zamecnik, 636 F.3d at 877. Otherwise, school authorities could do what Tinker clearly forbids: protect other students "from the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509 (emphasis added).

None of the decisions in the line of authority just reviewed, Harper included, however, purported to permit reliance on an "undifferentiated fear or apprehension of disturbance" or a desire to avoid the "trouble" that accompanies "[a]ny departure from absolute regimentation." Id. at 508 (emphases added). Each found that there was "something more" than the "mere desire to avoid . . . discomfort and unpleasantness" involved. Id. at 509 (emphasis added).

We recognize that L.M. contrasts regulable speech that causes a negative psychological impact on others, such as bullying or harassing speech, see Doe, 19 F.4th at 508-09; Chen ex rel. Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 718 (9th Cir. 2022); C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1146-47,

1152 (9th Cir. 2016), with passive, silent expression that is not similarly targeted at specific students. L.M. does so on the ground that the former species of speech is "coercive" because it pervasively and repeatedly targets specific students, while the latter species results in what he contends is merely a "subjective psychological intrusion[,]" such that, in his view, the speech may not be regulated under Tinker.

But L.M. himself acknowledged at oral argument that schools could bar silent, passive expression that described persons who identify as transgender in obviously highly demeaning terms but targeted no specific individual.[8] And while L.M. concedes only that such expression would constitute "fighting words," see R.A.V., 505 U.S. at 383-84, 386, much as the plaintiff argued in Nuxoll about a similarly highly demeaning message ("homosexuals go to hell"), 523 F.3d at 670-71, we do not see how the fighting-words rubric is more illuminating than, and thus preferable to, the material-disruption rubric.

To that point, by invoking the "fighting words" doctrine, L.M. is embracing, necessarily, the notion that words that otherwise would not constitute

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[8] Specifically, L.M. conceded that a school could bar a shirt displaying the message "All Trans Kids Are Retarded." We do not use that language lightly, but the example clarifies that all parties agree that there are messages so overtly and highly demeaning of a personal characteristic that, if displayed on a shirt, can be restricted by a school based solely on its words, even if no specific students are targeted. From this example it would appear the parties also would agree that known religious, racial, and sex- and sexual-orientation-related slurs also fall within this category of overtly and highly demeaning speech.

"fighting words" may be so deemed in the public-school setting because of the heightened psychological sensitivities of school children. After all, even such highly demeaning expression as L.M. thinks regulable would not constitute "fighting words" outside a school. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[Fighting words are] words . . . which by their very utterance . . . tend to incite an immediate breach of the peace."); United States v. Bartow, 997 F.3d 203, 207-09 (4th Cir. 2021) (recognizing that speaking "even the most egregious racial slur," without more, "is not a fighting word per se" and that "fighting words" are limited to "direct personal insults" that are "directed to the person of the hearer" (internal citations omitted)). Yet, we find it strange that school authorities could respond to demeaning speech when its "psychological effects," Nuxoll, 523 F.3d at 674, are strong enough to provoke "violent resentment" by other students, cf. Gooding v. Wilson, 405 U.S. 518, 528 (1972) (describing fighting words as language that "when used to or of another person, and in his presence, naturally tend to provoke violent resentment"), but not when those effects are strong enough to "crush a child's sense of self-worth," Muller, 98 F.3d at 1540, and so impede that child's ability to learn, see Trachtman v. Anker, 563 F.2d 512, 520 (2d Cir. 1977) (Gurfein, J., concurring) (observing in applying Tinker in a high-school setting that "a blow to the psyche may do more permanent damage than a blow to the chin"), or otherwise "poison the educational atmosphere," Nuxoll, 523 F.3d at 676, and so lead to "symptoms of a sick school," id. at 674.

Relatedly, L.M. does not suggest that Derby (on which the District Court here relied) was wrong to

uphold the restriction on the passive, silent display of the confederate flag. He argues only that the confederate flag is distinguishable from his speech because, on his account, his "messages about gender . . . aren't remotely comparable to the Confederate flag, which flew over a breakaway polity dedicated to the slavery of African Americans." Thus, in this way, too, L.M.'s real challenge appears to turn on a question of degree and not kind about the nature of the message -- a question to which we will turn our attention shortly. Cf. Morse v. Frederick, 551 U.S. 393, 409-10 (2007) ("Stripped of rhetorical flourishes, then, the debate [with the dissent] . . . is less about constitutional first principles than about whether [the student's] banner constitutes promotion of illegal drug use. . . . [A] contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.").

We should add that, consistent with the line of authority that we find persuasive, the Supreme Court post-Tinker has itself credited school authorities' concerns about the serious negative psychological impact of student expression on other students. It did so in holding that a student could be disciplined for a lewd speech at a school assembly in part because the speech "was acutely insulting to teenage girl students" and "could well be seriously damaging to its less mature audience." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683-85 (1986) (emphasis added).

To be sure, L.M. does point to three circuit rulings that he contends support his position: Saxe, 240 F.3d 200 (3d Cir. 2001); Sypniewski, 307 F.3d 243 (3d Cir. 2002); and Zamecnik, 636 F.3d 874 (7th Cir. 2011). But none undermines the Tinker framework that we

distill from the large body of federal court rulings in this area, and indeed, all three are in that line.

L.M. is right that Saxe held that a school district's anti-harassment policy was overbroad under Tinker. But Saxe did not set forth a categorical rule protecting such derogatory expression when passively and silently expressed. It instead drew a distinction between "speech about some enumerated personal characteristic[ ]" that is "merely offensive to some listener" and speech of that kind where there is some "threshold showing of severity" in the educational environment caused by the speech. Id. at 216-17 (emphasis added). Thus, Saxe concluded that, while the school district had a "compelling interest in promoting an educational environment that is safe and conducive to learning," the school district could not prohibit "derogatory" speech about "such contentious issues as 'racial customs,' 'religious tradition' . . . [or] 'sexual orientation' " without a "particularized reason as to why it anticipates substantial disruption." Id. at 217.

Sypniewski, which followed Saxe, is no different. As we have seen, it, too, deemed a school policy restricting speech -- there, one barring racial harassment -- overbroad in barring "written material . . . [that] creates ill will." 307 F.3d at 264-65. But it also upheld the portion of the policy prohibiting materials that "create[ ] . . . hatred" because that term "implie[d] such strong feelings that a serious possibility of disruption might be inferred." Id. at 265 (emphasis added); but see Derby, 206 F.3d at 1367-68 (upholding policy that, as construed by the school district, prohibited written material "that is racially divisive or creates ill will or hatred"). And Sypniewski

held that the school administrators there were without authority to bar the t-shirt bearing the word "redneck" because the evidence did not support the conclusion that students at the school would react to that word similar to how they reacted to terms like "hick" or displays of the confederate flag. See 307 F.3d at 255-57.

Finally, Zamecnik did affirm the injunction against the high school barring the "Be Happy, Not Gay" message because the evidence for forecasting a material disruption was speculative, unpersuasive given the heckler's veto doctrine, and unreliable in explaining why the phrase in question was "particularly insidious." 636 F.3d at 877-81. But Zamecnik reasoned that "Be Happy, Not Gay" was "only tepidly negative" and would not "have even a slight tendency to . . . poison the educational atmosphere." Id. at 877-78. Thus, the court did not suggest that the outcome would be the same for a more overtly demeaning message and, if anything, indicated the opposite. See id. at 876–78.

E.

In following the lead of other courts that have grappled with similar cases, we emphasize that in many realms of public life one must bear the risk of being subjected to messages that are demeaning of race, sex, religion, or sexual orientation, even when those messages are highly disparaging of those characteristics. But, like these other courts, we do not understand Tinker, in holding that schools must allow for robust discussion and debate over even the most contentious and controversial topics, to have

held that our public schools must be a similarly unregulated place.

The Supreme Court has recognized, post-Tinker, that "[it] does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school." Fraser, 478 U.S. at 682; see Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the judgment) ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."). Indeed, the Court has observed that "[even in] our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate" and that "the role and purpose of the American public school system is to inculcate the habits and manners of civility as values in themselves indispensable to the practice of self-government." Fraser, 478 U.S. at 681 (cleaned up).

Across the decades, the federal courts in the line of authority we find persuasive have recognized that the "special characteristics of the school environment," Tinker, 393 U.S. at 506, warrant affording school officials the ability to respond to the way speech demeaning other students' "unalterable or otherwise deeply rooted personal characteristics" can "poison the school atmosphere," Nuxoll, 523 F.3d at 671-72. That flexibility to "teach . . . [and] demonstrate the appropriate form of civil discourse and political expression," Fraser, 478 U.S. at 683,

however, has not been understood by these same courts to entitle school authorities to regulate debate on any topic just because it may be highly upsetting to some students. As Judge Brown has explained, "[p]art of a public school's mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in 'terms of debate highly offensive or highly threatening to others.' " West v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233-34 (D. Kan. 1998) (emphasis added) (quoting Fraser, 478 U.S. at 683), aff'd by Derby, 206 F.3d 1358; see also Harper, 445 F.3d at 1182 (distinguishing demeaning comments about political topics, like the war in Iraq, with such comments "relating to a core characteristic of particularly vulnerable students" based on the degree of "damag[e] to the individual or the educational process"). And so, with our framework for applying Tinker to this sensitive context in place, we now turn to L.M.'s specific challenges to the rulings below.

IV.

We begin with L.M.'s challenges to the rulings rejecting his as-applied claims, which turn on what this record shows about the reasonableness of both Middleborough's (1) interpretation of the messages at issue in each claim as being demeaning of the kind of characteristic of personal identity described above and (2) forecast that each of those messages, due to its negative psychological impact on students with the demeaned characteristic, would "poison the educational atmosphere" and thereby materially disrupt the learning environment, Nuxoll, 523 F.3d at 676. Because we conclude that the record reveals that Middleborough has made each showing, we conclude

its actions must be upheld under Tinker's material-disruption limitation even if not also, based on those same showings, under Tinker's rights-of-others limitation.

A.

As to the as-applied claim that concerns Middleborough's actions on March 21, L.M. asserts that the Shirt was "on all fours" with Tinker's armbands or, at least, was like the "Be Happy, Not Gay" t-shirt Nuxoll found "tepidly negative" on its face and having not "even a slight tendency to . . . poison the educational atmosphere." 523 F.3d at 676. L.M. separately contends that, in any event, the record evidence is too sparse to support Middleborough's forecast of the expression's disruptive impact on student learning due to the "vague" nature of the supporting affidavits from school administrators. We are not convinced on either score.

1.

Insofar as the Shirt does demean the gender identities of students who are transgender or gender nonconforming, we agree with Middleborough it is no less likely to "strike a person at the core of his being" than it would if it demeaned the religion, race, sex, or sexual orientation of other students. Nuxoll, 523 F.3d at 671; see Bostock v. Clayton Cnty., Ga., 590 U.S. 644 (2020); Mass. G.L. ch. 71, § 37O; Mass. G.L. ch. 76, § 5. Notably, on this specific point, L.M. contends only that the message -- though concerning gender identity -- is not demeaning of anyone's gender identity. So, the threshold question is whether the message is demeaning of gender identity at all.

We see little sense in federal courts taking charge of defining the precise words that do or do not convey a message demeaning of such personal characteristics, so long as the words in question reasonably may be understood to do so by school administrators. See Morse, 551 U.S. at 401 ("The message on [the student's] banner is cryptic. . . . But [the principal] thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one."); Norris, 969 F.3d at 29 (explaining that the Supreme Court "has repeatedly emphasized the necessary discretion school officials must exercise and the attendant deference owed to many of their decisions"); see also Scott, 324 F.3d at 1249; Nuxoll, 523 F.3d at 671. Indeed, there are good reasons for federal courts to be wary of making such an assessment for those whose job it is to deliver public education. Cf. Nuxoll, 523 F.3d at 675 ("[W]e are concerned that if the rule is invalidated the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students . . . it is sued for violating laws against harassment.").

In some cases, the assessment may be easy -- the words involved may not address such a characteristic at all, do so in terms not plausibly thought negative, or, alternatively, be the kind of denigrating speech that even L.M. acknowledges schools may restrict. But there is a spectrum of negativity, see Nuxoll, 523 F.3d at 676 (holding that " 'demeaning' [was] too strong a characterization" of the message, which on its face was "only tepidly negative"); but see id. at 678-79 (Rovner, J., concurring in the judgment), and

because we must decide questions of degree and not just kind, deference here cannot amount to rote acceptance, see Norris, 969 F.3d at 30.

L.M. does assert that the Shirt's message is "purely ideological" and "summarized [his] beliefs at a high level of generality without criticizing opposing views." Thus, L.M. contends, the Shirt's message is not "hateful or bigoted" and neither targets anyone nor "criticiz[es] opposing views," as it "doesn't deny any person's existence of inherent value." L.M. does not dispute, however, that the message expresses the view that students with different "beliefs about the nature of [their] existence" are wrong.

Consistent with that acknowledgement, the District Court determined the message is reasonably understood to be an assertion, however sincerely believed, that individuals who do not identify as either male or female have no gender with which they may identify, as male and female are their only options. As the District Court put it, the message "may communicate that only two gender identities -- male and female -- are valid, and any others are invalid or nonexistent."

We agree with the District Court and so cannot say the message, on its face, shows Middleborough acted unreasonably in concluding that the Shirt would be understood -- in this middle-school setting in which the children range from ten-to-fourteen years old -- to demean the identity of transgender and gender-nonconforming NMS students. Cf. Nuxoll, 523 F.3d at 671 ("[F]or most people these are major components of their personal identity -- none more so than a sexual orientation that deviates from the

norm. Such comments can strike a person at the core of his being."); Trachtman, 563 F.2d at 518 ("The defendants have consistently treated the topic of sexuality as an important part of students' lives, which requires special treatment because of its sensitive nature."). We also note that Middleborough interpreted the message in applying a dress code and thus in the context of assessing a particular means of expression that is neither fleeting nor admits of nuance. As a result, Middleborough's assessment of the message's demeaning character does not necessarily reflect a categorical judgment that, whenever uttered, the message has such a character. So understood, we see no basis for substituting our judgment for Middleborough's as to whether the Shirt demeaned the gender identities of other students at NMS.

2.

We turn, then, to the reasonableness of Middleborough's forecast that, by demeaning those identities, the Shirt would be materially disruptive to the learning environment because of its negative psychological impact on transgender and gender nonconforming students at NMS. In that regard, Middleborough argues that, based off its specific knowledge of the students at NMS, it "reasonably forecast[ed]" that the Shirt's message "alone" would "materially disrupt transgender and gender non-conforming students' ability to focus on learning while in a classroom where the message is being displayed." Middleborough further contends that, given its knowledge of "past incidents in which [students in the LGBTQ+ community] expressed concern about not being sufficiently protected," it reasonably concluded

that "if [L.M. was] permitted to wear the same shirt, others would follow suit . . . . [and] that disruption would . . . have ensued with a standoff between a group of students wearing the message [of the Shirt] . . . and those students who are members of the LGBTQ+ community and their allies."

