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

Brief *Amicus Curiae* of America's Future, Public Advocate of the United States, Public Advocate Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, Public Advocate Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

In March of 2023, L.M., a 12-year-old James T. Nichols Middle School student, wore a shirt to school that read, "There are only two genders." *L.M. v. Town of Middleborough*, 677 F. Supp. 3d 29, 33 (Dist. Mass. 2023) ("*LM I*"). The student chose that message in response to the school's flood of messages to students promoting the view that "sex and gender are self-defined, limitless, and unmoored from biology." Petition for Certiorari ("Pet. Cert.") at 2. The school

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

required him to remove the shirt. When L.M.'s father asked the school why he had been required to remove the shirt, school officials responded that they would continue to prohibit L.M.'s shirt 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.'" *LM I* at 35.

On May 5, 2023, L.M. wore the shirt to school again, "but with the phrase 'ONLY TWO' covered by a piece of tape with the word 'CENSORED.'" *Id.* at 35. Again, the school required him to remove the shirt. *Id.*

L.M.'s father and stepmother brought suit on his behalf in the District of Massachusetts, alleging violations of his First Amendment speech rights. *Id.* at 32. Noting that "a group of potentially vulnerable students will not feel safe," the district court ruled that L.M. had not shown that the school had violated his constitutional rights. *Id.* at 38. The district court ruled that the school's action "falls within the 'invasion of the rights of others' framework of *Tinker*" *v. Des Moines Independent Community School District,* 393 U.S. 508 (1969).

On appeal, the First Circuit upheld the district court, on different grounds. Finding that the shirt could produce a disruption of the educational environment at the school, the First Circuit ruled that "regardless of whether *Tinker*'s rights-of-others limitation applies here, we conclude that *Tinker*'s material-disruption limitation does," and upheld the

district court on those grounds. *L.M. v. Town of Middleborough*, 103 F.4th 854, 866 (1st Cir. 2024) ("*LM II*")

SUMMARY OF ARGUMENT

The First Circuit conducted a remarkably thorough review of district and circuit court cases on various types of school speech issues since *Tinker*. It then synthesized those cases, and came up with an approach which it found reasonable, but which fails to follow, and actually circumvents *Tinke*r, authorizing school censorship in the absence of any real threat of substantial disruption.

In full accord with modern transgender ideology, the Circuit Court focused extensively on the feelings of the "trans" students, stressing the risk that they could injure themselves — neither of which factors demonstrates *ipse dixit* substantial disruption of the school. It may indicate that these students had deep-seated emotional troubles, but so do many other students. If the school truly wished to protect the excessively sensitive, it would need to prohibit any comment on clothes, facial features, manner of speaking, academic performance, family situation, or a host of other features which lead to critical comments. It has often been said, children can be cruel, and anyone who has worked in a school knows that to be true. But here there was no cruelty and no targeted comments. Discussion of politics or religion could be banned by this test. Where is the line to be drawn, other than to protect the peculiar sensitivities of those who have fallen into Transgenderism.

The circuit court spoke of students "who had been bullied based on their gender identities," and those "who had self-harmed, contemplated suicide, or attempted to commit suicide 'because of their gender identity.'" *LM II* at 860. The court lauded the motivations of the school system which was trying to do the right thing by developing a reasonable approach, as if those goals were synonymous with a constitutionally permitted approach. While giving lip service to the need of schools to permit students to take different positions on controversial issues, the court viewed any statement remotely critical of "trans" ideology as hateful to those students. Even though the statements on the shirt were not directed to anyone particular, the court viewed them as hostile, offensive, unwelcome, and the equivalent of harassment or bullying. *Id.* at 862. The court focused on the need of the school to make students "feel safe, supported, and fully included." *Id.* at 864. The court assumed that any statement thought to be "demeaning" which had "the potential for the back-and-forth of negative comments and slogans between factions of students" could result in disruption. *Id.* at 884. Well, any disagreement on any controversial issue could lead to "back-and-forth" which is also known as dialogue, even if negative in nature. In the end, the court seemed persuaded by "the reasonableness" of the school district's approach. *Id.* at 878. However, the court's feelings about how to protect the feelings of trans students does not resolve the constitutional issue presented here.

