No. 24-410

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 ET AL.,

Respondents.

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

---

AMICUS CURIAE BRIEF OF J.R., A MINOR, BY AND THROUGH HIS MOTHER AND GENERAL GUARDIAN, EDEN HOPE RODRIGUEZ, AND CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

William E. Trachman
Counsel of Record
James L. Kerwin
MOUNTAIN STATES LEGAL FOUNDATION
2596 S Lewis Way
Lakewood, CO 80227
(303) 292-2021
wtrachman@mslegal.org

John C. Eastman
Anthony T, Caso
CONSTITUTIONAL COUNSEL GROUP
1628 N. Main St, #289
Salinas, CA 93906
(909) 257-3869
jeastman@ccg1176.com

Attorneys for Amici Curiae

November 12, 2024

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
IDENTITIES AND INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT	4
I. The Court Should Grant Review to Hold that Student Speech that Contributes to the Marketplace of Ideas Can Never Be Suppressed Based Solely on the School Officials' Opposition and Predicted Psychological Strain Felt by Listeners	4
II. The Court Should Grant Review to Protect Students' Rights to Share Views on Controversial Topics	13
III. The Court Should Grant Review to Rule that Speech Reflecting Foundational Legal Principles That Have Been Repeatedly Reaffirmed by the Supreme Court Cannot be Suppressed as Disruptive.	21
Conclusion	27

TABLE OF AUTHORITIES

<u>CASES</u> <u>PAGE(S)</u>

303 Creative LLC v. Elenis,
143 S. Ct. 2298 (2023).................................... 9

Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.,
57 F.4th (11th Cir. 2022) 24, 26

Ballard v. United States,
329 U.S. 187 (1946).. 21

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1985).. 8

Blackwell v. Issaquena Co. Bd. of Ed.,
363 F.2d 749 (1966) 6

Bostock v. Clayton County,
590 U.S. 644 (2020).. 3

Dep't of Educ. v. Louisiana,
603 U.S. 866, 144 S. Ct. 2509 (2024)............. 26

Dobbs v. Jackson Women's Health Org.,
142 S. Ct. 2228 (2022).................................... 21

Frontiero v. Richardson,
411 U.S. 677 (1973).. 21

Gitlow v. New York,
268 U.S. 652 (1925).. 15

Harper v. Poway Unified Sch. Dist.,
445 F.3d 1166 (9th Cir. 2006) 12

Mahanoy Area Sch. Dist. v. B. L. by & through Levy,
594 U.S. 180 (2021).................................. 7, 13, 20

Matal v. Tam,
582 U.S. 218 (2017).. 7

Meriwether v. Hartop,
992 F.3d 492 (6th Cir. 2021) 13

Murthy v. Missouri,
144 S. Ct. 1972 (2024).................................... 2

National Institute of Family Life Advocates v. Becerra,
585 U.S. 755 (2018).. 2

National Rifle Ass'n v. Vullo,
602 U.S. 175 (2024).. 2

Neese v. Becerra,
2022 WL 1265925 (N.D. Tex. 2022) 24

Newport News Shipbuilding and Dry Dock Co. v. EEOC,
462 U.S. 669 (1983).. 21

Parents Defending Ed. v. Linn Mar Comm. Sch. Dist.,
2023 WL 6330394 (8th Cir., 2023) 13

Police Dep't of City of Chicago v. Mosley,
408 U.S. 92 (1972).................................... 20

Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.,
605 F.3d 703 (9th Cir. 2010) 10

Saxe v. State Coll. Area Sch. Dist.,
240 F.3d 200 (3rd Cir. 2001) 7, 10

Street v. New York,
394 U.S. 576 (1969)....................................... 7

Thornhill v. Alabama,
310 U.S. 88 (1940)... 17

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969).................................. 4, 5, 6, 9

Tuan Anh Nguyen v. I.N.S.,
533 U.S. 53 (2001).. 21

United States v. Virginia,
518 U.S. 515 (1996)....................................... 21