L.M. responds that Middleborough's concerns on this score are supported only by "vague affidavits referencing [those] concerns without addressing their cause." He thus contends that the evidence does not demonstrate a "link between students' troubles and passive t-shirt messages," as nothing in the record shows that a message like this one had been used in any prior bullying or caused any of the struggles by transgender and gender nonconforming NMS students of which school officials were keenly aware.

School officials, however, must have some margin to make high-stakes assessments in conditions of inevitable uncertainty. See Mahanoy, 594 U.S. at 201 (Alito, J., concurring) ("[T]he school has a duty to protect students while in school because their parents are unable to do that during those hours."); id. at 189 (Maj. Op.); Zamecnik, 636 F.3d at 880 ("A school . . . [has] the responsibility of protecting . . . its students from being seriously distracted from their studies by offensive speech during school hours."). In consequence of what the record here shows about what Middleborough reasonably understood the message to convey and what it knew about the NMS student population, we do not understand Tinker, our own precedents, or any other circuits' decisions to support our second-guessing Middleborough's assessment that there was the requisite basis for the forecast of material disruption here.

First, there is the demeaning nature of the message. To be sure, there is a spectrum of messages that are demeaning of characteristics such as race, sex, religion, sexual orientation, and so gender identity as well. It is hard to see how it would be unreasonable to forecast the disruptive impact of messages at the most demeaning end of that spectrum, given their tendency to poison the educational atmosphere. See Nuxoll, 523 F.3d at 674 ("Imagine the psychological effects if the plaintiff wore a T-shirt on which was written 'blacks have lower IQs than whites' or 'a woman's place is in the home.' "); Saxe, 240 F.3d at 206, 217 (reasoning that "disparaging comment[s]" about other students' personal characteristics may "create an 'hostile environment' " and thus be restricted if there is a "threshold showing of severity or pervasiveness").

But, while oral argument indicated the Shirt's message is not at the farthest end of demeaning, see n.8 supra, neither is it, on its face, only "tepidly negative." L.M. himself agrees that the message directly denies the self-conceptions of certain middle-school students, and those denied self-conceptions are no less deeply rooted than those based on religion, race, sex, or sexual orientation. This is also a middle-school setting, with some kids as young as ten. See, e.g., Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 416–17 (3d Cir. 2003) (recognizing that the age of students is a relevant consideration in administrators' decisions to regulate student speech); Sonnabend, 37 F.4th at 426 (same); K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99, 108 (3d Cir. 2013) (same). In addition, Middleborough was enforcing a dress code, so it was making a forecast

regarding the disruptive impact of a particular means of expression and not of, say, a stray remark on a playground, a point made during discussion or debate, or a classroom inquiry. The forecast concerned the predicted impact of a message that would confront any student proximate to it throughout the school day. See Tinker, 393 U.S. at 515 (Stewart, J., concurring) (stating that "in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." (emphasis added) (quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in the judgment))); Morse, 551 U.S. at 404 ("[S]chool boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate.' " (emphasis added) (first quoting Fraser, 478 U.S. at 683, then citing Fraser, 478 U.S. at 689 (Brennan, J., concurring in the judgment))).

Second, in making its assessment of how disruptive the Shirt would be on the educational atmosphere, Middleborough was not acting on abstract concerns about the potential impact of speech demeaning the gender identities of some students at NMS. Middleborough was not aware of any prior incidents or problems caused by this specific message. But it knew the serious nature of the struggles, including suicidal ideation, that some of those students had experienced related to their treatment based on their gender identities by other students, and the effect those struggles could have on those students' ability to learn. Indeed, Tucker had previously worked on recommending out-of-district

placements for such students prior to her coming to NMS. In such circumstances, we think it was reasonable for Middleborough to forecast that a message displayed throughout the school day denying the existence of the gender identities of transgender and gender non-conforming students would have a serious negative impact on those students' ability to concentrate on their classroom work. See Zamecnik, 636 F.3d at 880 ("[Schools have] the responsibility of protecting [students] from being seriously distracted from their studies by offensive speech during school hours."); Sapp, 2011 WL 5084647, at *5.

Finally, precisely because the message was reasonably understood to be so demeaning of some other students' gender identities, there was the potential for the back-and-forth of negative comments and slogans between factions of students that Nuxoll could "foresee [leading to] a deterioration in the school's ability to educate its students." 523 F.3d at 672. And that potentiality, too, was not rooted solely in abstract concerns. In addition to Tucker having been told by Carroll that L.M.'s teacher "was concerned" that "members of the LGBTQ+ population at NMS as current students . . . would be impacted by the t-shirt['s] message and potentially disrupt classes," administrators were aware from student survey data that a number of students had "specific concerns about how the LGBTQ+ population [was] treated" at NMS. Given its specific knowledge of those facts and the "vulnerability of gender non-conforming and transgender youth . . . attending NMS," Middleborough had legitimate reason to be worried about "uninhibited ... hallway debate over [gender identity] -- whether carried out in the form of dueling

T-shirts, dueling banners, dueling pamphlets, annotated Bibles, or soapbox oratory" that would "lead to . . . symptoms of a sick school." Nuxoll, 523 F.3d at 671, 674.

Against this backdrop, we see no reason to substitute our judgment for Middleborough's with respect to its application of its Dress Code here. We conclude the record supports as reasonable an assessment that the message in this school context would so negatively affect the psychology of young students with the demeaned gender identities that it would "poison the educational atmosphere" and so result in declines in those students' academic performance and increases in their absences from school -- in other words, what Nuxoll described as "symptoms of a sick school . . . [and] therefore of substantial disruption." Id. at 674, 676.

We recognize that L.M. claims Middleborough was motivated by "a few subjective complaints" and "simply dislikes" his views. But we have explained why we do not accept that characterization of the predicate on which Middleborough acted, and nothing indicates Middleborough permitted comparably demeaning speech, cf. Tinker, 393 U.S. at 510 (emphasizing that the school "did not purport to prohibit the wearing of all symbols of political or controversial significance," including the Iron Cross), barred L.M.'s oral expression of disagreement with pro-LGBTQ+ views in school, or prohibited the mere utterance of the particular message in question, cf. id. at 513 (reasoning that, if a rule were adopted "forbidding discussion of the Vietnam conflict, or expression by any student of opposition to it anywhere on school property except as part of a

prescribed classroom exercise," that rule would be unconstitutional absent a showing of material disruption); see also Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd., 246 F.3d 536, 541-42, 544 (6th Cir. 2001) (reversing grant of summary judgment where evidence suggested viewpoint discrimination because "only certain racial viewpoints [were banned] without any showing of disruption"); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1281 (11th Cir. 2004) (reversing a grant of summary judgment after concluding that there was a dispute of material fact as to whether the student was "punished for the substance of his unpatriotic views rather than an alleged disruption of class").[9]

L.M. contends that he wore the Shirt to respond to Middleborough's asserted views on gender. But Tinker does not require a school to tolerate t-shirts that denigrate a race or ethnicity, for instance, just because the school celebrates Black History Month, Asian and Pacific American Heritage Month, and Hispanic Heritage Month. See Harper, 445 F.3d at 1185-86. For this reason, too, we reject L.M.'s contention that Middleborough was not entitled to act as it did in barring the Shirt pursuant to Tinker's material-disruption limitation, even if not also pursuant to the rights-of-others limitation based on the same two showings.

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[9] We see no reason to take up L.M.'s invitation to be, as far as we can tell, the first court to import recent decisions that clearly did not contemplate the special characteristics of the public-school setting into that setting. See Matal v. Tam, 582 U.S. 218 (2017); Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

B.

Turning to the as-applied claim concerning the incident involving the Taped Shirt on May 5, our analysis is largely the same. L.M. contends he wore that shirt to protest Middleborough's March 21 actions. But "[w]e conduct the Tinker inquiry objectively" and focus on "the reasonableness of the school administration's response, not on the intent of the student." Norris, 969 F.3d at 25 (quoting Cuff ex rel. B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 113 (2d Cir. 2012)).

The Taped Shirt did cover "Only Two" with the word "CENSORED," which raises a question as to whether it conveyed a less negative message than the Shirt. But the Taped Shirt was the same shirt and thus, aside from the taping, looked the same. And while L.M. left his first-period class with Tucker and did not return to classes on March 21, L.M. spoke at the School Committee meeting about the precise contents of the Shirt on April 13, had significant local and national press coverage between March 21 and May 5, and had photos of himself wearing the Shirt go viral online in that period. Middleborough thus reasonably concluded that, given the attention L.M.'s wearing of the Shirt on March 21 garnered, other students would know the words written on the Taped Shirt, even if two words were covered up. See Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426, 430-433 (4th Cir. 2013) (upholding bar on a student wearing certain shirts protesting her school's prohibition on displays of the confederate flag because administrators "reasonably predicted that the protest shirt was likely to cause a substantial disruption" because it "explicitly broadcast" the same racially

inflammatory messages as the Confederate flag and thus "could just as easily" cause the same disruptions).

V.

We turn, then, to L.M.'s challenges to the District Court's rulings granting judgment as a matter of law to Middleborough on his claims facially attacking the Dress Code. Those claims concern the Dress Code's (1) prohibition on clothing that "state[s], impl[ies], or depict[s] hate speech or imagery that target[s] groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification" and (2) rule that clothing "[school] administration determines to be unacceptable to our community standards will not be allowed [at NMS]." We see no merit to this set of challenges either.

A.

As to L.M.'s community-standards-provision claim, our jurisdiction is limited to "Cases" and "Controversies." U.S. Const. art. III § 2 cl. 1; see Doyle v. Huntress, Inc., 419 F.3d 3, 6 (1st Cir. 2005) (explaining our "obligation to inquire sua sponte into our jurisdiction over the matter" in every case"). L.M. thus must show he has standing to bring this claim. See Wilkins v. Genzyme Corp., 93 F.4th 33, 40 (1st Cir. 2024). He cannot.

In the email exchange with L.M.'s father, Lyons explained that L.M. had been asked to remove the Shirt because "[t]he content of [his] shirt targeted students of a protected class; namely in the area of gender identity" before pasting the entirety of the Dress Code. That statement most naturally refers to

the hate-speech provision, and L.M. makes no argument otherwise. L.M.'s counsel's letter to Middleborough also identified the hate-speech provision as the sole relevant and unconstitutional provision, and no other evidence indicates that the community-standards provision was even a partial basis for Middleborough's actions on either March 21 or May 5.

Because L.M. "advances no affirmative argument that [the community-standards provision] is not severable from different parts of the [Dress Code]" he asserts are invalid and were applied to him, L.M. has no standing to challenge the community-standards provision based on past prohibitions. See Signs for Jesus v. Town of Pembroke, NH, 977 F.3d 93, 100 (1st Cir. 2020). There is also no non-speculative basis for concluding that future prohibitions would be fairly traceable to the community-standards provision. See Clapper v. Amnesty Int'l USA, 568 U.S. 398, 413 (2013).

B.

As to the hate-speech-provision claim, L.M. advances various reasons it is facially unconstitutional. But we do not find those reasons persuasive.[10]

[10] Middleborough's cursory contention that L.M. does not have standing to challenge the hate-speech provision because his speech was unprotected conflates the question of whether speech is protected with whether that protected speech may nonetheless be constitutionally regulated under Tinker.

1.

L.M. contends that the provision is unconstitutionally vague under the Fourteenth Amendment's Due Process Clause, because the provision affords Middleborough unbridled discretion to enforce it in a discriminatory and viewpoint-discriminatory manner in that "hate speech" has "no standard definition and is largely in the eye of the beholder" and the "any other classification" language is "completely vacuous." School disciplinary rules, however, "need not be as detailed as a criminal code" because "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures" and schools have a legitimate "need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct." Fraser, 478 U.S. at 686; see Sypniewski, 307 F.3d at 266 (explaining that "courts have been less demanding of specificity" when confronted with vagueness challenges to student dress and disciplinary codes); J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 935-36 (3d Cir. 2011) (en banc). The Dress Code also permits a student to be disciplined only for "[r]epeated violations," thereby ensuring notice will be given in advance of such action. See A.M. ex rel. McAllum v. Cash, 585 F.3d 214, 225 (5th Cir. 2009); Hardwick, 711 F.3d at 442. Thus, this challenge claim fails as to his Due Process-based claims for monetary, declaratory, and injunctive relief.

2.

L.M.'s claim that the provision is overbroad under the First Amendment relies in part on its use of the

term "hate speech," which he contends has "no standard definition," and in part on its bar against clothing that "state[s]," "depict[s]," or "impl[ies]" such speech. He also argues that the bar on messages that "target groups" based on "any other classification" permits Middleborough to invent any "group" it wants and sweep in any speech that refers to anyone, especially if "target[ing]" turns on "the reaction of listeners." In pressing these points, L.M. emphasizes that the hate-speech provision does not refer to substantial disruption or interference with other students' rights and therefore "most . . . applications [of the provision] are to protected, not unprotected, speech."

The Supreme Court has emphasized post-Tinker, however, that public schools require flexibility in the drafting and administration of disciplinary codes. See Fraser, 478 U.S. at 686. And because there is "a much broader 'plainly legitimate' area of speech [that] can be regulated at school than outside school," Sypniewski, 307 F.3d at 259, "the overbreadth doctrine warrants a more hesitant application in [the public-school] setting than in other contexts," Hardwick, 711 F.3d at 441 (alteration in original) (quoting Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 258 (4th Cir. 2003)).

It is significant, therefore, that the hate-speech provision applies only to apparel and then only when worn "to school" (emphasis added). Cf. Saxe, 240 F.3d at 216 n.11 (expressing concern that anti-harassment policy could be "read to cover conduct occurring outside of school premises"). The word "hate" in "hate speech" also indicates that the provision refers only to speech that provokes "such strong feelings that a

serious possibility of disruption might be inferred." Sypniewski, 307 F.3d at 265. Thus, we do not understand the provision to bar "any unwelcome [message] which offends an individual because of some enumerated personal characteristics." Saxe, 240 F.3d at 215 (cleaned up). As a result, the provision's failure to mention "material disruption" or "invasion of the rights of others" is not fatal. Cf. id. at 217 (finding "hostile environment" portion of anti-harassment policy overbroad because it "[did] not, on its face, require any threshold showing of severity or pervasiveness"); Sypniewski, 307 F.3d at 265.