These *amici* also address the speech issue here in context, demonstrating that the school is adopting one

viewpoint and one religious view, to the exclusion of others. Throughout our nation's history, those exercising government power are routinely tempted to censor views of which they disapprove, and push those views they embrace. When fads such as the Cult of Transgenderism arise on the scene, they do not last, and eventually society returns to normal. Until that happens, the Courts must protect the speech of those who displease those wielding government power.

ARGUMENT

I. THE SCHOOL BOARD FAILED TO MEET ITS BURDEN TO JUSTIFY ITS POLICY CENSORING THE SPEECH OF STUDENTS UNDER *TINKER*.

A. The *Tinker* Standard.

The First Circuit below identified the correct issue and then accurately identified and quoted the relevant language from the controlling Supreme Court authority, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Nevertheless, it contorted *Tinker,* as well as various district and circuit court cases applying it, to create a new test, causing it to reach a profoundly incorrect result. After analyzing several circuit courts that have applied *Tinker*, the First Circuit came up with what might be among the most convoluted legal tests ever devised in First Amendment jurisprudence. Under this test:

> 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**[2] 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**...." [*LM II* at 873-74 (emphasis added).]

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[2] The court's standard articulated here — "given the common understanding that such characteristics are 'unalterable or otherwise deeply rooted' — is deeply confusing. Is the court discussing biological sex, which is most certainly "unalterable" or perceived gender, which is anything but "unalterable" and "deeply rooted"? Indeed most of the "scholarship" on transgenderism asserts the fluid nature of gender based on transitory feelings, not biological reality. *See* M. Rothblatt, The Apartheid of Sex at 16 (Crown Publishers: 1995) ("The guiding principle of [transgenderism] is that people should be **free to change**, either temporarily or permanently, the sex type to which they were assigned since infancy. Transgenderism makes manifest the continuum nature of sex types because even if a sex type was real at birth, it can now be **changed at will** during one's life." (Emphasis added.)).

Although *Tinker* clearly puts this burden of proof on "school officials" to demonstrate to the satisfaction of the court that there would be substantial disruption, the First Circuit abdicated its duty to review that finding, rather deferring to the school board, with respect to its central "demeaning" requirement which is referred to four times in its novel test. The court punted on its responsibility to the First Amendment, stating:

> [w]e 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.... [W]e see no basis for substituting our judgment for Middleborough's as to whether the Shirt demeaned the gender identities of other students.... [*LM II* at 879-80.]

In other words, whatever the school board does is fine with the First Circuit. This explanation is well beyond deference; it is abdication.

B. Material Disruption.

Again, the circuit court adopted the position of the school board regarding the message on L.M.'s shirt, as it declined to "second-guess[] Middleborough's assessment that there was the requisite basis for the forecast of material disruption." *Id.* at 881.

The court agreed with the school, "First, there is the demeaning nature of the message." *Id.* "Second ... Middleborough was not acting on abstract concerns

about the potential impact of speech demeaning the gender identities of some students at" the school. *Id*. at 882. "Finally, precisely because the message was reasonably understood to be so demeaning," the First Circuit concluded that the school could foresee the shirt leading to "a deterioration in the school's ability to educate its students." *Id*. (citing *Nuxoll ex rel. Nuxoll v. Indian Prairie School District*, 523 F.3d 668, 672 (7th Cir. 2008)).

Notably, none of the record evidence cited by the panel even mentions actual "disruption" of any sort, and certainly not "substantial" or "material" disruption. Rather, all of this supposed evidence falls in the category that *Tinker* described as "the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker* at 509.

