

No. 25-259

IN THE
Supreme Court of the United States

JANUARY LITTLEJOHN, ET VIR,

Petitioners,

v.

SCHOOL BOARD OF LEON COUNTY, FLORIDA, ET AL.,

Respondents.

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

**BRIEF OF NC VALUES INSTITUTE AND
ADVOCATES FOR FAITH & FREEDOM AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

TAMI FITZGERALD
NC VALUES INSTITUTE
9650 Strickland Rd.
Suite 103-226
Raleigh, NC 27615

DEBORAH J. DEWART
Counsel of Record
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

ROBERT H. TYLER
JULIANNE FLEISCHER
ADVOCATES FOR FAITH &
FREEDOM
25026 Las Brisas Road
Murrieta, CA 92562

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

Amici curiae respectfully urge this Court to grant the Petition and reverse the Eleventh Circuit ruling.

NC Values Institute, formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation that works in various arenas of public policy to protect faith, family, and freedom, including parental rights. See <https://ncvi.org>.

Advocates for Faith & Freedom is a nonprofit legal organization dedicated to protecting the fundamental constitutional liberties that have long defined the United States as a beacon of freedom. These include the rights to free speech, the free exercise of religion, and the fundamental right of parents to direct the upbringing, education, and care of their children. See <https://faith-freedom.com>.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“Does the Constitution still protect parents' fundamental right to direct the upbringing of their children when government actors intrude without their knowledge or consent?” *Littlejohn v. Sch. Bd. of Leon Cnty.*, 132 F.4th 1232, 1308 (11th Cir. 2025)

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

(Tjoflat, J., dissenting). The Eleventh Circuit effectively says “no,” employing a “shocks-the-conscience” test that should never apply to fundamental rights. Parental rights take center stage here, but the School Board’s dangerous policy and the circuit court’s analytical approach combine to endanger other equally fundamental rights—beginning with free speech.

Transgender ideology has invaded American life at an alarming rate. The need for this Court’s review is nowhere more urgent than where public schools adopt secret sex transition policies. The alarming proliferation of such policies, and the multitude of lawsuits filed by shocked parents, underscores the need for review. This case, like the factually similar *Protecting Our Children v. Eau Claire Area Sch. Dist.*, “presents a question of great and growing importance.” 145 S. Ct. 14, 14 (2024) (Alito, J., dissenting from denial of certiorari). If anything ought to “shock the conscience,” this is it.

The Leon County School Board maintains a “Lesbian, Gay, Bisexual, Transgender, Gender Nonconforming and Questioning Support Guide.” *Littlejohn v. Sch. Bd. of Leon Cnty.*, 132 F.4th 1232, 1236 (11th Cir. 2025). The Guide demands the use of a child’s preferred name and pronouns, not only without parental consent or knowledge—but under an official policy that directs school personnel to actively deceive a child’s parents if they do not affirm their *child’s* life-altering decision to transition. The school district surreptitiously facilitates a major life decision virtually guaranteed to cause irreparable harm. The Guide turns family structure on its head.

“[T]he *child* ha[s] to request parental attendance” at a meeting to develop a Student Support Plan for his/her proposed gender transition. *Ibid.* (emphasis added). Instead of children requiring parental permission, parents require their *child*’s permission.

In addition to the massive intrusion on parental rights, the Board’s unconscionable policy jeopardizes free speech and religion. Pronouns are part of everyday speech and touch a matter of intense public concern. Not everyone accepts culturally popular “gender identity” concepts or believes a person can transition from one sex to the other. The First Amendment safeguards the to speak according to one’s own beliefs, even in public schools.

ARGUMENT

I. THE GUIDE COMPELS SPEECH ON A CONTENTIOUS TOPIC.

There is hardly a more “dramatic example of authoritarian government and compelled speech” than when King Henry commanded Sir Thomas More to sign a statement blessing the King’s divorce and remarriage. Richard F. Duncan, *Article: Defense Against the Dark Arts: Justice Jackson, Justice Kennedy, and the No-Compelled Speech Doctrine*, 32 Regent U. L. Rev. 265, 292 (2019-2020). Thomas More, a faithful Catholic, could not sign.

Five centuries later, the Leon County School Board has created a conundrum no less momentous than Thomas More’s predicament. Its Guide and related “Transgender Student Support Plan” reek of

viewpoint-based compelled speech. As in *Barnette*, there is “probably no deeper division” than a conflict provoked by the choice of “what doctrine . . . public educational officials shall compel youth to unite in embracing.” Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 292, citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). The “deep division” here impacts the speech of students, parents, and school personnel. The school district goes beyond merely teaching transgender ideology and actively participates in furtively facilitating sex transitions that lack the support of a child’s family.