In contending that the provision could "sweep[ ] in speech that only a diversity, equity, and inclusion expert would find 'hateful,' and even depictions of famous art," L.M. points in part to the provision's use of the words "impl[ies]" and "depict[s]." But the prohibited messages still must constitute "hate speech," as the words L.M. highlights here merely describe means (including subtle ones) of expressing the prohibited "hate speech."[11] Nor does the residual clause support L.M.'s concern that the provision could sweep in any classification one could imagine. The word "other" ensures that it encompasses only classifications akin to those listed, all of which pertain to classes of persons commonly protected in anti-

[11] L.M. argues that the provision unconstitutionally discriminates in viewpoint between "negative" and "positive" messages, but we do not read Tinker or any other Supreme Court or federal court student-speech decision to require "positive messages" be prohibited if a "negative" message is regulable because it materially disrupts or invades others' rights. Cf. Sypniewski, 307 F.3d at 264 ("[S]chools are generally permitted to step in and protect students from abuse.").

discrimination measures. See, e.g., Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114-15 (2001) (explaining the ejusdem generis canon); cf. Fraser, 478 U.S. at 681 (explaining that the "role and purpose" of public schools is to "inculcate the habits and manners of civility as values" (citation omitted)).

Finally, the word "target" causes no concern, as we see no reason to construe it (as L.M. contends we must) to have a meaning dependent entirely on the subjective understanding of any student rather than the objectively reasonable understanding of school administrators. Nor does L.M. argue that the word "target" renders the provision overbroad once it is construed in that narrower way.[12]

VI.

We close by emphasizing a point that may be obvious but should not be overlooked. The question here is not whether the t-shirts should have been barred. The question is who should decide whether to bar them -- educators or federal judges. Based on Tinker, the cases applying it, and the specific record here, we cannot say that in this instance the Constitution assigns the sensitive (and potentially consequential) judgment about what would make "an environment conducive to learning" at NMS to us rather than to the educators closest to the scene.

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[12] L.M. also contends that the provision is an impermissible prior restraint because it "forbids certain messages before they occur." But, as he offers no support for equating the provision with restrictions that have been deemed prior restraints, see Alexander v. United States, 509 U.S. 544, 553 n.2 (1993), the contention is waived for lack of development, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

The judgment of the District Court is **affirmed**.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison, Plaintiff, v. TOWN OF MIDDLEBOROUGH; MIDDLEBOROUGH SCHOOL COMMITTEE; Carolyn LYONS, Superintendent of the Middleborough Public Schools, in her official capacity; and HEATHER TUCKER, acting Principal of Nichols Middle School, in her official capacity, Defendants.	*	Civil Action No. 1:23-cv-11111-IT

MEMORANDUM & ORDER (Corrected)

June 16, 2023

TALWANI, D.J.

Plaintiff L.M., a minor, by and through his father and stepmother, alleges violations of his First and Fourteenth Amendment rights by Defendants Town of Middleborough, the Middleborough School

Committee (the "School Committee"), and two school administrators. Verified Compl. [Doc. No. 11]. Pending before the court is L.M.s Motion for a Preliminary Injunction [Doc. No. 12], which Defendants oppose.

I. Background

Nichols Middle School ("Nichols") is a public middle school in Middleborough, Massachusetts. Verified Compl. ¶ 43 [Doc. No. 11]. Defendant Carolyn Lyons is the Superintendent of Middleborough Public Schools, and Defendant Heather Tucker is the acting Principal of Nichols. Id. ¶¶ at 26, 36.

Student survey data collected in June 2022 at Nichols "show over 20 individual student[ ] comments about perceived bullying at school, feeling unwelcome at school, and expressing specific concerns about how the LGBTQ+ population is treated at school." Affidavit of Carolyn Lyons ("Lyons Aff.") ¶ 23 [Doc. No. 45]. Lyons is aware of several Nichols students, including "members of the LGBTQ+ community," having attempted to commit suicide or having had suicidal ideations, and that "[t]hese situations have frequently cited LGBTQ+ status and treatment as a major factor." Id. at ¶ 25. In July 2022, one Middleborough High School student committed suicide. Id.; see also Second Affidavit of Heather Tucker ("Tucker Aff.") ¶ 32 [Doc. No. 46] (Tucker was informed of the student suicide). Before assuming her position at Nichols, Tucker had met with parents of students and students themselves who have been bullied "because of the lack of acceptance of their gender identify." Tucker Aff. ¶ 2 [Doc. No. 46]. Tucker has also worked closely with students who have been

hospitalized for attempted suicide or suicidal ideation or who have self-harmed "because of their gender identity." Id. Tucker is aware of several students at Nichols who identify as "transgender or gender nonconforming." Id. at ¶ 31.

In January 2022, May 2022, and January 2023, teachers and staff at Nichols received training "to further the goal of providing support to students who are part of the LGBTQ+ community." Lyons Aff. ¶ 24 [Doc. No. 45].

Nichols promotes messages commonly associated with "LGBTQ Pride." Affidavit of L.M. ("L.M. Aff.") ¶ 5 [Doc. No. 43]. Nichols also observes events like "Pride Month," and "Pride Day" in support of the "LGBTQ+ community." Tucker Aff. ¶ 27 [Doc. No. 46]. Nichols has had a Gay Straight Alliance Club since at least 2018, "[t]o further the goal of providing support to students who are part of the LGBTQ+ community." Lyons Aff. ¶ 22 [Doc. No. 45]. The club is a student-run organization, id., that is intended as a space for students who "fit under the LGBTQ+ umbrella or are their allies." Tucker Aff. ¶ 31 [Doc. No. 46]. Generally, approximately ten to twenty students attend the club meetings. Id.

Each year, students and their families are provided with the Nichols Jr. Middle School Student & Family Handbook (the "Handbook"). Tucker Aff. ¶ 3 [Doc. No. 46]. The Handbook includes a Code of Conduct with a dress code (the "Dress Code"). Verified Compl. Ex. C 44-45 [Doc. No. 11-3]. The Dress Code provides, in relevant part, that Nichols:

expect[s] all students to conform to the following:

....

- Clothing must not state, imply, or depict hate speech or imagery that target groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification.
- Any other apparel that the administration determines to be unacceptable to our community standards will not be allowed.

Id. The Dress Code states further that "[i]f students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school. Repeated violations of the [D]ress [C]ode will result in disciplinary action." Id.

L.M. is a twelve-year old student at Nichols. L.M. Aff. ¶ 2 [Doc. No. 43]. L.M. and his father both signed an acknowledgment form at the beginning of the 2022-2023 school year reflecting that each "understand[s] the regulations and policies of [Nichols] contained in the Student/Parent Handbook for 2022-20223" and that L.M., as a student, "is responsible for following the regulations and policies of [Nichols]." Lyons Aff., Ex. B, Nichols Handbook 80 [Doc. No. 45-2].

On March 21, 2023, L.M. attended school at Nichols in a t-shirt with the message "THERE ARE ONLY TWO GENDERS" (the "Shirt"). L.M. Aff. ¶ 14 [Doc. No. 43].[1] While L.M. was participating in gym

[1] L.M. attests that he equates "gender" with "sex" and that he believes that there are only two sexes, male and female. Id. at ¶ 6.

class, Principal Tucker asked L.M. to come speak with her. Id. at ¶ 15; Tucker Aff. ¶ 6 [Doc. No. 46]. Tucker informed L.M. that he could not wear the Shirt because of complaints, and that he could either remove the Shirt or discuss it further in another room. L.M. Aff. ¶ 15 [Doc. No. 43]; Tucker Aff. ¶ 6 [Doc. No. 46]. L.M. indicated he would like to discuss it further and Tucker escorted him to another room, where the school counselor joined the conversation. L.M. Aff. ¶ 16 [Doc. No. 43]; Tucker Aff. ¶ 7 [Doc. No. 46]. Tucker reiterated that some students and staff complained that the Shirt made them upset, and that L.M. needed to remove the Shirt to return to class. L.M. Aff. ¶ 18 [Doc. No. 43]. L.M. declined and Tucker called L.M.'s father. L.M. Aff. ¶ 18 [Doc. No. 43]; Tucker Aff. ¶ 8 [Doc. No. 46]. Tucker explained to L.M.'s father that L.M. could not return to class if he did not remove the Shirt. L.M. Aff. ¶ 18 [Doc. No. 43]; Tucker Aff. ¶ 8 [Doc. No. 46]. L.M.'s father picked L.M. up from school and L.M. did not return to class for the rest of the day. Id. at ¶ 8. L.M. did not observe any disruption to school classes or activities by his wearing of the Shirt. L.M. Aff. ¶ 17 [Doc. No. 43]. Nor did L.M. observe any students complaining or appearing to be upset. Id. at ¶ 16.

L.M. returned to school the following day and has attended every school day since then. Tucker Aff. ¶ 10 [Doc. No. 46]. L.M. was permitted to wear other t-shirts to Nichols, including ones with the messages: "Don't Tread on Me"; "First Amendment Rights"; "Freedom Over Fear"; and "Let's Go Brandon." Tucker Aff. ¶¶ 11, 28 [Doc. No. 46]. L.M. was not asked to remove any of these shirts. Id.

On April 1, 2023, L.M.'s father emailed

Superintendent Lyons regarding the March 21, 2023 incident. Verified Compl. ¶ 95 [Doc. No. 11]; Lyons Aff. ¶ 4 [Doc. No. 45]. L.M.'s father asked about the substance and number of complaints lodged regarding the Shirt and why L.M. was removed from class given the Shirt "simply stated [L.M.]'s view on a subject that has become a political hot topic." Compl, Ex. E Emails [Doc. No. 11-7]. On April 4, 2023, Lyons responded that L.M. was not, nor would be the subject of discipline for wearing the Shirt. Id. Lyons explained that Tucker sought L.M.'s compliance with the Dress Code, which Lyons supported, where the "content of [the S]hirt targeted students of a protected class; namely in the area of gender identity." Id.

L.M. has not been restricted from posting on social media when not in school. Tucker Aff. ¶ 12 [Doc. No. 46]. On April 13, 2023, L.M. attended the School Committee meeting and spoke during the public comment period regarding the Shirt. Verified Compl. ¶ 97 [Doc. No. 11]. At the School Committee Meeting, L.M. stated:

> What did my shirt say? Five simple words: "There are only two genders." Nothing harmful. Nothing threatening. Just a statement I believe to be a fact. I have been told that my shirt was targeting a protected class. Who is this protected class? Are their feelings more important than my rights? I don't complain when I see "pride flags" and "diversity posters" hung throughout the school. Do you know why? Because others have a right to their beliefs just as I do. Not one person, staff, or student told me that they were bothered by what I was wearing.

> Actually, just the opposite. Several kids told me that they supported my actions and that they wanted one too.

Id. L.M.'s statements have been broadcast on YouTube. Id. (citing *There Are Only Two Genders*, YouTube, (May 3, 2023) bit.ly/3pD6TN8 (last accessed May 16, 2023) at 9:40-12:20).

On April 27, 2023, counsel for L.M. sent a letter to Lyons, asserting that Defendants had censored L.M. in violation of his First Amendment rights by restricting L.M. from wearing the Shirt in school. Id. at ¶¶ 98, 99; Verified Compl. Ex. F, April 27, 2023 Letter [Doc. No. 11-8]. The letter stated that L.M. intended to wear the Shirt again on May 5, 2023. Counsel requested Lyons' confirmation that L.M. would be permitted to wear the Shirt. Verified Compl. ¶¶ 98-99 [Doc. No. 11]; Verified Compl. Ex. F, April 27, 2023 Letter [Doc. No. 11-8].

On or about April 29, 2023, the incident involving the Shirt became the subject of news coverage, which included interviews of L.M. and discussion on social media amongst parents, students, and others about the incident. Tucker Aff. ¶ 16 [Doc. No. 46].

On May 4, 2023, counsel for the Middleborough Public Schools responded to L.M.'s counsel's letter, stating that under Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969), and Massachusetts law prohibiting discrimination, harassment, and bullying on the basis of sexual orientation and gender identity, Middleborough Public Schools "has, and will continue to, prohibit [the Shirt worn by L.M.] or anyone else [wearing messages] likely to be considered discriminatory,

harassing and/or bullying to others including those who are gender nonconforming by suggesting that their sexual orientation, gender identity or expression does not exist or is invalid." Verified Compl. Ex. G, May 4, 2023 Letter [Doc. No. 11-9]. Assistant Principal Jason Carroll learned of this letter from Principal Tucker and was aware of concern that the Shirt "would be disruptive and would cause students in the LGBTQ+ community to feel unsafe." Affidavit of Jason Carroll ("Carroll Aff.") ¶ 3 [Doc. No. 47].

On May 5, 2023, L.M. wore the Shirt to Nichols, but with the phrase "ONLY TWO" covered by a piece of tape with the word "CENSORED" (the "Taped Shirt"). L.M. Aff. ¶¶ 19, 20 [Doc. No. 43]. When L.M. arrived at his first class, he was instructed to go to Tucker's office. Id. at ¶ 20; Carroll Aff. ¶ 4 [Doc. No. 47] (Carroll looked for L.M. that morning and brought him to Carroll's office to meet with Tucker and Carroll). Before meeting with Tucker, L.M. removed the Taped Shirt. L.M. Aff. ¶ 20 [Doc. No. 43] (L.M. removed the Taped Shirt on the way to the office); Carroll Aff. ¶ 4 [Doc. No. 47] (when Carroll and Tucker entered Carroll's office, L.M. had already removed the Taped Shirt); Tucker Aff. ¶ 22 [Doc. No. 46] (when Tucker returned to Carroll's office after speaking with the Superintendent and School counsel, L.M. had removed the Taped Shirt). Tucker instructed L.M. that he could keep the Taped Shirt in his backpack or leave it in the Assistant Principal's Office for the day. Tucker Aff. ¶ 22 [Doc. No. 46]. L.M. put the Taped Shirt away and returned to class. L.M. Aff. ¶ 21 [Doc. No. 43]; Carroll Aff. ¶ 5 [Doc. No. 47]. He did not wear the Taped Shirt for the remainder of the school day. L.M. Aff. ¶ 21 [Doc. No. 43]. L.M. did

not witness any disruption to school classes or activities resulting from his wearing the Taped Shirt on May 5, 2023. L.M. Aff. ¶ 22 [Doc. No. 43].

On May 9, 2023, two other students wore shirts with the words "There Are Only Two Genders" to Nichols. Tucker Aff. ¶ 24 [Doc. No. 46]. Tucker met with the students and told them they were required to change their shirts. Id. One student followed this directive and returned to class. Id. The other student did not, the student's parents were called, and Tucker met with the student's mother at the school. Id. Following this meeting, the student went home as the school day was over. Id. Neither these two students nor L.M. was disciplined after wearing a shirt with the words "There are only two genders." Id. at ¶¶ 9, 24.