All that the First Circuit was provided on which to rely was the school's "legitimate reason to be worried" regarding reaction to the message on L.M.'s shirt. The basis for the school's forecast was never stated, but perhaps it was a prediction that a girl who already suffers from the mental disturbance of gender dysphoria, who is then infused with large amounts of testosterone which makes people more aggressive[3],

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[3] *See, e.g.,* A. Powell, "How a hormone affects society," *The Harvard Gazette* (Sept. 17, 2021). T. Kristensen, "Effects of testosterone therapy on constructs related to aggression in transgender men: A systematic review," HORMONES AND BEHAVIOR, vol. 128 (Feb. 2021) ("Transgender men are assigned female sex at birth, but identify as men. The anabolic and androgenic sex hormone testosterone has been positively associated with aggression. Therefore, **transgender men** are

and which her entire body is not equipped to handle, could behave violently towards others. Is that to be the reason that the sensitivities of trans persons must be protected, even at the expense of the rights of others? However, if that biological fact about the dangers of hormone therapy for girls were ever admitted, it would counsel against any administration of male hormones to females, which would violate transgender ideology. Actually, the truth is that the school has not carried its burden to demonstrate that recognizing the biological fact of two sexes causes a "substantial" or "material" risk of disturbances of the educational experience.

C. Applying *Tinker* Correctly.

The key principles that can be drawn from *Tinker* are:

- Divisive speech is part of the "hazardous freedom" that is "the basis of our national strength." *Tinker*, 393 U.S. at 508-09.

- Schools cannot restrict speech based on an "undifferentiated fear or apprehension of disturbance." *Id*. at 508.

- To justify its restricting student speech, a school must show that the speech would "materially and substantially interfere with

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warned of **increasing aggression** when initiating testosterone therapy." (Emphasis added.))

> the requirements of appropriate discipline in the operation of the school." *Id*. at 509.

The *Tinker* standard could not be met when the school admitted — and the First Circuit agreed — that the school's ban on the t-shirt was based on a speculative "forecast of material disruption." Here, the school would go so far as to prevent students from wearing a shirt with a message not directed at anyone that could cause someone to feel embarrassed. After all, a t-shirt "that deviates from the views of another person may start an argument or cause a disturbance." *Id*. at 508. However, "our Constitution says we must take this risk...." *Id*. The First Amendment prevents schools from banning speech based on the "undifferentiated fear" that comes from "[a]ny variation of the majority's opinion." *Id*.

II. THE MIDDLEBOROUGH SCHOOLS' CENSORSHIP POLICY VIOLATES THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

Although the "question presented" by Petitioner here deals only with the Free Speech Clause of the First Amendment, the Middleborough schools' Censorship Policy violates the Establishment Clause as well. The transgender debate, at its core, is a religious one, and by choosing winners or losers in that debate, the government is imposing religion, far more than the public school sought to do in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

As this Court has noted specifically in the public school context, the First Amendment was designed to remove government entirely from determining winners and losers in the realm of speech, opinion, political views, and religion. "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. If there are any circumstances which permit an exception, they do not now occur to us." *Barnette* at 642.

Whether or not to recite the Pledge of Allegiance no doubt seems to most to have little religious significance. But a Jehovah's Witness family challenged the Pledge in *Barnette*, asserting that their faith allowed them to "pledge allegiance" only to God. This Court quite properly accepted and protected that belief from government compulsion.

LGBTQ+ indoctrination is every bit as much a matter of conscience and religion as any Christian doctrine. It openly opposes and denigrates the view that men and women are created in the image and likeness of God.

- *Genesis* 5:2: "Male and female he created them, and he blessed them and named them Man when they were created."
- *Matthew* 19:4: "And he answered and said unto them, Have ye not read, that he which made them at the beginning made them male and female."

The Middleborough school district has favored one side of the debate, while squelching the opposing side. If this Court's Establishment Clause jurisprudence prevents favoring Christian doctrine, then it most certainly also prevents favoring trans doctrine.