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943)....................................... 2, 14

Constitutional Provisions and Statutes

U.S. Const. Amend. I 15

20 U.S.C. § 1681(a)(2) 24

20 U.S.C. § 1681(a)(8) 24

Regulations

34 C.F.R. pt. 106 26

34 C.F.R. § 106.33 25

34 C.F.R. § 106.34(a)(3) 25

34 C.F.R. § 106.37(c)(1) 25

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) 26

Other Authorities

AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848).... 17

Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840 at 431)..................... 15

Common Sense, CITIZEN PAINE (Madison House 2002)........... 16

Declaration of Rights and Other Amendments, North Carolina Ratifying Convention (Aug. 1, 1788)... 19

James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) 14

New York Ratification of Constitution, 26 July 1788, *Elliot 1:327—31* 19

The Firstness of the First Amendment, 65 Yale L.J. 464 (1956) 15, 20

Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) 15

Transgender women must sign up for military draft under Biden admin, trans men get a pass, Fox News, Oct. 11, 2022 25

U.S. Dep't of Educ., Off. for Civil Rts., Annual Report to the Secretary, the President, and the Congress, at 27 (2021) 23

IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

J.R., is a teenager who's willing to stand up for what he believes. But in 2023, when J.R. was only 12 years old, officials at J.R.'s school prohibited J.R. from displaying a Gadsden Flag on his backpack. They also stopped him from displaying Velcro patches on his backpack in support of the Second Amendment of the United States Constitution.

School officials took this action notwithstanding the fact that J.R.'s display of these patches had caused no disruption at the school for years. J.R. is now pursuing litigation in the United States District Court for the District of Colorado, represented by Mountain States Legal Foundation, and supported by the Center for Constitutional Jurisprudence, through his mother and general guardian, to protect his First Amendment right to express himself, in a manner that does not cause disruption, at school.

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful

[1] All parties have been notified of amici's intent to file this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

and preeminent authority in our national life, including the natural right of freedom of speech. The Center has previously appeared before this Court as counsel of record or *amicus curiae* in several cases addressing these issues, including *Murthy v. Missouri*, 144 S. Ct. 1972 (2024); *National Rifle Ass'n v. Vullo*, 602 U.S. 175 (2024); and *National Institute of Family Life Advocates v. Becerra*, 585 U.S. 755 (2018), to name a few.

This case is of interest to *amici* because of the school's blatant censorship of student speech that in no way disrupts the school's educational mission.

SUMMARY OF ARGUMENT

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), this Court described—in the education context no less—as a "fixed star in our constitutional constellation" the precept that "no official, high or petty, can prescribe what shall be orthodox … in … matters of opinion."

Eighty-one years later, some school officials still haven't gotten the message. Indeed, many have decided that there are opinions, or even statements of objective biological fact, that simply cannot be uttered. For instance, LM wore a shirt to his public middle school stating the scientific and legal truism that "there are only two genders." This message could reasonably be interpreted as a critique—albeit a mild one—of fashionable elite ideologies concerning sex and gender. It is not, however, appropriate to

suppress a student's speech because the listeners of that speech are likely to overreact, act unreasonably, or disrupt the school environment. This Court should grant the writ of certiorari to reinforce (1) that *Tinker*'s disruption standard is not a right to a "heckler's veto"; and (2) the Framers did not envision an exception to the First Amendment for speech that was loathed by one political faction.

Officials may believe that the message that "there are only two genders" is controversial. However, it is a statement of fact, as this Court has reaffirmed time and again, including, most recently, in *Bostock v. Clayton County*, 590 U.S. 644 (2020), as a matter of foundational legal principle: *there are in fact, only two genders*. Applying *Tinker* and its progeny to allow government curtailment of speech that expresses a legally accurate statement, particularly one that a student might just as likely hear in a government or biology class as on a t-shirt is a clear danger to the First Amendment right of students. LM's expression thus cannot be limited, consistent with the First Amendment.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Hold that Student Speech that Contributes to the Marketplace of Ideas Can Never Be Suppressed Based Solely on the School Officials' Opposition and Predicted Psychological Strain Felt by Listeners

Public schools ought to inculcate the culture and practice of free speech among rising generations of Americans. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (cleaned up). This is why students maintain free speech rights past "the schoolhouse gate," *id.* at 506, and why, once inside, they are not to be treated as "closed-circuit recipients of only that which the State chooses to communicate," *id.* at 511. Consistent with these principles, this Court has repeatedly reaffirmed that school officials have a duty to foster open debate, including encouraging, if not acceptance, then at least tolerance, of unpopular opinions.