On May 11, 2023, Plaintiff filed the instant action bringing claims under 42 U.S.C. 1983 for violation of the First and Fourteenth Amendments. L.M. contends that the Defendants' application of the Dress Code to restrict the Shirt and the Taped Shirt, but not other messages by Nichols students pertaining to sexual orientation, gender identity, and expression, amounted to impermissible viewpoint discrimination. Plaintiff also asserts that the Dress Code is vague and overbroad on its face.

On May 19, 2023, Plaintiff filed his Emergency Motion for a Temporary Restraining Order and Preliminary Injunction [Doc. No. 12]. Following a hearing, the court denied emergency relief. June 1, 2023 Elec. Order [Doc. No. 38]. The court held oral argument as to the preliminary injunction on June 13, 2023. Clerk's Notes [Doc. No. 48].

II. Preliminary Injunction Standard

The issuance of a preliminary injunction before a trial on the merits can be held is an "extraordinary remedy" that shall enter only if a plaintiff makes a clear showing of entitlement to such relief. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). In evaluating a motion for a preliminary injunction, the court considers four factors:

> (1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

Esso Standard Oil Co. v. Monroig–Zayas, 445 F.3d 13, 17–18 (1st Cir. 2006) (quoting Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (1st Cir. 2004)).

The first factor is the most important: if the moving party cannot demonstrate a likelihood of success on the merits, "the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002). "In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." Sindicato Puertorriqueno de Trabajadores v. Fortuno, 699 F.3d 1, 10 (1st Cir. 2012). "To demonstrate likelihood of success on the merits, plaintiffs must show 'more than mere possibility' of success—rather, they must establish a 'strong likelihood' that they will ultimately prevail." Id. at 9 (quoting Respect Maine PAC v.

McKee, 622 F.3d 13, 15 (1st Cir. 2010)).

III. Discussion

A. *Likelihood of Success on the Merits*

One can certainly argue (particularly with hindsight) that the actions taken by the Defendants were not in the best interest of the students Defendants were seeking to protect. Had Defendants permitted L.M. to wear the Shirt, perhaps he would have listened to and heard other students' explanation as to why they viewed his message as hostile. Perhaps he would have learned from those students that they do not use the word "gender" to refer to chromosome pairs or anatomy but to identity. As a seventh-grader — a time when students are beginning to consider views of the world that differ from those of their parents — he may have been more open to that understanding if the discussion occurred in school and was not drowned out by the megaphone of the media and the adult protesters outside the school. And in that event, perhaps LM. would have chosen voluntarily to cease wearing the Shirt and the students Defendants were seeking to protect would not have had to enter the school past protesters amplifying L.M.'s words. But whether Plaintiff can show a likelihood of success does not depend on whether the Defendants could have handled the issue differently but whether the Constitution limits them from taking the action they took.

1. Legal Framework

A student's rights to freedom of expression while attending public school in Massachusetts is defined by Supreme Court and First Circuit case law. "First

Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." Tinker, 393 U.S. at 506. "[F]or the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Id. at 509.

But "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (internal citation and quotation marks omitted). "A school need not tolerate student speech that is inconsistent with its basic educational mission, [ ] even though the government could not censor similar speech outside the school." Id. (citation and internal quotation marks omitted).

So while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," schools may impose limitations on speech. Tinker, 393 U.S. at 506. "[C]onduct by the student, in class or out of it, which for any reason–whether it stems from time, place, or type of behavior–materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." Id. at 513. This interest in regulating speech is at its strongest when the speech occurs under the school's supervision, where the school stands in loco parentis

towards all students, and of lesser interest where the speech or expression occurs outside of school. Mahonoy Area Sch. Dist. v. B.L., 141 S.Ct. 2038, 2046 (2021).[2]

While a school bears the burden of justifying restrictions on student speech, Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 25 (1st Cir. 2020), courts should generally defer to school administrators' decisions regarding student speech so long as the administrators' judgment is reasonable, id. at 30.

2. Challenge to March 21, 2023 Dress Code Enforcement

Plaintiff contends that he is likely to prevail on his claim that the Shirt was constitutionally protected expression and that Defendants'enforcement of the Dress Code on March 21, 2023, impermissibly restricted L.M.'s First Amendment free speech right, constituted viewpoint discrimination, and lacked justification. Plaintiff asserts that Defendants have not met their burden of demonstrating (i) that the shirt caused a material and substantial disruption, where Defendants assert only a few unidentified

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[2] The Court in Mahanoy pointed to three features of off-campus speech that diminish the strength of the unique educational characteristics that call for special First Amendment leeway in school: (1) the school is rarely standing in loco parentis off campus; (2) regulation of off-campus speech coupled with regulations on-campus speech would stop students from engaging in speech at all; and (3) "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus" because of schools' role in preparing citizens to carry on "[o]ur representative democracy." 141 S.Ct. at 2046.

complaints were made, or (ii) that the Shirt invaded the rights of others, where the Shirt did not target a specific individual. Mem. in Supp. of Pl. Emergency Mot. for Temp. Restraining Order and Prelim. Injunction ("PI Mem.") 9-10 [Doc. No. 13]; Pl. Suppl. Mem. in Supp. of Mot. for Prelim. Injunction ("Suppl. PI Mem.") 7 [Doc. No. 42]. Defendants do not dispute that the Shirt may be constitutionally protected speech, however, they assert that their restriction of the Shirt was justified where (i) the administration received complaints from students and staff, and (ii) the Shirt invaded on the rights of trans and gender non-conforming students, who are a protected class under Massachusetts law. Defs. Opp. 5, 10 [Doc. No. 44].

Plaintiff has not established a likelihood of success on the merits where he is unable to counter Defendants' showing that enforcement of the Dress Code was undertaken to protect the invasion of the rights of other students to a safe and secure educational environment. School administrators were well within their discretion to conclude that the statement "THERE ARE ONLY TWO GENDERS" may communicate that only two gender identities–male and female–are valid, and any others are invalid or nonexistent,[3] and to conclude that students who identify differently, whether they do so openly or not, have a right to attend school without being confronted by messages attacking their identities. As Tinker

[3] L.M. attests that he does not believe his views about sex and gender to be inherently hateful and does not intend to deny any individual's existence. L.M. Aff. ¶¶ 8-9 [43]. His intent is not relevant to the question of whether the school permissibly concluded that the Shirt invades the rights of others.

explained, schools can prohibit speech that is in "collision with the rights of others to be secure and be let alone." 393 U.S. at 508.

Plaintiff contends that, under Norris, Defendants could not restrict the Shirt as an "invasion of the rights of others" unless it determined that the speech "targeted a specific student." Suppl. PI Mem. 7, 8 [Doc. No. 42] (quoting Norris, 969 F.3d at 29, emphasis added by Plaintiff). Norris, however, did not attempt to set a rule for all speech that is an "invasion[ ] of the rights of others" or even "the precise boundaries of what speech constitutes 'bullying' such that it falls within the 'invasion of the rights of others' framework of Tinker." Norris, 969 F.3d at 29 n.18. Instead, Norris concluded that where the school had justified the limitation on the student's statement that "THERE IS A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS" on the ground that the student had engaged in "bullying" under the school's policy, the school was required to demonstrate that it had a reasonable basis to determine that the speech targeted a specific student and invaded that student's rights. Id. at 25, 29.

Here, the School's rational for prohibiting the Shirt is not that LM is bullying a specific student, but that a group of potentially vulnerable students will not feel safe. A broader view directed at students' safety has been acknowledged by other courts. See, e.g., West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000) (holding the display of the confederate flag may interfere with the rights of others to be secure); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (recognizing that school officials may suppress speech that is

vulgar, lewd, obscene, or plainly offensive as "such language, by definition, may well 'impinge upon the rights of other[s].' "); Scott v. School Bd. of Alachua Cty., 324 F.3d 1246. 1247 (11th Cir. 2003) (recognizing that a students' rights cannot interfere "with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve."); see also Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 505 (1st Cir. 2021) ("Tinker holds that schools have a special interest in regulating speech that involves the 'invasion of the rights of others.' ").

Accordingly, Plaintiff has not shown a substantial likelihood of success on his claim that Defendants violated his constitutional rights in requiring him to remove the Shirt at school.[4]

3. Challenge to May 5, 2023 Dress Code Enforcement

Plaintiff contends that he is likely to prevail on his claim that Defendants also unconstitutionally restricted his speech when Plaintiff wore the Taped Shirt to school on May 5, 2023, because (i) the underlying message was constitutionally protected speech, and (ii) the Taped Shirt was a form of constitutionally protected protest of Defendants' censorship of Plaintiff. Suppl. PI Mem. 3-4 [Doc. No. 42]. Defendants respond that the underlying message was not constitutionally protected speech, and that

[4] The court need not determine at this juncture whether Defendants were also justified in prohibiting the Shirt under Tinker based on a material disruption of classwork or substantial disorder.

Plaintiff's use of tape on the Shirt merely covered part of the offending message while still conveying the same meaning and raising the same concerns for which Defendants had restricted the Shirt in the first place.[5] Defs. Opp. 7-8 [Doc. No. 44].

Plaintiff again is unable to demonstrate a reasonable likelihood of success on the merits where Defendants have shown that they restricted the speech based on their expectation that it too would intrude on the rights of others. First, as discussed supra, the original message of the Shirt was not protected speech and could be restricted by Defendants. Second, while a message protesting censorship would not invade the rights of others, the school administrators could reasonably conclude that the Taped Shirt did not merely protest censorship but conveyed the "censored" message and thus invaded the rights of the other students.

4. Challenge to the Dress Code

Plaintiff contends that he is also likely to show the Dress Code is facially vague and overly discretionary where it targets some speech and not others. PI Mem. 14 [Doc. No. 13]. Plaintiff points to the Dress Code's application to L.M.'s "protest" on May 5, 2023, as an

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[5] Defendants also assert that the Taped Shirt could be restricted because Defendants had reasonably forecast substantial and material disruption stemming from the taped version of the Shirt. Defendants rely, in part, on threats received by school staff and administrators about the Shirt and its restriction, as well as the need for an increased police presence at Nichols. Lyons Aff. ¶¶ 10-11 [Doc. No. 45]. These threats should be discouraged by all parties. The court has not considered those threats in applying the "invasion of the rights of others" prong of Tinker.

illustration of how "vague" and "overbroad" the Dress Code is on its face. Suppl. PI Mem. 14 [Doc. No. 42]. But this example does not support his claim where Defendants could reasonably find that the Taped Shirt would interfere with the rights of other students.

Nor is Plaintiff's overbreadth challenge likely to succeed where the Dress Code does not threaten discipline for a violation of the Dress Code that has not been specifically identified by the school as improper. To the contrary, the Dress Code provides that "[i]f students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school." Verified Compl., Ex. C 44-45 [Doc. No. 11-5]. Only "[r]epeated violations of the [D]ress [C]ode will result in disciplinary action." Id. at 45.

Accordingly, L.M. has failed to demonstrate a likelihood of success on the merits of his claim that the Dress Code facially violates his First Amendment rights.

B. *Potential for Irreparable Harm*

L.M. has likewise not established a potential for irreparable harm absent a preliminary injunction. L.M. contends that any deprivation of his First Amendment freedoms constitutes irreparable injury, and that, where he has made a strong showing of a likelihood of success on the merits, "the irreparable injury component of the preliminary injunction analysis is satisfied as well." PI Mem. 14-15 [Doc. No. 13]. However, where the court has concluded that Plaintiff has not demonstrated a likelihood of success

on the merits, and Plaintiff offers no other arguments as to the potential for irreparable harm, Plaintiff has failed to establish this prong of the preliminary injunction analysis.

C. *Balance of Equities*

The third prong of the preliminary injunction analysis, the balance of equities between the parties, cuts in Defendants' favor. As to the harm to L.M. absent an injunction, there is no doubt Defendants have restricted L.M.'s speech during school hours. However, this is not a circumstance where the restrictions are such that L.M. "cannot engage in that kind of speech at all." Mahonoy Area Sch. Dist., 141 S.Ct. at 2046. Although L.M.'s speech as to the specific message displayed on the Shirt has been restricted while at school, L.M. has been and remains free to convey his message elsewhere, and in fact, his message has been amplified through social media, news outlets, and this litigation. Further, L.M. has not been restricted from other speech while attending school. He has worn a variety of messages, see Tucker Aff. ¶ 11 [Doc. No. 46], and can voice his views elsewhere, id. at ¶ 12; Verified Compl. ¶ 97 [Doc. No. 11]. L.M. has only been prohibited from wearing the Shirt and the Taped Shirt, and only while attending school, based on Defendants' reasonable determination that the Shirt invaded the rights of other students.

Defendants, by contrast, contend that, were an injunction to issue, the hardship to Defendants and students at Nichols would not be insignificant. First, Defendants contend that the Shirt would cause harm to students who identify as transgender or gender

nonconforming because it would prevent them from attending school without harassment. See Defs. Opp. 17-19 [Doc. No. 44]. Second, Defendants contend that, were Plaintiff permitted to wear the Shirt, Defendants would fail to comply with their mandate from the Massachusetts Legislature prohibiting discrimination, bullying, or harassment in schools based on gender identity or expression and directives from the Massachusetts Department of Elementary and Secondary Education ("DESE") requiring that schools provide a safe environment to progress academically and developmentally regardless of gender identity. Id.; see also M.G.L. c. 76 § 5; M.G.L. c. 71 § 37O; 603 C.M.R. § 26.05; DESE, Guidance for Mass. Pub. Sch. Creating a Safe and Supportive School Environment, available at https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html.

The balance of relative hardships cuts against the requested relief. While Plaintiff may experience some limited restriction in his ability to convey a specific message during the school day absent injunctive relief, were an injunction to issue, the court credits Defendants' contention that other students' rights to be "secure and to be let alone" during the school day would be infringed upon, as would Defendants' ability to enforce policies required under state law and regulations. Accordingly, this prong weighs against Plaintiff's requested relief.

D. *Public Interest*

Finally, the court must consider the preliminary injunction's effect on the public interest. Plaintiff asserts that enjoining unconstitutional acts is always in the public interest. PI Mem. 15 [Doc. No. 13]

(quoting Dorce v. Wolf, 506 F. Supp. 3d 142, 145 (D. Mass. 2020)). However, as discussed supra, Plaintiff has not established a likelihood of success on his claim that an unconstitutional act occurred or is threatened, and therefore, has not established an injunction is in the public interest. By contrast, Defendants point to statutes passed by the Massachusetts Legislature prohibiting discrimination, bullying, or harassment in schools based on gender identity or expression, as well as directives from the Massachusetts Department of Elementary and Secondary Education requiring that schools provide a safe environment to progress academically and developmentally regardless of gender identity. Defs. Opp. 7-8 [Doc. No. 44].

Accordingly, this prong weighs against injunctive relief as well.