A. Transgenderism Doctrine Is at Its Core Religious.

Transgenderism is a religion with ancient pagan religious roots. Perhaps unaware, many transgenderism advocates have embraced what was a foundational principle of many early pagan religious sects. One of the "gods" of the pagan world was Ishtar, the "goddess of war and sexual love." *See* "Ishtar," *Britannica.* "An ancient Mesopotamian tablet records ... [Ishtar saying] 'When I sit in the alehouse, I am a woman, and I am an exuberant young man.'" J. Cahn, The Return of the Gods (Frontline: 2022) at 118. The goddess Ishtar had summertime festivals and parades. "The parades of the goddess featured men dressed as women, women dressed as men, each dressed as both, male priests parading as women, and cultic women acting as men. They were public pageants and spectacles of the transgendered, the cross-dressed, the homosexual, the intersexual, the cross-gendered." *Id.* at 181.

B. The Middleborough School District Has Clearly Established One Religious View on Transgenderism, while Suppressing Other Views.

As the district court noted, while banning Petitioner's speech, "Nichols promotes messages commonly associated with 'LGBTQ Pride.' ... Nichols also observes events like 'Pride Month,' and 'Pride Day' in support of the 'LGBTQ+ community.' ... 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.'" *LM I* at 33.

The First Circuit approvingly quoted the district court's assertion that "'school administrators were well within their discretion to conclude' that the message displayed on the Shirt ["There are only two genders"] 'may communicate that only two gender identities — male and female — are valid, and any others are invalid or nonexistent.'" *LM II* at 865. The district court noted 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." *LM I* at 38.

A slight hypothetical reframing underscores the Establishment Clause violation here. If Middleborough fostered "Polytheist Pride day" or sponsored a "Polytheist/Atheist Alliance Club" with the goal of "providing support to students who are part of the non-monotheist community," but forbade wearing of the slogan "there is only one God" because it "may communicate that there is only one God" or

convey that polytheism is "invalid," the Establishment Clause violation would be too plain for argument. The same principle applies here.

This Court noted in *Lawrence v. Texas*, 539 U.S. 558 (2003), that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)). A transgender message rejects a Christian's most intimate beliefs regarding "one's own concept of existence, of meaning, of the universe, and of the mystery of human life" but is permitted in Massachusetts.

The belief that a person can "change genders" is a religious construct, not a scientific one. Science recognizes that "differences between males and females ... exist within every cell of their bodies."[4] Science recognizes that "[i]n females, the majority of genes on one of the two X chromosomes are silenced in every cell.... [T]here are multiple, ubiquitous differences in the basic cellular biochemistry of males and females that can affect an individual's health."[5] Science admits that "physiologists ... all accept that

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[4] "Every Cell Has a Sex: X and Y and the Future of Health Care," Yale School of Medicine (Aug. 30, 2016).

[5] T. Wizemann and M. Pardue, Exploring the Biological Contributions to Human Health: Does Sex Matter? at 35 (National Academies Press: 2001).

there are obvious differences between males and females" due in part to the unyieldingly dimorphic nature of cells between males and females, men and women.[6]

The idea that a person can "choose genders" is a concept based in faith, in ideas of right and wrong, a religious construct, not science. And government may not endorse and establish the pagan religious construct of transgenderism while silencing the Biblical belief that there are only two genders.

C. This Court Has Long Banned Proselytizing in Government Schools.

Under this Court's jurisprudence, when compulsory public schools affirm some religious beliefs while disparaging others, as the Middleborough schools brazenly do here, an Establishment Clause violation occurs. This Court has been clear that simply putting the **imprimatur of the state** in favor of one religious belief over another, is sufficient to **create the violation**. Consider this Court's long line of cases to that effect:

- In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court banned government schools compelling children to salute the flag and pledge allegiance regardless of the particular

[6] K. Shah, C. MacCormack and N. Bradbury, "Do you know the sex of your cells?" AM. J. PHYSIOL. CELL. PHYSIOL. 306, C-3, C-4 (2014).

religious views of the child or the sincerity with which they are held.