In its seminal *Tinker* opinion, the Court addressed whether a high school could regulate symbolic speech protesting the Vietnam War—one of the most weighty public issues of the day. 393 U.S. at 510 n.4 (noting that our involvement in the Vietnam War had been "the subject of a major controversy for some time [and that the] debate . . . had become vehement in many localities."). Several students planned, as part of a broader movement, to wear black armbands in class to bear "silent . . . witness" against the war, but not to otherwise engage in any speech or conduct. *Id.* at 514. The Court held that the school's enforcement of a hastily adopted policy prohibiting armbands violated the students' First Amendment rights. *Id.* at 508-14.

"The classroom is peculiarly the marketplace of ideas." *Id.* at 512 (cleaned up). The *Tinker* Court found that school officials could not conclude that silently wearing two-inch black armbands would materially disrupt school operations. *Id.* at 509-10. Accordingly, the school's attempt to suppress its students' speech was unconstitutional. Here, LM's expression similarly concerned important social issues at the core of First Amendment values, and could not be prohibited, absent conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

Tinker did not provide a comprehensive analysis of what it meant by the suggestion that student speech that "invades" or "collides with the rights of others" could be regulated by school authorities. Nevertheless, *Tinker*'s holding is irreconcilable with the proposition that school authorities are at liberty to regulate speech on matters of public concern merely "to avoid . . . discomfort and unpleasantness." *Id.* at 509. In passing, the *Tinker* court adopted language about the "collision with the rights of others" directly from the Fifth Circuit's opinion in *Blackwell v. Issaquena Co. Bd. of Ed.*, 363 F.2d 749 (1966). *See Tinker*, 393 U.S. at 513.

In *Blackwell*, however, there was no question that the speech at issue interfered with the school's ability to educate students, and the students' ability to learn. 363 F.2d at 751-54. Specifically, as part of a multi-day series of student protests, students stayed

out of class and engaged in loud disturbances in school hallways, physically accosted other students who did not wish to be part of the protest, and even forced them to wear supportive buttons under threat of assault. The plaintiff students aggressively insulted their principal by calling him an "Uncle Tom," "threw [protest] buttons into the building through the windows," and generally subjected non-participating students to "harassment" that made it impossible for them to learn. *Id.* at 751-53.

Against this background, the Fifth Circuit had little trouble finding that the protests involved "an unusual degree of commotion, boisterous conduct, [and] a collision with the rights of others." *Id.* at 754. The limited categories of "rights of others" to which the Fifth Circuit referred (and which the Supreme Court later implicitly adopted in *Tinker*) then, were (1) the right not to be forced to join a protest, (2) the right of bodily integrity (*i.e.*, a right against being forced to wear an unwanted protest button), and (3) a right to be free from a multi-day spree of chaos and disorder rendering learning all but impossible.

The First Amendment withdraws from the State any power to "shield" others from *mere ideas* that can potentially cause distress in sensitive listeners. *See, e.g.*, *Matal v. Tam*, 582 U.S. 218, 223 (2017) (citing the "bedrock First Amendment principle [that s]peech may not be banned on the ground that it expresses ideas that offend"); *Street v. New York*, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are

themselves offensive to some of their hearers."); *accord Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 192 (2021) (declining to find substantial disruption or "harm to the rights of others" where student speech caused "some members of the cheerleading team [to be] 'upset'"); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001) (Alito, J.) ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."). This is all the more true where the alleged emotional distress is felt not by "a particular member of the school community, but [is] based on [a generalized feeling of] negativity put out there . . . in the school." *Mahanoy*, 141 S. Ct. at 2048.