IV. Conclusion

For the foregoing reasons, all four preliminary injunction factors weigh against the relief requested, and accordingly, Plaintiff's Motion for Preliminary Injunction [Doc. No. 12] is DENIED.

IT IS SO ORDERED.

June 16, 2023

/s/ Indira Talwani
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

L.M., Plaintiff, v. TOWN OF MIDDLEBOROUGH; MIDDLEBOROUGH SCHOOL COMMITTEE; Carolyn LYONS, Superintendent of the Middleborough Public Schools, in her official capacity; and HEATHER TUCKER, acting Principal of Nichols Middle School, in her official capacity, Defendants.	* * * * * * * * * * * * * * * * * * * *	Civil Action No. 1:23-cv-11111-IT

FINAL JUDGMENT

TALWANI, D.J.

Plaintiff L.M.'s Complaint [Doc. No. 11] sought injunctive relief against Defendants Town of Middleborough, Middleborough School Committee, Middleborough Superintendent of Schools Carolyn Lyons, and Nichols Middle School Acting Principal Heather Tucker. For the reasons set forth in the court's Memorandum and Order [Doc. No. 51] denying a preliminary injunction, and where the parties have agreed that judgment as a matter of law is

appropriate based on the factual record established through the preliminary injunction proceedings (without prejudice to Plaintiff's appeal of legal issues), Joint Motion for Entry of Final Judgment [Doc. No. 61], the court DENIES Plaintiff's request for permanent injunctive relief and enters judgment for the Defendants.

IT IS SO ORDERED

July 19, 2023

/s/ Indira Talwani
United States District Judge

Text Only Docket Entry No. 38
Dated June 1, 2023

Judge Indira Talwani: ELECTRONIC ORDER Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction 12 is DENIED as to the temporary restraining order without prejudice. The Motion remains pending as to the request for a preliminary injunction. Plaintiff has not demonstrated sufficient grounds for immediate injunctive relief before a full review of the facts and legal arguments where (i) Plaintiff's delay in filing his Motion 12 for nearly two months from the March 21, 2023 incident in which he alleges his speech was unconstitutionally restricted undermines the urgency of his claims; (ii) Plaintiff's speech outside of school hours has not been limited; and (iii) the court has scheduled a prompt further hearing so that the motion for a preliminary injunction may be resolved prior to the end of the academic year. (Kelly, Danielle) (Entered: 06/01/2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison, *Plaintiff*, v. **TOWN OF MIDDLEBOROUGH; MIDDLEBOROUGH SCHOOL COMMITTEE; CAROLYN J. LYONS**, Superintendent of the Middleborough Public Schools, in her official capacity; and **HEATHER TUCKER**, acting Principal of Nichols Middle School, in her official capacity, *Defendants*.	Civil Case No.: **VERIFIED COMPLAINT** **Jury Trial Demanded**

PLAINTIFF'S VERIFIED COMPLAINT

Plaintiff L.M., by and through his father and stepmother and natural guardians, Christopher Morrison and Susan Morrison, and for his Verified Complaint against Defendants, hereby states as follows:

INTRODUCTION

1. Throughout the entire United States, and much of the world, a debate rages on the very nature of human identity and existence. Medical doctors and psychiatrists, school boards and teachers, politicians and citizens, parents and children are all engaged in the debate about what makes a person a man, a woman, a boy, a girl, or even whether those categories themselves have any meaning at all.

2. The Constitution guarantees a freedom of thought that includes a freedom to differ. "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). There are perhaps no questions that "touch the heart of the existing order" more than those concerning the nature of human existence itself.

3. The Constitution protects this freedom to differ, in part, by prohibiting the government from adopting and enforcing a set of approved views on these matters in America's public schools. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe 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." *Id.*

4. Defendants have abandoned this guiding light and adopted one particular view on this subject: that a person's subjective identity determines whether a person is male or female, not a person's sex. Defendants have expressed this view through their

own speech and instituted annual, school-wide events celebrating their view and encouraging students to engage in their own speech on this subject—as long as the students express the viewpoint Defendants approve.

5. Compounding their unlawful adoption of an orthodoxy in this area, they have created and implemented a Speech Policy which Defendants admit permits students to express viewpoints supporting Defendants' view of gender identity but forbids students from expressing a contrary view.

6. L.M., a middle school student at Nichols Middle School ("NMS"), has observed Defendants expressing their favored view about gender identity. L.M. has a different view of this fundamental matter, informed by his scientific understanding of basic biology that there are only two sexes, male and female, and that a person's gender (their status as a boy or girl, man or woman) is inextricably tied to sex.

7. Pursuant to their policies and practice, Defendants also permit students to convey a multitude of messages concerning virtually unlimited topics on their shirts at NMS. L.M. has observed many of his schoolmates wearing shirts with messages on them.

8. Yet, on March 21, 2023, Defendant Tucker ordered L.M. to remove his shirt with the message "There are only two genders" at school. This is a picture of the shirt L.M. desires to wear:

9. L.M. politely declined to remove the shirt, Defendant Tucker indicated that he would not be able to return to class if did not remove the shirt. As a result, L.M. was forced to leave school for the day.

10. L.M.'s shirt caused no disruptions at NMS.

11. Defendants prohibited L.M. from wearing his "There are only two genders" shirt pursuant to their Dress Code that prohibits messages on clothing that "state, imply, or depict hate speech or imagery that target groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification" (the "Speech Policy").

12. Defendants' censorship of L.M.'s message, and the Speech Policy and practice on which that censorship was based, violate the First and Fourteenth Amendments to the United States Constitution.

13. Preliminary injunctive relief is necessary because L.M. desires to immediately wear his "There are only two genders" shirt, and shirts with similar messages, to school but is self-censoring his speech because Defendants have enforced and will continue to enforce their Speech Policy against him, which will subject him to the escalating discipline outlined in those policies for repeat infractions, up to and including suspension.

JURISDICTION & VENUE

14. This is a civil rights action that raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

15. This Court has original jurisdiction over these federal claims under 28 U.S.C. §§ 1331 and 1343.

16. This Court has authority to award the requested damages pursuant to 28 U.S.C. § 1343; the requested declaratory relief pursuant to 28 U.S.C. §§ 2201–02; the requested injunctive relief pursuant to 28 U.S.C. § 1343 and FED. R. CIV. P. 65; and costs and attorneys' fees under 42 U.S.C. § 1988.

17. Venue is proper in this district and this division pursuant to 28 U.S.C. § 1391(b) because the Defendants reside in this district and because all of the acts giving rise to this action occurred in this district and division.

PLAINTIFF

18. L.M., a minor, is a seventh-grade student at Nichols Middle School and, at all times relevant to this Complaint, a resident of Plymouth County,

Massachusetts.

19. Christopher Morrison is L.M.'s father and natural guardian. Susan Morrison is L.M.'s stepmother and legal guardian. At all times relevant to this Complaint, Christopher and Susan are residents of Plymouth County, Massachusetts.

DEFENDANTS

20. The Town of Middleborough (the "Town") is a body corporate, with the authority to sue and be sued. G.L. c. 40 §§ 1, 2.

21. The Middleborough School Committee (the "School Committee") is the governing board with final policymaking authority over the Town's public school system, Middleborough Public Schools (the "District"). Mass. Gen. Laws ch. 71 § 37.

22. The School Committee is charged, *inter alia*, with the power to select and to terminate the superintendent and to establish educational goals and policies for the schools in the District consistent with the requirements of law and statewide goals and standards established by the board of education. *Id.*

23. The School Committee is responsible for the enactment, enforcement, and existence of policies and practices related to student expression, including the Speech Policy challenged herein.

24. The School Committee is required to appoint and employ a superintendent to manage the District in a fashion consistent with state law and the policy determinations of the School Committee. Mass. Gen. Laws ch. 71 § 59; Middleborough School Committee Policy CB. A true and correct copy of SCSD Policy CB

is attached as Exhibit A.

25. The superintendent "has responsibility for carrying out, through procedures, the policies established by the School Committee." Middleborough School Committee Policy CH. A true and correct copy of SCSD Policy CH is attached as Exhibit B.

26. The School Committee has designated Defendant and Superintendent Carolyn J. Lyons as the individual responsible for implementing committee policy in the daily operations of the District.

27. The School Committee retains broad supervisory authority over Defendant Superintendent Lyons, the assistant superintendents, the principal of each school in the District, and all other staff for the District.

28. The District and the School Committee were and are aware of the enforcement of certain District policies, including the Speech Policy, and their application to student speech.

29. The School Committee were and are aware that District officials enforced the Speech Policy against L.M. when they prohibited L.M. from wearing the shirt with the message "There are only two genders" on it.

30. School officials were acting pursuant to District policy in promulgating and enforcing the Speech Policy against L.M.

31. The School Committee has ratified and implemented the Speech Policy adopted and enforced

by Defendants at NMS. The School Committee is ultimately responsible for its implementation and enforcement by District employees.

32. Defendant Lyons, as a policy maker, is responsible for the enactment, implementation, and enforcement of the District policies and their application to student speech.

33. Defendant Lyons is responsible for the administration, interpretation, and oversight of certain District policies, including the Speech Policy, and their application to student speech.

34. Defendant Lyons enforced the Speech Policy against L.M. when she approved Defendant Tucker's decision to forbid L.M. from wearing the shirt.

35. Defendant Lyons is sued in her official capacity.

36. Defendant Heather Tucker is, and was at all times relevant to this Complaint, the acting Principal of the Nichols Middle School, a public school organized pursuant to the laws of Massachusetts.

37. Defendant Tucker is responsible for the enforcement of certain District policies, including the Speech Policy, and their application to student speech.

38. Defendant Tucker twice enforced the Speech Policy against L.M. when she prohibited L.M. from wearing the shirt with the message "There are only two genders" and the shirt with the message "There are censored genders" on it.

39. Defendant Tucker is sued in her official capacity.

40. All Defendants prohibited L.M. from wearing his "There are only two genders" shirt pursuant to the Speech Policy and practice challenged herein.

41. All Defendants prohibited L.M. from wearing his "There are censored genders" shirt pursuant to the Speech Policy and practice challenged herein.

42. All Defendants are responsible for the implementation and application of the Speech Policy and practice by school employees.

FACTUAL ALLEGATIONS

I. Defendants' Speech Policy

43. NMS is a public middle school located in Middleborough, Massachusetts.

44. NMS is under the direction and control of the Defendants.

45. Defendants are the official policymakers for NMS and have enacted and are responsible for the Speech Policy challenged herein and its enforcement against L.M.

46. Defendants approved the John T. Nichols Jr. Middle School Student & Family Handbook 2022–2023 (the "Student Handbook"). A true and correct copy of the Student Handbook is attached as Exhibit C.

47. The Student Handbook includes a section entitled "Dress Code" which incorporates Defendants' Speech Policy. Exhibit C at 45.

48. The Speech Policy states the dress code is "governed by health, safety and appropriateness." *Id.*

49. The Speech Policy includes the following

prohibition: "Clothing must not state, imply, or depict hate speech or imagery that target groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification." *Id.* at 46.

50. The Speech Policy also provides "[a]ny other apparel that the administration determines to be unacceptable to our community standards will not be allowed." *Id.*

51. If "students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school." *Id.*

52. "Repeated violations of the dress code will result in disciplinary action." *Id.*

53. The Student Handbook specifies that "violation of the dress code" is a Level 1 infraction. Discipline for a Level 1 infraction ranges from warning to possible school suspension. Ex. C at 39.

54. Under the Speech Policy, school officials can censor expression that they deem inappropriate or that they subjectively determine targets a certain group even if this expression is not materially and substantially disruptive.

II. L.M.'s Desired Expression

55. L.M. is a twelve-year old student currently enrolled in the seventh grade at NMS.

56. L.M. has attended school in the District since Kindergarten.

57. L.M. is a very good student. He is on the Honor Roll.

58. L.M. has observed Defendants and other school officials expressing messages about human identity, sex, and gender.

59. Defendants embrace and express the idea that a person's status as "male" or "female," or something else entirely depends solely on the person's identity and has no relationship to the person's biology.

60. Defendants embrace and express the idea that however a person identifies, that identity is "valid" and must be recognized as such by others.

61. Defendants embrace and express the idea that there are unlimited "valid" genders.

62. Defendants express their views on human identity, sex, and gender through their speech, curricula, and extracurricular events.

63. In particular, Defendants designate June as "Pride Month" and have a special "PRIDE Spirit Week" in the month of June to "celebrate Pride Month!" A true and correct copy of last year's *Tiger Times Nichols Middle School* newsletter announcing last year's Pride Month is attached hereto as Exhibit D.

64. The District itself defines "Pride" as "the promotion of the self-affirmation, dignity, equality, and increased visibility of LGBTQIA+ people as a social group." Ex. D at 3.

65. During Pride Month, the school expresses its own view and also encourages students to engage in their own expression, but only if the students' expression supports Defendants' views on human

identity, sex, and gender.

66. For example, students are encouraged to "[w]ear a positive message of *acceptance*/love" and to "[w]ear your Pride gear to *celebrate Pride Month*." *Id.* (emphasis added).

67. L.M. believes that there are only two sexes, male and female. Like many people, he equates the word "gender" with "sex."

68. In fact, some of the District's own communications support the view that there are only two sexes. The Student Handbook states: "All aspects of public school education must be fully open and available to members of **both** sexes and of minority groups." Ex. C at 14 (emphasis added). The Student Handbook also states: "Sexual Harassment is defined by the Middleborough School Committee as . . . written materials or pictures derogatory to **either gender**. . ." Id. at 57 (emphasis added).

69. L.M.'s sincerely held beliefs compel him to share his beliefs and views with his classmates.

70. In L.M.'s experience in his peer group, his view of human identity, sex, and gender is subject to censure because it differs from the view promoted by authority figures in the school community, including Defendants, by popular culture, and by other students.

71. In L.M.'s experience, many of his classmates agree with his views but are afraid to express their views because of the social consequences of expressing a view that differs from the view promoted by authority figures in the school community, including Defendants, by popular culture, and by other

students.

72. Because L.M. believes that the view promoted by authority figures in the school community, including Defendants, by popular culture, and by other students is ultimately false and harmful, L.M. wants to express his own view in the school.

73. L.M. also wants to express his own view in the school because he has frequently observed Defendants express their own view through speech and events, and he wants to demonstrate to his other classmates that caring, compassionate people can still hold his view in good faith.

74. L.M. respects the right of others to express views that differ from his own. He seeks only the right to engage with the topics that are already being addressed and to express his own view on those topics, including the topic of human identity, sex, and gender.

75. One way that L.M. desires to accomplish this goal is by wearing clothing, displaying messages, like the "There are only two genders" shirt that Defendants censored.