- In *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court stated that compulsory, tax-supported public schools could not enable sectarian groups to give religious instruction to public school students in public school buildings.
- In *Engel v. Vitale,* 370 U.S. 421 (1962), the Court ruled that students in government schools could not be required to recite an official state prayer, **even if students may remain silent or be excused**, and the prayer was denominationally neutral.[7]
- In *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), the Court ruled that school boards many not require passages from the Bible to be read or the Lord's Prayer to be recited, **even if students may be excused from attending or participating**.[8]

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[7] "Neither the fact that the prayer may be denominationally neutral nor the fact that **its observance on the part of the students is voluntary** can serve to free it from the limitations of the Establishment Clause," this Court ruled. *Engel* at 430 (emphasis added). "[I]t is no ... business of government to compose official prayers for any group of the American people to recite." *Id.* at 425.

[8] "Any child shall be excused from such Bible reading ... upon the written request of his parent or guardian." *Abington* at 205. "The fact that some pupils ... might be excused ... does not mitigate the obligatory nature of the ceremony for [the state law] unequivocally requires the exercises to be held every school day." *Id.* at 210-211.

- In *Stone v. Graham*, 449 U.S. 39 (1980), the Court prohibited posting a copy of the Ten Commandments purchased with private contributions on the wall of school classrooms.[9]
- In *Wallace v. Jaffree,* 472 U.S. 38 (1985), the Court struck down a state law authorizing a one-minute period of silence in public schools for meditation and voluntary prayer.
- In *Edwards v. Aguillard*, 482 U.S. 578 (1987), this Court struck down a Louisiana law requiring public schools that taught the theory of evolution to also teach the theory of creation.[10]
- In *Lee v. Weisman*, 505 U.S. 577 (1992), including clergy to offer prayers at a public school graduation ceremony was found to violate the Establishment Clause.

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[9] "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.... [T]his ... is not a permissible state objective under the Establishment Clause." *Stone v. Graham* at 42. "It does not matter that ... the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies ... provides **the 'official support of the State ... Government' that the Establishment Clause prohibits**...." *Id.* at 42 (emphasis added).

[10] The Court ruled that "the Act ... has the ... purpose of discrediting evolution by counterbalancing its teaching ... with the teaching of creationism." *Id.* at 589. The Court declared that the purpose of the Establishment Clause is to ensure that "**Government [does] not intentionally endorse religion or a religious practice**." *Id.* at 587 (emphasis added).

- In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), this Court struck down a policy permitting student-initiated, student-led prayer at graduations and football games, although the prayers were required to be "nonsectarian" and "non-proselytizing."

Indeed, in *Everson v. Bd. of Education*, 330 U.S. 1 (1947), this Court stressed that the First Amendment "**requires the state to be a neutral** in its relations with groups of religious believers and non-believers." *Id.* at 18 (emphasis added). This Court famously declared that:

> The "establishment of religion" clause of the First Amendment means at least this.... Government can[not] ... pass laws which aid one religion, aid all religions, or **prefer one religion over another**.... [*Id.* at 15 (emphasis added).]

In dissent, Justice Jackson provided important context relevant to the Middleborough Censorship Policy, noting that "[o]ur [modern] **public school** ... is a relatively recent development dating from about 1840. It is **organized on the premise that secular education can be isolated from all religious teaching so that the school can ... maintain a strict and lofty neutrality as to religion**." *Everson* at 23-24 (Jackson, J., dissenting) (emphasis added). Unfortunately, history shows that the *Everson* Court and Justice Jackson's dissent were overly optimistic in believing that "secular education [could be] isolated from all religious teaching," or be "neutral." Certainly,

teaching transgenderism as a moral good is not purely a secular matter, but also a religious doctrine.

In 1878, this Court adopted James Madison's definition of "religion" as "the duty we owe the Creator." *Reynolds v. United States*, 98 U.S. 145, 163 (1878). In his Memorial and Remonstrance Against Religious Assessments, Madison defined "religion" as "the duty which we owe to our Creator and the manner of discharging it," and "the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."[11]

Teaching that transgenderism is to be celebrated, is a religious proposition. Since the teaching of a pro-transgenderism curriculum constitutes religious teaching, it must be barred under this Court's Establishment Clause Jurisprudence.