In contrast, where student speech does not involve the expression of ideas on matters of public concern, but rather consists merely of juvenile outbursts, bullying, harassment, or otherwise low- or zero-value expression, the "personal sensibilities of . . . [the] audience[]," can, in narrow circumstances, be considered by a school official in suppressing speech. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1985).

In *Fraser*, for example, this Court countenanced regulation of student speech "unrelated to any political viewpoint," *id.* at 685, that was characterized by "pervasive sexual innuendo" and delivered to a school assembly of 600 children, *id.* at 677-83, "many of whom were only 14 years old and on

the threshold of awareness of human sexuality," *id.* at 683. Given that the lewd content of the "confused boy['s]" speech could create "offens[e] to both teachers and students—indeed to any mature person [and] was acutely insulting to teenage girl students," *id.*, the Court held that it could be suppressed by school officials, *id.* at 680.

On the other hand, where a student is engaging in speech on important public topics, the fact that audience members may take offense or feel personally attacked carries little, if any, weight in the First Amendment analysis. Indeed, in *Tinker* itself, there was evidence that wearing black armbands in opposition to the Vietnam War would engender traumatic feelings in classmates whose friend had been killed in the war. 393 U.S. at 509 n.3. Yet against the background of high-value speech on a topic of utmost public importance, the Supreme Court did not suggest in any way that the undeniable emotional impacts on students who might naturally feel offended on behalf of their fallen classmate amounted to an invasion of their rights. *Id.* at 509; *see also Mahanoy*, 141 S. Ct. at 2055 (Alito, J. concurring) ("At the other end of the spectrum, there is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that . . . addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection.") (citations omitted); *accord 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023) ("[T]he First Amendment protects

an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply 'misguided' and likely to cause 'anguish' or 'incalculable grief.'") (internal citations omitted); *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) ("Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched.").

All of this makes particularly good sense in the public-school setting. Ideally, public schools have the primary mission of educating students. *See, e.g.*, *Saxe*, 240 F.3d at 217. This includes instruction in such things as literature, history, and science, but also, crucially, includes the very important role of inculcating a culture of free speech and tolerance for the views of others—even views that can cause hurt and dismay in listeners. *See, e.g.*, *Mahanoy*, 141 S. Ct. at 2046 (because "America's public schools are the nurseries of democracy. . . . schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"); *id* at 2049 (Alito, J. concurring) ("[P]ublic schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government.").

Student conduct that genuinely interferes with

the functions of a public school may be addressed by school administrators. If, for instance, speakers are marching in and out of classrooms, accosting students who do not wish to join in, chanting, and drowning out instructors' voices, hardly any learning at all can take place. This is the *Tinker* "substantial disruption" prong.

This is different, however, from a "hecklers' veto" theorized by school officials. Allowing censorship based on the hypothetical disruption that might be caused by others is antithetical to the First Amendment. Schools have no substantial interest in allowing suppression of ideas because some group of students is ready to respond in a disruptive, even violent way to speech that they do not like.

Absent substantial disruption caused by the student speaker, however, if a student listener experiences psychological distress when exposed to speech on a matter of public concern, the mission of the educational institution includes not only a duty to foster a necessary respect for the right of others to speak, *Mahanoy*, 141 S. Ct. at 2046, but also to *help that student* develop resilience and a sense of self-worth that comes with responding to and attempting to refute the disagreeable speech. After all, suppressing objectionable ideas only forces them to be "whispered behind backs or scribbled on bathroom walls," while "confronting . . . such views in a public forum may well empower [allegedly distressed] students, contributing to their sense of self-esteem." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166,

1200 (9th Cir. 2006) (Kozinski, J. dissenting), *vacated as moot by* 549 U.S. 1262 (2007). Helping create the next generation of citizens who have a proper respect for free speech may sometimes require that school administrators address the overreactions of students who feel "threatened," "harmed," or "offended" by others' opinions (not to mention statements of objective biological fact); and those students in turn can benefit from standing up to oppose—through reasoned debate—the speech with which they disagree.