III. Censorship of L.M.'s Expression

76. On March 21, 2023, acting on his desire to express his beliefs to his classmates, L.M. decided to wear a shirt with the message "There are only two genders."

77. "There are only two genders" was the only message displayed on L.M.'s shirt.

78. Pursuant to the Speech Policy challenged herein, Defendants regularly permit L.M.'s

schoolmates to wear clothing and other apparel with messages on them.

79. Almost every school day, multiple students in the District wear shirts with some sort of expressive message on them, including shirts promoting many sports teams and different types of products.

80. Defendants express messages in schools throughout the District on myriad of topics as well, including topics related to human identity, sex, and gender. Defendants express these messages through posters, flags, and events. Below are two examples at Middleborough High School:

81. In the picture above, the sign below the rainbow flag reads:

> Black Lives Matter
> Proud friend/ally of LGBTQ+
> Refugees & immigrants are welcome
> Love is love
> Diversity is beautiful

82. Just as these other students wear shirts and other apparel with expressive messages to share their beliefs and views with their classmates, and to respond to Defendants' expression on the specific subject of human identity, sex, and gender, L.M. wore his "There are only two genders" shirt to do the same.

83. While he was participating in gym, which was the first class of the day, Defendant Tucker removed L.M. from class. Defendant Tucker told L.M. that he could not wear the shirt because other students had complained.

84. Defendant Tucker told L.M. that he could either remove the shirt or if he had questions they could discuss it further in another room.

85. L.M. indicated that he would like to discuss the situation further.

86. Defendant Tucker then escorted L.M. to another room. The school counselor then joined the conversation.

87. L.M. asked why he could not wear the shirt. Defendant Tucker said some students complained that it made them upset.

88. Defendant Tucker made it clear that L.M. must remove the shirt or he could not return to class.

89. L.M. politely explained that he could not remove the shirt in good conscience.

90. Defendant Tucker then called L.M.'s father and explained that L.M. could not return to class if he did not remove the shirt.

91. As a result, L.M.'s father picked him up from school and L.M. was forced to miss classes the rest of the day.

92. During the time L.M. wore his shirt on March 21, its message caused no disruptions.

93. During the time L.M. wore his shirt on March 21, no student became visibly upset or distracted by its message.

94. During the time L.M. wore his shirt on March 21, no student objected to its message.

95. On April 1, L.M.'s father sent an email to Defendant Lyons. The email stated in part:

> Would you please help me understand why my son was removed from class and ultimately missed out on a day of class

> instruction. There was nothing about [L.M.'s] shirt that was directed to any particular person. It simply stated his view on a subject that has become a political hot topic. It is a topic that is being discussed in social media, schools, and churches all across our country. My son is now asking me why he is not allowed to express his own political statement when he sees others doing the same every day in their choice of clothes, pins, posters, and speech.

A true and correct copy of the email is attached hereto as Exhibit E.

96. On April 4, Defendant Lyons replied to the email. Defendant Lyons confirmed that she supported Defendant Tucker's decision to force L.M. to remove the shirt or leave school.

> As for how Mrs. Tucker enforced the dress code, I am in support of her position. The dress code does clearly articulate the expectation that the dress code will be governed by health, safety, and appropriateness. That appropriateness comes at the discretion of the building administration. The content of [L.M.'s] shirt targeted students of a protected class; namely in the area of gender identity. While I cannot share the numbers or names of students and staff that complained about this shirt, I can assure you that there were several students and several staff who did.

Id.

97. On April 13, L.M. attended the School

Committee's public meeting. During the public comment period, L.M. informed the School Committee about the incident. He explained:

> What did my shirt say? Five simple words: "There are only two genders." Nothing harmful. Nothing threatening. Just a statement I believe to be a fact. I have been told that my shirt was targeting a protected class. Who is this protected class? Are their feelings more important than my rights? I don't complain when I see "pride flags" and "diversity posters" hung throughout the school. Do you know why? Because others have a right to their beliefs just as I do. Not one person, staff, or student told me that they were bothered by what I was wearing. Actually, just the opposite. Several kids told me that they supported my actions and that they wanted one too.

There Are Only Two Genders, YouTube, (May 3, 2023) bit.ly/3pD6TN8 (last accessed May 16, 2023) at 9:40-12:20.

98. On April 27, L.M.'s attorney sent a letter to Defendant Lyons informing her that Defendants' censorship of L.M. violated his First Amendment rights. A true and correct copy of the letter is attached hereto as Exhibit F.

99. The letter informed Defendant Lyons that L.M. intended to wear the same shirt again on Friday, May 5 and requested that Defendant Lyons confirm in writing that the District would allow him to wear the shirt.

100. On May 4, Defendants' counsel responded with a letter unequivocally stating that the District "has, and will continue to, prohibit the wearing of a t-shirt by L.M. or anyone else which is likely to be considered discriminatory, harassing and/or bullying to others including those who are gender nonconforming by suggesting that their sexual orientation, gender identity or expression does not exist or is invalid." A true and correct copy of the letter is attached hereto as Exhibit G.

101. As Defendants interpret their Speech Policy, some viewpoints on the topic of "gender identity or expression" are permitted while some viewpoints on the same topic are prohibited. In particular, speech expressing the viewpoint that there are only two genders is prohibited, while speech expressing the viewpoint that gender is fluid and is on a spectrum is permitted.

102. The letter further asserts Massachusetts law prohibits communications "that may reasonably be considered intimidating, hostile, offensive or unwelcome based on race, color, religion, national origin, sex, sexual orientation, gender identity or any other status protected by law and/or may otherwise be reasonably likely to lead to a disruption of its operations." *Id.*

103. As a result of Defendants' stated position, L.M. did not wear his shirt to school on May 5 with the message "There are only two genders."

104. On May 5, in protest of Defendants' censorship of his message, L.M. wore a shirt with the message "There are censored genders." This is a picture of the shirt that L.M. wore:

105. As soon as L.M. arrived at his first class, his teacher instructed him to go to Defendant Tucker's office.

106. On the way to the office, L.M. removed the shirt.

107. When he arrived at her office, Defendant Tucker asked L.M. if she could trust him not to put the shirt back on with the message "There are censored genders." L.M. agreed not to put the shirt back on.

108. L.M. complied with Defendant Tucker's order to remove the shirt because he did not want to miss another day of school.

109. L.M. was forced to wear another shirt for the remainder of the day.

110. During the time L.M. wore his shirt on May 5, its message caused no disruptions.

111. During the time L.M. wore his shirt on May 5, no student became visibly upset or distracted by its

message.

112. During the time L.M. wore his shirt on May 5, no student objected to its message.

113. As a result of Defendants' policies and actions, L.M. has not worn either the "There are only two genders" shirt or the "There are censored genders" shirt since May 5 even though he desires to do so.

IV. Continuing Impact of Defendants' Policies on L.M.

114. Defendants' Speech Policy challenged herein, and which school officials enforced in censoring L.M.'s shirts, remain in place and serve to chill and deter L.M.'s (and other students') expression.

115. Immediately and in the future, L.M. desires to wear his "There are only two genders" shirts, and shirts with similar messages, as a means of sharing his beliefs with his fellow classmates.

116. Since one of L.M.'s purposes in wearing the "There are only two genders" shirts was to stand against the pressure that he perceived from the school community, including Defendants, and his peers *not* to express this view, the censorship Defendants imposed upon him is especially harmful, and L.M.'s need to correct this censorship is vital to his ability to spread his message.

117. Because part of L.M.'s purpose in speaking was to stand against the pressure he perceived *not* to express his message, Defendants' decision to censor his second shirt, which itself expresses a message

about Defendants' active censorship of messages about gender identity (rather than a message about gender identity itself), L.M.'s need to correct this second act of censorship is vital to his ability to spread his message.

118. L.M. is refraining from wearing his "There are only two genders" shirt or other shirts bearing similar messages, however, out of fear that he will again be found to have violated the Defendants' Speech Policy challenged herein, and thus be subject to punishment, including detention and possible suspension.

119. L.M.'s fear of punishment severely limits his constitutionally-protected expression at NMS.

LEGAL ALLEGATIONS

120. Students do not shed their constitutional rights at the schoolhouse gate.

121. All of the acts of the Defendants, their board members, officers, agents, employees, and servants were executed and are continuing to be executed by Defendants under the color and pretense of the policies, statutes, ordinances, regulations, customs, and usages of the State of Massachusetts.

122. L.M. is suffering irreparable harm from the conduct of the Defendants.

123. L.M. has no adequate or speedy remedy at law to correct or redress the deprivation of his rights by the Defendants.

124. Unless the Defendants' Speech Policy and practice challenged herein are enjoined, L.M. will continue to suffer irreparable injury.

FIRST CAUSE OF ACTION
First Amendment: Freedom of Speech
(42 U.S.C. § 1983)

125. Plaintiff re-alleges and incorporates herein, as though fully set forth, Paragraphs 1 through 124 of this Complaint.

126. The First Amendment's Freedom of Speech Clause, incorporated and made applicable to the states by the Fourteenth Amendment to the United States Constitution, prohibits censorship of protected expression.

127. Non-disruptive, private student expression is protected by the First Amendment.

128. L.M.'s speech is protected speech under the First Amendment.

129. L.M.'s expression—wearing a shirt with the "There are only two genders" and "There are censored genders" message—did not and does not materially and substantially interfere with the orderly conduct of educational activity at NMS.

130. The messages L.M. expressed with his apparel are exclusively L.M.'s private expression and are not school-sponsored speech.

131. But pursuant to their Speech Policy and practice, Defendants have singled out L.M.'s expression and prevented him from displaying his messages on his shirt at NMS.

132. Viewpoint-based restrictions, whether in a public or nonpublic forum, are unconstitutional.

133. Content-based restrictions on speech in a public forum are presumptively unconstitutional and

are subject to strict scrutiny.

134. Time, place, and manner restrictions on speech must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

135. Defendants' censorship of L.M.'s shirts while permitting shirts and other apparel with different messages on related topics is viewpoint discrimination, which is unconstitutional in any type of forum.

136. Defendants expressly interpret their policy in a viewpoint discriminatory manner, permitting expression of the viewpoint that gender is fluid, is on a spectrum, or there are more than two genders, while prohibiting any expression of a contrary view.

137. Defendants expressly interpret their policy to prohibit the expression of certain viewpoints without regard to whether the expression materially or substantially disrupts the school, its operations, or its environment, or the achievement of any legitimate pedagogical objective.

138. Defendants' unequal treatment of L.M.'s expression is also a content-based restriction of his speech in an otherwise open forum.

139. Pursuant to their Speech Policy and practice, Defendants allow students at NMS to wear clothing and other apparel with a wide variety of expressive messages during school, including shirts promoting many sports teams and different types of products.

140. Defendants' Speech Policy and practice

also impose an unconstitutional heckler's veto because they permit the restriction of protected student expression merely because school officials deem a student's expression "offensive" to others.

141. Prior restraints on speech may not delegate overly broad discretion to government decision-makers, may not allow for content-based restrictions, must further a compelling government interest, must be narrowly tailored, and must be the least restrictive means available.

142. Defendants' Speech Policy and practice impose an unconstitutional prior restraint because they vest school officials with unbridled discretion to permit or deny student expression subject to no standards or guidelines, thereby permitting content- and viewpoint-based enforcement of the policies.

143. Defendants' Speech Policy and practice give unbridled discretion to school officials by permitting them to forbid messages on clothing they deem to be "hate speech," "that target groups based on . . . sexual orientation or gender identity," or are otherwise "unacceptable" to the District's "community standards."

144. Defendants' Speech Policy and practice are overbroad because they sweep within their ambit protected First Amendment expression.

145. Defendants' Speech Policy and practice are overbroad because they restrict student speech that does not and will not materially and substantially disrupt the educational process.

146. The overbreadth of the Defendants' Speech Policy and practice chill the speech of students who

might seek to engage in private expression through the wearing of messages on their clothing.

147. Defendants have no compelling or legitimate reason that would justify their censorship of the message that L.M. seeks to express.

148. Defendants' Speech Policy and practice are not the least restrictive means of achieving any compelling interest they may allege.

149. Defendants' Speech Policy and practice are not reasonably related to any legitimate pedagogical concerns.

150. Censoring students' protected speech per se is not and cannot be a legitimate pedagogical concern.

151. Defendants' Speech Policy prohibiting "hate speech" or "unacceptable" messages on clothing, both facially and as-applied, violates the Free Speech Clause of the First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment.

SECOND CAUSE OF ACTION
Fourteenth Amendment: Due Process
(42 U.S.C. § 1983)

152. Plaintiff re-alleges and incorporates herein, as though fully set forth, Paragraphs 1 through 124 of this Complaint.

153. The Due Process Clause of the Fourteenth Amendment prohibits the government from censoring speech pursuant to vague standards that grant enforcement officials unbridled discretion.

154. The arbitrary determination by school

officials of what is and is not "hate speech," what speech "targets" a specific group, or what speech is "unacceptable to community standards" violates this norm.

155. Students of common intelligence must guess as to whether their expression will be deemed "hate speech," or "target[s]" a specific group, or "unacceptable" and thus subject to censorship and punishment.

156. Defendants' Speech Policy and practice of prohibiting "hate speech," or speech that "target[s]" a specific group, or "unacceptable" messages on clothing are vague and allow for unbridled discretion in determining which student speech is permissible.

157. Defendants' Speech Policy and practice allow school officials to act with unbridled discretion when deciding whether student expression is "hate speech," "unacceptable to community standards," or "target[s]" a specific group.

158. The discretion given to school officials in Defendants' Speech Policy and practice leaves censorship of student speech to the whim of school officials.