Compelled speech is abhorrent to the First Amendment, particularly where government mandates conformity to its preferred viewpoint. *Barnette*, *Wooley*, and *NIFLA* are “eloquent and powerful opinions” that stand as “landmarks of liberty and strong shields against an authoritarian government’s tyrannical attempts to coerce ideological orthodoxy.” Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 266; *Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Nat’l Institute of Family & Life Advocates v. Becerra* (“*NIFLA*”), 585 U.S. 755 (2018).

A. Transgender ideology is a matter of intense public concern that merits heightened constitutional protection.

There is no more contentious “matter of public concern” than gender identity, “a controversial [and] sensitive political topic[] . . . of profound value and concern to the public.” *Janus v. AFSCME, Council 31*,

585 U.S. 878, 913 (2018) (cleaned up). The Guide mandates speech—names and pronouns—to “communicate a message” many believe is false—that “[p]eople can have a gender identity inconsistent with their sex at birth.” *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). “Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.” *Id.* at 508. No government official may coerce *any* person’s viewpoint on this matter.

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

The Guide purports to ensure that all students are treated equitably and with dignity. But this goal does not demand erasure of the First Amendment rights of other students, teachers, or parents.

It is a “critical part of a [teacher’s] job” to “affirm[] the equal dignity of every student” to create an optimal learning environment. Erica Goldberg, “*Good Orthodoxy*” and the Legacy of *Barnette*, 13 FIU L. Rev. 639, 666 (2019). But “students need to tolerate views that upset them, or even disturb them to their core.” *Id.* Students must learn to endure speech that is offensive or even false as “part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.” *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so as not to “strangle the free mind at its source and teach youth to discount important principles of our

government as mere platitudes.” *Barnette*, 319 U.S. at 637. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). That “community” includes faculty, students and parents.

II. COMPELLED SPEECH AND VIEWPOINT DISCRIMINATION ARE UNIQUELY PERNICIOUS FREE SPEECH VIOLATIONS.

The Guide combines the worst of two worlds—compelled speech and viewpoint discrimination.

The “proudest boast” of America’s free speech jurisprudence is that we safeguard “the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 582 U.S. 218, 246 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Gender identity may be “embraced and advocated by increasing numbers of people,” but that is “all the more reason to protect the First Amendment rights of those who wish to voice a different view.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000). Our law also protects the right to *not* express viewpoints a speaker hates. Compelled expression is even worse than compelled silence because it affirmatively associates the speaker with a viewpoint he does not hold.

The Guide “[m]andates speech” many “would not otherwise make” and “exacts a penalty” for refusal to comply. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). “Misgendering” or “deadnaming” may lead to charges of harassment.

The Guide requires *male* pronouns for a biological *female* or *female* pronouns for a biological *male*, based entirely on a child's command. "When the law strikes at free speech it hits human dignity . . . *when the law compels a person to say that which he believes to be untrue, the blade cuts deeper* because it requires the person to be untrue to himself, perhaps even untrue to God." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 59 (2020) (emphasis added).

The Guide's mandatory speech is based not only on *content* but also *viewpoint*, demanding endorsement of transgender ideology. The Guide transgresses the freedom of thought that undergirds the First Amendment and merits "unqualified attachment." *Schneiderman v. United States*, 320 U.S. 118, 144 (1943).

A. The Guide's speech decrees violate liberties of religion and conscience.

The Guide forces students, teachers, and parents to become "instrument[s] for fostering . . . an ideological point of view" many find "morally objectionable." *Wooley*, 430 U.S. at 714-715. This glaring viewpoint discrimination emerges even in the "Glossary":

Heterosexism – An overt or tacit bias against homosexuality, rooted in the belief that heterosexuality is superior or the norm.

Heteronormative – The belief system that heterosexuality is the norm; the assumption that heterosexuality is universal and anything other than heterosexuality is unnatural.

Guide, p. 10.

Convictions about sexuality are integrally intertwined with conscience and the teachings of many faith traditions. Compelled speech—that a boy is a girl or a girl is a boy—tramples these convictions. Religious speech is not only “as fully protected . . . as secular private expression,” but historically, “government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted).

B. The Guide ushers in an Orwellian system that destroys liberty of thought.

“The possibility of enforcing not only complete obedience to the will of the State, but *complete uniformity of opinion* on all subjects, now existed for the first time.” George Orwell, “1984” 206 (Penguin Group 1977) (1949) (emphasis added). As Justice Kennedy cautioned, “[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); see Duncan, *Defense Against the Dark*

Arts, 32 Regent U. L. Rev. at 265. The Guide imperils these liberties.

“[T]he history of authoritarian government . . . shows how relentless authoritarian regimes are in their attempts to stifle free speech.” *NIFLA*, 585 U.S. at 780 (Kennedy, J., concurring). There is “no such thing as good orthodoxy” under a Constitution that safeguards thought, speech, conscience, and religion, even when the government pursues seemingly benign purposes like national allegiance (*Barnette*), equality, or tolerance. Goldberg, “*Good Orthodoxy*”, 13 FIU L. Rev. at 643. “Even commendable public values can furnish the spark for the dynamic that Jackson insists leads to the ‘unanimity of the graveyard.’” Paul Horwitz, *A Close Reading of Barnette, in Honor of Vincent Blasi*, 13 FIU L. Rev. 689, 723 (2019).