Regardless of whether one agrees or disagrees with LM's expression, it is beyond argument that it represents the sharing of a social and political point of view and, therefore, a contribution to the marketplace of ideas. Because the speech at issue goes to core First Amendment concerns, this Court should hold that it is categorically exempt from regulation based solely on the alleged psychological impact on listeners. *See Parents Defending Ed. v. Linn Mar Comm. Sch. Dist.*, No. 22-2927, 2023 WL 6330394, at *4 (8th Cir., Sept. 29, 2023) (student speech stating the belief that "biological sex is immutable," is not "bullying" or "harassment" amenable to proscription under the *Tinker* "rights of others" standard, but rather represents an "open exchange of ideas" protected by the First Amendment despite its potential to offend); *cf. Meriwether v. Hartop*, 992 F.3d 492, 510 (6th Cir. 2021) (enforcement of university gender identity speech policies would amount to an unconstitutional attempt "to discipline professors, students, and staff any time their speech might cause offense.").

II. The Court Should Grant Review to Protect Students' Rights to Share Views on Controversial Topics.

There is little to no evidence that, at the time of the Founding, the First Amendment was meant to enshrine a broad right to a heckler's veto for students in public schools. The Framers, no strangers to controversial speech themselves, were unlikely to have even contemplated such an exception. *See Mahanoy*, 594 U.S. at 202 n. 14 ("At the time of the adoption of the First Amendment, public education was virtually unknown, and the Amendment did not apply to the States.").

Because *Tinker* is baked into this Court's precedents, and the manner in which the lower court applied *Tinker* grants a heckler's veto to disruptive students and administrators, the Court ought to grant a writ of certiorari in this matter to emphasize that *Tinker* is not a "get-out-of-jail-free" card for schools that want to suppress traditional or conservative ideas, much less biological facts that might make some uncomfortable.

Rather, the Court should ground its analysis in the broad principles enshrined in the First Amendment. The free speech clause preserves the natural right to liberty of conscience. That generally includes the right to hold one's own opinions, and to share those opinions with others to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his

opinions and the free communication of them."). Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642.

The founding generation rejected the idea that government officials should wield such power. They instead recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840 at 431).

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that freedom. U.S. Const. Amend. I. (That prohibition extends to state and local governments. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).) As Thomas Cooley noted, the First Amendment's guarantee of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW,

(Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet *Common Sense* urged his fellow citizens to take direct action against the Crown. John P. Kaminski, CITIZEN PAINE (Madison House 2002) at 7.

Such speech was not protected under British rule. Paine thus chose to publish *Common Sense* anonymously in its first printing. *See id*. Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack the British at Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British, and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the founding generation set out to draft their first state constitutions, even in the midst of the war. These constitution writers were careful to set out express protections for speech.

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the

press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The revolution against the Crown was not the only topic of controversy that generated pamphlets in this period. The abolition of slavery was a topic that divided the nation in the late 1700's, and that would send the nation into civil war in the 1800's. The Pennsylvania Abolition Society, formed in 1775, was one organization that pushed its views on others. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. The Society and other abolitionists during this period engaged in legal actions, published books against slavery, circulated petitions, and distributed pamphlets. *See id.* at 17-18. The focus of their efforts was to convince their fellow citizens of the inherent evils of slavery. In their own way, the abolitionists were an early example of a right to life organization, promoting the view that we are equal in the eyes of our Creator and entitled to life and liberty.

The arguments offered by the abolitionist were designed to capture the attention of their fellow citizens. In the words of William Garrison, in his anti-slavery newspaper, "The Liberator," "I do not wish to think, or speak, or write, with moderation … I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE

HEARD." *The Liberator*, vol. 1, issue 1, January 1, 1831 (image available at http://fair-use.org/the-liberator/1831/01/01/the-liberator-01-01.pdf).