159. Defendants' Speech Policy prohibiting messages on clothing that are "hate speech," "unacceptable to our community standards," or that "target" a specific group, both facially and as-applied, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests

that this Court enter judgment against Defendants, and provide Plaintiff with the following relief:

A. That this Court issue a Preliminary and Permanent Injunction enjoining Defendants, their officials, agents, employees, and all persons in active concert or participation with them, from enforcing Defendants' Speech Policy challenged herein both facially and as-applied so as to prohibit L.M. from wearing a shirt with the message "There are only two genders" or similar messages at NMS;

B. That this Court render a Declaratory Judgment, declaring Defendants' Speech Policy prohibiting messages that are deemed to be "hate speech," "unacceptable to community standards," or that "target" specific groups on clothing unconstitutional, facially and as-applied to L.M.'s speech;

C. That this Court adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy in order that such declarations shall have the force and effect of final judgment;

D. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's order;

E. That this Court grant an award of actual and nominal damages against Defendants Town of Middleborough and Middleborough School Committee to Plaintiff in an amount this Court deems appropriate;

F. That this Court grant to Plaintiff reasonable costs and expenses of this action, including attorneys' fees in accordance with 42 U.S.C. § 1988;

G. That this Court grant the requested injunctive relief without a condition of bond or other security being required of Plaintiff; and

H. That this Court grant such other and further relief as this Court deems just and proper.

Respectfully submitted this 19th day of May, 2023.

s/ Andrew Beckwith

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Attorneys for Plaintiff
**Pro Hac Vice application forthcoming.*

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury for all issues so triable.

s/ Andrew Beckwith
Andrew Beckwith
Attorney for Plaintiff

DECLARATION UNDER PENALTY OF PERJURY

I, Christopher Morrison, a citizen of the United States and a resident of the State of Massachusetts, hereby declare that under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 16th day of May, 2023.

s/Christopher Morrison
Christopher Morrison

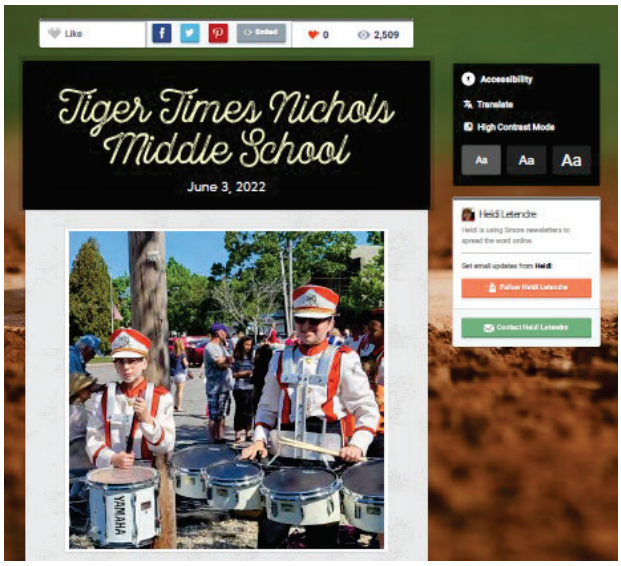
DECLARATION UNDER PENALTY OF PERJURY

I, Susan Morrison, a citizen of the United States and a resident of the State of Massachusetts, hereby declare that under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 16th day of May, 2023.

s/Susan Morrison
Susan Morrison

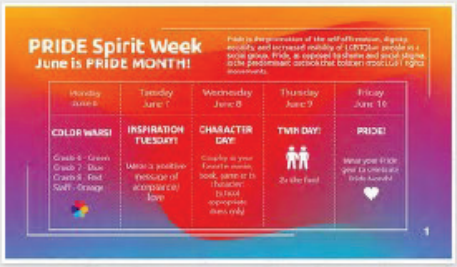
Exhibit D to Complaint – Tiger Times Nichols Middle School Newsletter



End of Year Dance Thursday, June 15th (can dress up, not necessary)
Field Day, Wednesday, June 22nd (If the weather is bad, Field Day will be June 23d- we will flip-flop the days).
Breakfast and Yearbook Signing, Thursday, June 23rd

8th Grade Awards Ceremony
12:30-1:45 Families are invited to attend and enter through gymnasium doors. More information to come at a later date.

- June 15th, B Cluster
- June 16th A Cluster
- June 17th, C Cluster



June Concert Information

Dear Band, Chorus and Orchestra students and families,

We are excited to announce our June concert dates! **Band and Orchestra will have their concerts on the same night, as we did in March. Chorus will have their concert the following week.**

- All concerts will be performed in the Alan R. Lindsay auditorium of the Nichols Middle School.
- Students are asked to wear concert attire with a white top, and black pants, keeping dress code in mind.

Tuesday, June 7th, 6:00 PM - BAND
-Band Students arrive at 5:30 PM for set-up(report to the cafeteria)
-Concert runs from 6:00 PM-6:45 PM
Tuesday, June 7th, 7:15 PM - Orchestra
-Orchestra Students arrive at 6:45 PM for tuning (report to the cafeteria)
-Concert runs from 7:-15-7:45 PM
Tuesday, June 7th, 8PM -Chorus
-Students arrive at 7:30 PM to warm-up (report to the cafeteria)
-Concert runs from 8 PM- 8:30 PM
Please contact Mr. Converse with any questions about the chorus concert.
cconverse@middleboro.k12.ma.us
Please contact Mrs. Thornton with any questions about the band/orchestra concerts.
athornton@middleboro.k12.ma.us

Exhibit E to Complaint - Emails between Chris Morrison and Superintendent Lyons dated April 2023

On Sat, Apr 1, 2023 at 7:11 PM Sue Bowman <--> wrote:

Superintendent Lyons,

On the morning of Tuesday March, 21 I received a call from acting principal Heather Tucker. She explained that she had removed my son - from gym class and that she and a school counselor had met with him in regards to his shirt. - had worn a t-shirt that stated, "there are only two genders". She explained that they had a discussion with – about complaints she had received from staff and students that found his shirt upsetting, and that it was a disruption to the learning environment. They asked - to take his shirt off and he politely declined to do so. Mrs. Tucker told me that - is welcome to wear what he wants outside of school but she could not return him to class if he did not remove the shirt. I explained that - had asked for the shirt because he felt strongly about what it said. I told her that I would support him if he chose not to remove the shirt. I then asked if she wanted me to come pick him up. She told me she would prefer - to take the shirt off and return to class but if he wouldn't then yes, I was welcome to come pick him up.

When my wife Susan and I arrived at the school - was sitting in the office. The first thing he said to us was, "I didn't think it would be such a big deal". My son is a good kid, he is quiet, polite, and an honor roll student. My wife asked Mrs. Tucker how many students and staff had complained she stated that

"several students had complained". In our phone call Mrs. Tucker had clearly said that it was both students and staff. I would like to know if there were in fact any complaints from staff and if so how many, as well as how many students complained.

We have reviewed the student handbook and cannot find anything that indicates a school policy or rule that - broke. Would you please help me understand why my son was removed from class and ultimately missed out on a day of class instruction. There was nothing about - shirt that was directed to any particular person. It simply stated his view on a subject that has become a political hot topic. It is a topic that is being discussed in social media, schools, and churches all across our country.

My son is now asking me why he is not allowed to express his own political statement when he sees others doing the same every day in their choice of clothes, pins, posters, and speech.

I would like to point out that - only received positive feedback from other students on that day and since. Clearly he is not alone in his beliefs.

My son goes to school every day and witnesses other students disruptive behavior in class that goes unchecked, where foul language goes without a single word from teachers or staff, yet THIS was cause for him to be pulled from class.

I will look forward to your response.

Respectfully,

Chris Morrison

From: Carolyn Lyons <-->
Date: April 4, 2023 at 1:36:28 PM EDT
To: Sue Bowman <-->
Subject Re: NMS Dress code questions

Hello Mr. Morrison,

Thank you for reaching out. I have spoken with acting principal Heather Tucker about this situation at length. She did express that - was articulate in his position and respectful in his statements to her about these opinions.

It is important for you to understand that - was not the subject of discipline. Mrs. Tucker indicated to - and you that he is not, was not, and will not be the subject of discipline. While I understand that you picked him up at school, you were under no obligation to do so. An administrator asked for your compliance with the dress code and you chose not to comply with that procedure.

As for how Mrs. Tucker enforced the dress code, I am in support of her position. The dress code does clearly articulate the expectation that the dress code will be governed by health, safety, and appropriateness. That appropriateness comes at the discretion of the building administration. The content of - shirt targeted students of a protected class; namely in the area of gender identity. While I cannot share the numbers or names of students and staff that complained about this shirt, I can assure you that there were several students and several staff who did. I have pasted the entire dress code, which is part of the middle school handbook approved by the school committee, for your review. Finally, the procedure plainly states that violations of the dress code will

lead to a request to a parent to bring appropriate clothing to school. I find that Mrs. Tucker implemented this procedure as written.

I hope you find this information helpful.

Thank you,
Carolyn Lyons

"DRESS CODE

The dress code is governed by health, safety and appropriateness. We encourage students to dress in a neat and presentable manner that reflects pride in themselves and their school. School is a workplace, and an environment conducive to learning is necessary. Clothing that is too revealing causes distractions and inhibits learning is not allowed. We expect all students to conform to the following:

• Clothing must be neat and clean.

• Clothing that is excessively revealing , such as mini-skirts, short shorts, tank tops with shoulder straps under three inches, muscle shirts, pajamas or other sleepwear, loose fitting and low-cut tops, waistbands that are too low exposing underwear, and shirts which reveal the midriff, will not be allowed.

• Tank tops or basketball shirts must have a t-shirt underneath.

• Chains, chain belts, spikes, studs, and gang related attire is not allowed.

• Clothing with alcohol, tobacco, vulgar writing, sexual references or controlled substance reference will not be allowed.

• Outer coats, hats, caps, bandanas, sweatshirt hoods, and sunglasses will not be worn in the building without permission of an administrator.

• Wheeled shoes and platform shoes are dangerous on

our floors and not allowed. Blankets or other clothing that drapes down or is considered a tripping hazard will not be allowed.

• Clothing must not state, imply, or depict hate speech or imagery that target groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification.

• Any other apparel that the administration determines to be unacceptable to our community standards will not be allowed.

If students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school. Repeated violations of the dress code will result in disciplinary action."

Carolyn J. Lyons, J.D.
<she, her, hers>
Superintendent of Schools
Middleborough Public Schools
p: --
f: --
a: 30 Forest Street, Middleborough, MA 02346
c: --

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison, *Plaintiff*, v. **TOWN OF MIDDLEBOROUGH;** et al., *Defendants*.	**CASE NO.: 23-cv-11111** **Honorable Judge Indira Talwani**

DECLARATION OF L.M.

I, L.M. pursuant to 28 U.S.C. § 1746, declare as follows:

1. I make this declaration of my own personal knowledge, and, if called as a witness, I could and would testify competently to the matters stated herein.

2. I sign this declaration as a seventh-grade student currently enrolled at Nichols Middle School.

3. I have attended school in the District since Kindergarten and am on the Honor Roll.

4. I have observed Defendants and other school officials expressing messages about human identity, sex, and gender.

5. In particular, Defendants and other school officials promote ideas about human identity, sex, and

gender commonly associated with "LGBTQ Pride." This includes the idea that a person's identity, not their biology, determines whether they are male, female, or a potentially infinite range of other genders. Defendants encourage other students to express views on gender consistent with this view.

6. I believe that there are only two sexes, male and female, and equate the word "gender" with "sex."

7. In my experience, there is pressure to either repeat the view that Defendants express and encourage students to express or just stay quiet.

8. I believe that it is wrong to hate other people. I do my best not to hate anyone, and I do not believe that my view about sex and gender is inherently hateful.

9. I also have heard the claim that expressing the view that there are only two genders amounts to "denying the existence" of students who identify as transgender. But when I express my view, I am not denying the existence of anyone else. Disagreeing with the way someone would describe their existence is not the same as denying their existence.

10. Defendants' expression about gender and the expression they encourage other students to engage in about gender also conveys the idea that my view is false. I do not believe that Defendants or my classmates are denying my existence simply by disputing my account of reality, including my account of my own identity.

11. I do perceive that my view is commonly mischaracterized as hateful. This is upsetting to me because it is not true.

12. In addition, Defendants' view is commonly mischaracterized as the only "loving" or "inclusive" or "accepting" view.

13. One reason I wanted to publicly express my view at school was to stand up against the pressure that I perceive on people that share my view, and to counter the false idea that my view is necessarily hateful.

14. On March 21, 2023, acting on my desire to express my beliefs to my classmates, I decided to wear a shirt with the message "There are only two genders."

15. While I was participating in gym, which was the first class of the day, Defendant Tucker removed me from class. Defendant Tucker told me that I could not wear the shirt because she had heard some complaints. She told me I could either remove the shirt or if I had questions we could discuss it further in another room.

16. I indicated that I would like to discuss the situation further. Defendant Tucker then escorted me to another room. The school counselor then joined the conversation. I asked why I could not wear the shirt. Defendant Tucker said some students complained. I had not observed any students complain or appear to be upset.

17. I have not witnessed any disruption of school classes or activities resulting from the t-shirt on I wore on March 21, 2023, on that day or any other time.

18. Defendant Tucker made it clear that I must remove the shirt or I could not return to class. I

politely explained that I could not remove the shirt in good conscience. Defendant Tucker then called my father and explained that I could not return to class if I did not remove the shirt. My father picked me up from school and I was forced to miss classes the rest of the day.

19. On May 5, after finding out that I would not be allowed to express my view about gender with my "There are only two genders" shirt, I decided I wanted to speak up about the fact that my view about gender is being censored while other views about gender are allowed to be expressed.

20. To communicate my objection, I wore a shirt that said, "There are censored genders." As soon as I arrived at my first class, a school official instructed me to go to Defendant Tucker's office. On the way to the office, I removed the shirt because it was my understanding that I had been removed because of the shirt and that I would be prohibited from wearing the shirt.

21. When I arrived at her office, Defendant Tucker asked me if she could trust me not to put the shirt back on with the message "There are censored genders." I agreed not to put the shirt back on. I complied with Defendant Tucker's order to remove the shirt because I did not want to miss another day of school. I was forced to wear another shirt for the remainder of the day.

22. I did not witness any student become upset with the shirt I wore on May 5, 2023. I have not witnessed any disruption to school classes or activities resulting from my t-shirt, on May 5 or at any other time.

23. I have become aware that some other students have worn shirts similar to the one that I wore on March 21, 2023. I have not spoken with them about their reasons for doing so. On the days that they wore the shirts, I witnessed no disruption to any school classes or activities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 6/6/23 *s/ L.M.*
L.M.

Excerpts from John T. Nichols Jr. Middle School Student & Family Handbook 2022-2023

* * * *

Civil Rights

Every student has the right to attend school safely. All children must be able to learn in an environment that is free from discrimination based on race, color, sex, national origin, disability, religion, gender identity, or sexual orientation.

All aspects of public school education must be fully open and available to members of both sexes and of minority groups. No school may exclude a child from any course, activity, service, or resource available in that public school on account of race, color, sex, national origin, disability, religion, gender identity, or sexual orientation of such child. These regulations address five (5) areas of school policy: school admissions, admission to courses of study, guidance, course content, and co-curricular and athletic activities.

Federal law prohibits discrimination on the basis of sex in educational programs or activities receiving federal assistance. In accordance with the requirements of Title IX of the Education Amendments of 1972, Middleborough Public Schools hereby makes notice that it does not discriminate in any educational program or activity or in employment herein.

Section 504 of the Federal Rehabilitation Act of 1973, provides that no otherwise qualified handicapped individual in the United States, shall, solely by reason

of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. All staff are required to ensure that we are in compliance, and are also required to report any violations or non-compliance issues. Said reports should be filed with the individual school administrator and/or the Chapter 622 & Title IX Coordinator.