D. Middleborough's Transgender Proselytization Is Anything but Religiously Neutral.

Middleborough "promotes messages commonly associated with 'LGBTQ Pride.'" *LM I* at 33. Middleborough "also observes events like 'Pride Month,' and 'Pride Day' in support of the 'LGBTQ+ community.'" *Id.* Middleborough clearly takes the position that homosexuality and transgenderism are affirmative moral goods. "Straight Pride" apparently is not a moral good, nor is the "cisgender community"

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[11] J. Madison, "Memorial and Remonstrance against Religious Assessments" (June 20,1785).

one Middleborough targets for "support." Middleborough's activism for its preferred speech and suppression of Petitioner's contrary belief that "there are only two genders" takes it out of the realm of *Everson's* "neutral" status. Middleborough is telling students that the state disapproves of their beliefs and will silence them as "harmful," "detrimental" and "psychological attacks." *LM II* at 869.

Contrast Middleborough's approach with this Court's earlier statement in 1985 when it struck down an Alabama statute authorizing public school teachers to hold a moment of silence for "meditation or voluntary prayer." This Court ruled that "whenever the State itself speaks on a religious subject, one of the questions that we must ask is **whether the government intends to convey a message of endorsement or disapproval of religion**." *Wallace* at 60-61 (emphasis added). Here, the Middleborough schools actively "convey a message of disapproval," that Petitioner's speech is, as the First Circuit put it, "especially incendiary," and "poison [in] the educational atmosphere." *LM II* at 873-874. The Middleborough schools actively serve as Dunphy's "ardent fundamentalists," agitating for "Pride Day" and "Pride Month," while banning the scientifically accurate message that "there are only two genders." Middleborough's promotion of one religious belief over another is blatant.

Abington promised that "[t]he government is neutral, and, while protecting all, it prefers none, and it disparages none." *Abington* at 215. Middleborough schools' policy utterly destroys *Abington*'s promise and

effects an unconstitutional establishment of religion under this Court's Establishment Clause jurisprudence.

This Court should grant certiorari in order to strike down the Middleborough schools' censorship policy as a violation of both the Free Speech and Establishment Clauses of the First Amendment.

III. GOVERNMENT INCREASINGLY SILENCES THOSE WHO OPPOSE ITS ORTHODOXY.

The methods used by governments seeking to silence those with opposing viewpoints may vary depending on whether that power is that of a Washington, D.C. regulatory agency or a local school district, but the First Amendment should protect Americans from abuses from all levels of government. As Justice Alito explained in *Knox v. SEIU*, 567 U.S. 298 (2012):

> The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.... **The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves**. [*Id*. at 309 (emphasis added) (citations omitted).]

The inclination of government officials to suppress the speech of those with different political views has

existed since the country was founded. In 1798, the Sedition Act made it a crime, punishable by a $5,000 fine and five years in prison, to "'write, print, utter or publish ... any false, scandalous and malicious ... writings against the government ... with intent to defame ... or to excite against them ... the hatred of the good people of the United States.'"[12] Twenty-five people were prosecuted under the Act, only 10 convicted, and all those were pardoned by President Jefferson.

A century later, during World War I, President Woodrow Wilson pushed through Congress his own Sedition Act which "made it illegal to 'convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.' That sweeping language effectively criminalized most forms of anti-war speech."[13] Wilson threatened: "'If there should be disloyalty, it will be dealt with with **a firm hand of repression**.'" *Id.* (emphasis added). The Act carried a sentence of up to 20 years in prison, but was repealed after the end of the war.

With the passage of another century, a new generation of government officials have again manifested the desire to weaponize government power to squelch speech that challenges today's trendy moral

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[12] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273-274 (1964).

[13] D. Root, "When the Government Declared War on the First Amendment," *Reason* (Oct. 2017).

principles. There are reasons to believe that the tide is turning on the transgender issue, the pendulum is swinging back, and common sense is being restored. However, until then, as long as power is being used to censor disfavored speech in government schools, the assistance of the judiciary is needed to stop such overreach. As this Court has recognized, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* at 506. "That [government schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette* at 637.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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