Notwithstanding the controversial nature of speech activity in the latter half of the 18th Century, the founders were steadfast in their commitment to protect speech rights. The failure to include a free speech guarantee in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 The Documentary History of the Ratification of the Constitution at 149-50; *Letter of George Lee Turberville to Arthur Lee*, reprinted in 8 The Documentary History of the Ratification of the Constitution at 128; *Letter of Thomas Jefferson to James Madison*, reprinted in 8 The Documentary History of the Ratification of the Constitution at 250-51; *Candidus II*, Independent Chronicle, reprinted in 5 The Documentary History of the Ratification of the Constitution at 498; *Agrippa XII*, Massachusetts Gazette, reprinted in 5 The Documentary History of the Ratification of the Constitution at 722.

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 The Documentary History of the Ratification of the Constitution at 1553. For its part, North Carolina

proposed a similar amendment. *See Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18. New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 The Founders' Constitution, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 The Documentary History of the Ratification of the Constitution.

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF RIGHTS (Helen Veit, *et al.* eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guarantee in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

The First Amendment prohibited government from attempting to silence citizens, especially on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They

nonetheless insisted on including a prohibition on "abridging freedom of speech" in their new Constitution.

"America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190. And students who grow up fearful of saying controversial things will become adults who have the same fears, to the detriment of the country. Unfortunately, lower courts are using *Tinker* to grant a broad heckler's veto to those who are hostile to conservative and traditional views. That is deeply in tension with this Court's statement that "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The Court should grant review to hold that school officials cannot strategically rely on *Tinker* in order to suppress speech that they disagree with.

III. The Court Should Grant Review to Rule that Speech Reflecting Foundational Legal Principles That Have Been Repeatedly Reaffirmed by the Supreme Court Cannot be Suppressed as Disruptive.

This Court has held that there are two sexes, and that the differences between the two sexes are

based on biology. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring: '[T]he *two sexes* are not fungible[.]'") (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (emphasis added); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]") (emphasis added); *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) ("[T]he mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father."); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("[O]nly women can become pregnant[.]"); *accord Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2346 (2022) (dissenting opinion of JJ. Breyer, Sotomayor, and Kagan) ("[A] majority of today's Court has wrenched this choice from *women* and given it to the States.") (emphasis added).

LM's utterance that there are "two genders," by which he means that there are "two sexes," based on biology, is therefore a matter of fact as a legal statement, and thus should generally not be subject to

governmental regulation.[2]

Most recently, in *Bostock*, this Court relied on the time-tested truth that sex is binary and biologically determined. *Bostock*'s key passage is the following:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an

---

[2] Not to mention that the statement is undoubtedly true as a matter of biology. The fact that there are rare disorders of sexual development that sometimes make it difficult as a practical matter to determine whether an infant is male or female or sometimes result in external genitalia that appear to be ambiguous does not mean that there are more than two sexes, any more than the fact that in some rare cases persons are born with more than ten fingers means that humans are not mammals with ten fingers. Helen Joyce, TRANS: WHEN IDEOLOGY MEETS REALITY 64-65 (2022 paperback ed.) ("Sexes are classes of organisms defined by the developmental pathways that evolved to produce gametes: eggs and sperm. As with any part of the body, reproductive organs may develop in anomalous ways, just as some people are born with extra fingers or toes, or missing eyes or legs, but humans are still ten-fingered and ten-toed, binocular and bipedal. For there to be even three sexes there would have to be a third gamete, and there is not." (internal quotation marks omitted)).

> employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

140 S. Ct. at 1741–42; *see also* U.S. Dep't of Educ., Off. for Civil Rts., Annual Report to the Secretary, the President, and the Congress, at 27 (2021) ("The Court's holding stated that it was assuming that sex referred to an employee's biological sex, but in fact the Court's holding in *Bostock* relies on that assumption, by noting that the employee who identifies as female is biologically male[.]"). It is therefore a jurisprudential truth that there are "only two sexes."