A student or parent(s)/guardian(s) should immediately contact a teacher, school counselor, building administrator, or Superintendent of Schools' office with any complaint relating to civil rights issues in the schools. Measures are in place to take prompt action to investigate incidents and protect the rights of all individuals in the schools.

John T. Nichols, Jr. Middle School
508-946-2020
Henry B. Burkland Elementary School
508-946-2040
Middleborough High School
508-946-2010
Memorial Early Childhood Center
508-946-2030
Mary K. Goode Elementary School
508-946-2045
Chapter 622, Section 504 & Title IX Coordinator/Investigator
Mr. KevinAvitabile
508-946-2045

* * * *

DRESS CODE

The dress code is governed by health, safety and appropriateness. We encourage students to dress in a neat and presentable manner that reflects pride in themselves and their school. School is a workplace, and an environment conducive to learning is necessary. Clothing that is too revealing causes distractions and inhibits learning is not allowed. We expect all students to conform to the following:

- Clothing must be neat and clean.

  - Clothing that is excessively revealing, such as mini-skirts, short shorts, tank tops with shoulder straps under three inches, muscle shirts, pajamas or other sleepwear, loose fitting and low-cut tops, waistbands that are too low exposing underwear, and shirts which reveal the midriff, will not be allowed.
  - Tank tops or basketball shirts must have a t-shirt underneath.
  - Chains, chain belts, spikes, studs, and gang related attire is not allowed.
  - Clothing with alcohol, tobacco, vulgar writing, sexual references or controlled substance reference will not be allowed.
  - Outer coats, hats, caps, bandanas, sweatshirt hoods, and sunglasses will not be worn in the building without permission of an administrator.
  - Wheeled shoes and platform shoes are dangerous on our floors and not allowed. •

  Blankets or other clothing that drapes down or is considered a tripping hazard will not be allowed.
  - Clothing must not state, imply, or depict hate speech or imagery that target groups based on

race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification.

• Any other apparel that the administration determines to be unacceptable to our community standards will not be allowed.

If students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school. Repeated violations of the dress code will result in disciplinary action.

* * * *

SEXUAL HARASSMENT POLICY POSITION:

The Middleborough School Committee takes the position that all employees and students in the Middleborough Public Schools have the right to work and learn in an environment free from sexual harassment.

The Middleborough School Committee will take seriously all complaints of sexual harassment and will investigate through its designated Sexual Harassment Contact Persons (Investigators) each and every complaint thoroughly and as quickly as possible. Condoning sexual harassment will not be tolerated.

DEFINITION:

Sexual Harassment is defined by the Middleborough School Committee as unwelcome sexual advances and/or requests for sexual favors, unsolicited remarks, gestures or physical contact, display or circulation of written materials or pictures derogatory

to either gender, sexual advances and/or requests for sexual favors. In addition, other verbal or physical conduct of a sexual nature constitutes sexual harassment when:

1. Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain or maintain employment; or

2. Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment; or 32

3. Such conduct or communications has the purpose or effect of substantially interfering with an individual's employment or performance, or creating an intimidating, hostile or offensive environment.

Implicit in the above definition is that sexual innuendos, jokes, comments, pictures, displays of sexually suggestive materials, or questions are included in the prohibited conduct. Also implicit in the definition is that the policy applies equally between the sexes.

Massachusetts Family Institute
Dedicated to Strengthening the Family

April 27, 2023

Mrs. Carolyn J. Lyons, Superintendent of Schools
Middleborough Public Schools
30 Forest Street
Middleborough, MA 02346

Via Email:

Re: -'s Right to Free Speech

Dear Mrs. Lyons:

I am writing on behalf of Mr. -, a 7th-grade student at Nichols Middle School (NMS). Massachusetts Family Institute represents - , through his father, Chris Morrison, and stepmother, Susan Morrison, regarding a recent incident involving - at NMS.

Factual Background

On Tuesday, March 21, 2023, - wore a t-shirt to school that simply stated, "There are only two genders." - had asked his parents to buy him this shirt because he opposes the idea that there are many (even infinite) genders, which he sees as radical and untrue. He wore the shirt because he wanted to make a statement based on his deeply-held personal and political beliefs regarding the unchangeable nature of gender as a binary of male and female.

Unfortunately, - was not allowed to express his beliefs. Instead, acting principal Heather Tucker

removed him from gym class and met with him and a school counselor in a side room. During that meeting, she told - that his shirt was inappropriate because it made other students upset. She asked him to change his shirt in order to return to class, but - expressed that he could not do so in good conscience. Having reached this impasse, - father and stepmother came and picked him up. - missed the rest of his classes that day.

Following this incident, -'s father communicated with you and inquired about the school's justification for removing - from class and demanding that he change shirts. You replied that - shirt violated the school's dress code, specifically citing the provision which states, "Clothing must not state, imply, or depict hate speech or imagery that target groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification." You stated that "several" students and staff complained about the shirt but did not cite a particular number. You also did not give any examples of disruptions or potential disruptions that the shirt had caused or was likely to cause.

In sum, on the basis of a few complaints by unnamed students and staff, NMS censored - expression of political speech on a topic of ongoing public debate. In doing so, it is clear that NMS violated -'s right to free speech under the First Amendment to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights.

NMS Violated -'s Free Speech Rights by Censoring His Shirt

Public school students do not "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). Generally, unless a school can prove that a student's speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "impinge upon the rights of other students," it may not censor that speech. *Id.* at 509.

In the celebrated case of *Tinker v. Des Moines*, as with - here, students were forbidden from wearing certain apparel to silently express a political and philosophical message that was unpopular with their school's administration. *Id.* at 504. In that case, the attire at issue were black armbands worn to protest the Vietnam War. *Id.* Because there was no evidence that the armbands caused disruption to school operations, other than some "hostile remarks" by a few students, the Court found that the Des Moines school district had violated the protesting students' rights to make their opinions known. *Id.* at 508-09.

Tinker also made clear that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. School officials must show that any restriction on student speech "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

The fact that "discomfort or unpleasantness" arises on account of some students' personal experiences or characteristics does not give a school any more right to censor speech. In a case with

strikingly similar facts to those at issue here, a federal court held that certain students' discomfort with a classmate's shirt that read "Abortion is Homicide" was not enough to justify censoring the shirt. *K.D. v. Fillmore Cent. Sch. Dist.*, 2005 U.S. Dist. LEXIS 33871 (W.D.N.Y. 2005). In that case, the school district argued that the shirt caused a disruption because three female students complained about it and because it could be construed as a direct, personal attack on students who had themselves had abortions. *Id.* at *14; 20. The court rejected both of these arguments. *Id.* It first emphasized that the student's expression was passive in nature; wearing the shirt did not require the student to accost, confront, or debate other students, and if other students wanted to avoid viewing the message, they could choose not to look at the shirt. *Id.* at *19. The court then stressed that the shirt also did not infringe on the rights of other students, holding that "students do not have the right not to be 'upset' when confronted with a viewpoint with which they disagree." *Id.* at *20 (emphasis added).

Other courts have come to the same conclusions in similar cases. *See, e.g., Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 676 (finding it "highly speculative that allowing the plaintiff to wear a T-shirt that says 'Be Happy, Not Gay' would have even a slight tendency to provoke [harassment of gay students], or for that matter to poison the educational atmosphere"); *Pyle by & Through Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 159 (D. Mass. 1994) (upholding student's right to wear sexually suggestive t-shirt and stating that "The First Amendment does not permit official

repression or homogenization of ideas […] even when the expression of these ideas may result in hurt feelings or a sense of being harassed), *vacated on other grounds*, 55 F.3d 20; *C.H. v. Bridgeton Bd. of Educ.*, 2010 U.S. Dist. LEXIS 40038 (D. N.J. 2010) (holding that student had right to wear anti-abortion armband and distribute flyers in school because school presented no evidence that disruption was likely). Indeed, courts have even upheld students' rights to wear "Hitler Youth" buttons and Confederate flag apparel in the absence of a specific showing of substantial disruption. *See DePinto v. Bayonne Board of Education*, 514 F. Supp. 2d 633 (D.N.J. 2007); *Bragg v. Swanson*, 371 F. Supp. 2d 814 (S.D. W. Va. 2005). If these highly controversial statements have been protected, the simple statement of fact on - shirt must be allowed as well. In all of these cases, the operative principle is the same: the point of safeguarding the freedom of speech is not to protect the speech that those in power like, but the speech that they hate. *See United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Here, there is no doubt that the NMS administration and "several" students and staff did not like what - had to say. Indeed, NMS has made its position on gender ideology clear through the use of banners, flags, and curricula. Because - dissented from this orthodoxy, he was censored. But NMS has not pointed to any evidence of substantial disruption that took place because of -'s shirt that would justify such an action; as the cases above make clear, apprehension that some students may be offended, even that they may feel personally attacked, is not enough. Nor is there any evidence that other students'

rights were infringed – how could they have been, when -'s expression was passive and could easily be ignored or avoided? Complaints by other students and staff that - shirt made them feel upset or uncomfortable simply do not come close to the level of disruption required to justify censoring speech.

Finally, it is important to note what - shirt did *not* say. - shirt did not threaten students or staff who identify as transgender. It did not express ill will, disdain, or judgment toward them. Indeed, the shirt did not mention transgender-identifying people at all. It merely stated something that is, from - perspective, a fact: there are only two genders. While this might be a controversial opinion to some, how anyone could construe it as "hate speech" toward transgender-identifying people is baffling. Students who disagree with - opinion should certainly be allowed to express their opposing opinions, but no one should be able to simply shut down speech that makes them upset. By forbidding - from wearing this shirt, NMS intended to silence his dissenting viewpoint and thereby violated his free speech rights under the state and federal constitutions.

The NMS Dress Code's "Hate Speech" Provision is Facially Unconstitutional

The second problem with NMS's censorship of - is that the dress code policy it used to justify doing so is facially unconstitutional. The Federal District Court for the District of Massachusetts has already spoken to this exact issue in *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. at 157. While that case was ultimately vacated on other grounds, the law undergirding the district court's decision remains the

same and would lead to exactly the same outcome in this case. *See id.* In *Pyle*, South Hadley High School's dress code forbade clothing that was "directed toward or intended to harass, threaten, intimidate, or demean an individual or group of individuals, because of sex, color, race, religion, handicap, national origin, or sexual orientation." *Id.* at 162. When the plaintiff students wore sexually suggestive t-shirts, they were disciplined in part under this provision of the dress code. *Id.* at 158-59; 161. The court held that this provision was facially unconstitutional because it discriminated based on viewpoint: speech expressing positive opinions based on race, sex, religion, etc., were allowed, but speech expressing negative opinions on those topics was not. *Id.* at 171. The court found that it was "impossible to avoid the conclusion that the 'harassment' provision of the South Hadley dress code is aimed directly at the content of speech, not at its potential for disruption or its vulgarity." *Id.* It gave the example of two t-shirts, one that supported homosexuality and one that opposed it; the court stated that by censoring only the shirt that opposed homosexuality, the school would be "picking and choosing" between favored and disfavored speech, which would clearly violate the First Amendment. *See id.* at 172-73. After drawing on caselaw from the Supreme Court and multiple other federal circuit and district courts, the Massachusetts Federal District Court concluded that "South Hadley's desire to teach students tolerance of persons with a different religion, race, gender, or sexual orientation is certainly admirable. However, the school cannot silence speech that runs contrary to this laudable goal." *Id.* at 172.

It should be clear that the "hate speech" provision

of NMS's dress code is similarly facially unconstitutional and would be struck down if challenged in federal court. By allowing speech that supports gender identity ideology, but forbidding speech that opposes it, NMS is unconstitutionally "picking and choosing" speech that it favors and disfavors. - shirt did not in fact come close to expressing "hate speech" toward transgender-identifying students, but even had it done so, it could not be prohibited absent evidence of a material and substantial disruption to school operations. *Id.* at 173.

Conclusion

- intends to wear his shirt again on Friday, May 5th. Now that NMS is on notice that hindering him from wearing the shirt is a violation of his constitutional rights, we trust that it will not interfere with - doing so again. If it does, it may be necessary to take legal action against the school district. Please confirm in writing at your earliest opportunity that - will be allowed to wear the shirt.

Thank you for your time and attention to this matter. Please forward this letter to your school district's legal counsel. I look forward to your prompt response.

Sincerely,

Samuel J. Whiting, Esq.
Staff Attorney
Massachusetts Family Institute
sam@mafamily.org
781-569-0400

CC: Middleborough School Committee
Andrew Beckwith, Esq.

STONEMAN, CHANDLER & MILLER LLP

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JOHN M. SIMON

KATE CLARK
COLLEEN SHEA
JUSTIN R. GOMES
NIMESHA P. PERERA
GARRETT A. D. OEE
THOMAS P. DELMAR

MIRIAM K. FREEDMAN
OF COUNSEL

May 4, 2023

Via Electronic Mail: sam@mafamily.org
Samuel J. Whiting, Esquire
Massachusetts Family Institute
401 Edgewater Place, Suite 580
Wakefield, MA 01880

Re: --

Dear Attorney Whiting:

Please be advised that this firm and the undersigned represent the Middleborough Public Schools ("MPS"). Your letter to Superintendent Carolyn J. Lyons, has been sent to us for response. All future correspondence and communications should be directed to me at the above address.

While your letter contains a number of legal conclusions and interpretation of cases with which we strongly disagree, no purpose would be served by debating those cases or legal conclusions at this time. Suffice it to say that the United States Supreme Court made it clear that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 504, 508 (1969) did not involve "evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of the collision with the rights of other students to be secure and to be let alone. Accordingly, [that case did] not concern speech or action that intrudes upon the work of the

schools or the rights of other students."

At the present time, Massachusetts law provides protection against discrimination, harassment and bullying on the basis of sexual orientation and gender identity. See M.G.L. c. 71, § 37O; c. 76, § 51; 603 C.M.R. 26.00; Massachusetts Department of Elementary and Secondary Education ("DESE"), Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment, https://ww.doe.mass.edu/sfs/lgbtq/genderidentify.html#5. Those protections prohibit communications, whether oral, written, electronic or through the wearing of apparel, that may reasonably be considered intimidating, hostile, offensive or unwelcome based on race, color, religion, national origin, sex, sexual orientation, gender identity or any other status protected by law and/or may otherwise be reasonably likely to lead to a disruption of its operations. *Id.* It is in this legal context, that MPS has, and will continue to, prohibit the wearing of a t-shirt by - Morrison or anyone else which is likely to be considered discriminatory, harassing and/or bullying to others including those who are gender nonconforming by suggesting that their sexual orientation, gender identity or expression does not exist or is invalid.

Very truly yours,

/s/ Kay H. Hodge
Kay H. Hodge

cc: Carolyn J. Lyons, Superintendent
(Via electronic mail)