Moreover, there are many statutes at the state and federal levels that explicitly rely on the binary nature of sex. As just one example: Title IX of the Education Amendments of 1972 prohibits recipients of federal funds—like schools—from discriminating on the basis of sex, and treats sex as limited to the binary categories of male and female, both objective and fixed. 20 U.S.C. § 1681(a)(2) ("[T]his section shall not apply . . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*[.]") (emphasis added); *see also* 20 U.S.C. § 1681(a)(8) ("[T]his section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of *one sex*, opportunities for reasonably

comparable activities shall be provided for students of *the other sex*[.]") (emphasis added); *see also Adams*, 57 F.4th at 813 ("[R]eading in ambiguity to the term 'sex' ignores the overall statutory scheme and purpose of Title IX, along with the vast majority of dictionaries defining 'sex' based on biology and reproductive function."); *see also Neese v. Becerra*, No. 2:21-cv-163-z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'").

Not to be left out, the executive branch has also confirmed its view of sex as a binary in numerous regulations, including under Title IX. *See, e.g.*, 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of *one sex* shall be comparable to such facilities provided for students of *the other sex*.") (emphasis added); 34 C.F.R. § 106.34(a)(3) ("Classes . . . in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*.") (emphasis added); *cf.* 34 C.F.R. § 106.37(c)(1) ("To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of *each sex* in proportion to the number of students of *each sex* participating in interscholastic or intercollegiate athletics.") (emphasis added); Emma Colton, *Transgender women must sign up for military draft under Biden admin, trans men get a pass*, Fox News, Oct. 11, 2022 ("Transgender women must still

register for the military draft, according to the U.S. Selective Service. … Individuals who were born female, but identify as male do not need to register for the military draft, per the government.”).[3]

Indeed, when the Department of Education promulgated regulations under Title IX in 2020, it once again properly emphasized this point in the preamble to those regulations: “Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department’s current regulations, which the Department did not propose to revise in this rulemaking, reflect this presupposition.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,178 (May 19, 2020) (codified at 34 C.F.R. pt. 106) (emphasis added); *see also Adams*, 57 F.4th at 813 (“If sex were ambiguous, it is difficult to fathom why the drafters of Title IX went through the trouble of providing an express carve-out for sex-separated living facilities, as part of the overall statutory scheme.”). And this Court has unanimously indicated that expanding the definition of sex discrimination to include all gender identity discrimination is questionable. *See Dep’t of Educ. v. Louisiana*, 603 U.S. 866, 144 S. Ct. 2509, 2510 (2024) (“Importantly, all Members of the Court today accept that the plaintiffs were entitled to

---

[3] https://www.foxnews.com/us/transgender-women-must-sign-up-military-draft-biden-admin-trans-men-pass

preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity.”).

In sum, given that as a legal matter, *there are in fact only two sexes*, and given that this biological and jurisprudential reality has been repeatedly reaffirmed by all branches of government at all levels, students are almost certain to hear it repeated in many walks of life, including their biology, social studies classes, government classes that include units on the Supreme Court, and of course news media and casual conversations. No case has ever held that a legally true statement that a student could just as likely hear in his or her classes suddenly becomes an identity-based attack that disrupts the rights of others, when placed on a t-shirt. This is an independent reason to grant certiorari.

Conclusion

For the foregoing reasons, this Court grant review in order to uphold LM’s claim, and hold that his school violated his First Amendment rights.

Respectfully submitted,

William E. Trachman
Counsel of Record
James L. Kerwin
MOUNTAIN STATES
LEGAL FOUNDATION
2596 S Lewis Way
Lakewood, CO 80227
(303) 292-2021
wtrachman@mslegal.org

John C, Eastman
Anthony T, Caso
CONSTITUTIONAL
COUNSEL GROUP
1628 N. Main St
#289
Salinas, CA 93906
(909) 257-3869
jeastman@ccg1176.com

November 12, 2024

Attorneys for Amici Curiae