Compelled speech “invades the private space of one’s mind and beliefs.” Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 275. While “ordinary authoritarians” merely demand silence, prohibiting people from speaking the truth, “[t]otalitarians insist on forcing people to say things they know or believe to be untrue.” *Id.*, quoting Robert P. George. The Guide’s totalitarian mode demands compliance with a distorted view of reality that aligns with whatever “gender identity” any child demands.

There is “no more certain antithesis” to the Free Speech Clause than a government mandate imposed to produce “orthodox expression.” *Hurley v. Irish-American Gay*, 515 U.S. 557 579 (1995). Such a restriction “grates on the First Amendment.” *Id.* “Only a tyrannical government”—or *public school*

district—”requires one to say that which he believes is not true,” e.g., that “two plus two make five.” *Id.* Here, the Guide requires false statements about the sex of school children.

This Court has *never* upheld a viewpoint-based mandate compelling “an unwilling speaker to express a message that takes a particular ideological position on a particular subject.” Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 78. But that is precisely what the Guide requires, darkening the “fixed star in our constitutional constellation” that forbids any government official, “high or petty,” from prescribing “what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. Regardless of how acceptable transgender ideology is in the current culture, the School District’s interest in disseminating that ideology “cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Wooley*, 430 U.S. at 717.

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

Viewpoint discrimination is “an egregious form of content discrimination.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). It creates a “substantial risk of excising certain ideas or viewpoints from the public dialogue.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). This is

“poison to a free society.” *Iancu v. Brunetti*, 588 U.S. 388, 399 (2019) (Alito, J., concurring).

The government may not regulate speech “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger*, 515 U.S. at 829. The Guide is “a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression.” *NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring). The Guide not only controls content (names and pronouns) but also promotes an ideology unacceptable to many students and families. Such coerced compliance attacks the *dignity* the Guide claims to protect. “Freedom of thought, belief, and speech are fundamental to the dignity of the human person.” Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59.

The Guide contravenes “[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.” *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where government must respect a wide range of viewpoints. The government itself may adopt a viewpoint but may never “interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley*, 515 U.S. at 579.

The School Board may not enhance the dignity of some students by attacking the dignity of others, i.e., censoring their protected expression or compelling them to regurgitate the state's preferred message. The state must guard against "conflation of message with messenger." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 64. The First Amendment guards a speaker's autonomy to favor viewpoints he wishes to express and reject other viewpoints. *Ibid.* Rejecting a *message* is not equivalent to rejecting a *person* who prefers that message. Accordingly, rejecting transgender ideology is not tantamount to rejecting a *person* who chooses that perspective.

D. The prohibition of viewpoint discrimination is now a firmly established and necessary component of the Free Speech Clause.

A century ago, this Court affirmed a conviction under the Espionage Act, which criminalized publication of "disloyal, scurrilous and abusive language" about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today, the statute would undoubtedly be "invalidated as patent viewpoint discrimination." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21 (2019). The Court shifted gears in *Barnette*, "a forerunner of the more recent viewpoint-discrimination principle." *Id.* *Barnette*'s often-quoted "fixed star" passage was informed by "the fear of government manipulation of the marketplace of ideas." *Id.* Justice Kennedy echoed

the thought: “To permit viewpoint discrimination . . . is to permit Government censorship.” *Matal*, 582 U.S. at 252 (Kennedy, J., concurring).

Since *Barnette*, courts have further refined the principle of viewpoint discrimination. In *Cohen v. California*, Justice Harlan warned that “governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.” 403 U.S. 15, 26 (1971); see Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 22.

Viewpoint discrimination “is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of ‘free speech.’” *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). It eventually became apparent that this Court considered viewpoint regulation an “even more serious threat” to speech than “mere content discrimination.” Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 23. The “bedrock principle underlying the First Amendment” is that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In the early 1990’s this Court struck down an ordinance that criminalized placing a symbol on private property that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (burning cross). The Court considered

“the anti-viewpoint-discrimination principle . . . so important to free speech jurisprudence that it applied even to speech that was otherwise excluded from First Amendment protection.” Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25, citing *R.A.V.*, 505 U.S. at 384-385. The ruling defined viewpoint discrimination as “hostility—or favoritism—towards the underlying message expressed.” *R.A.V.*, 505 U.S. at 385 (citing *Carey v. Brown*, 447 U.S. 455 (1980)). The government may not “license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules.” *R.A.V.*, 505 U.S. at 392.

Government mandates may exhibit viewpoint discrimination by compelling a speaker to express either the government’s viewpoint (*Wooley*, *NIFLA*) (transgender ideology) or a third party’s viewpoint (*Hurley*) (student’s unilateral declaration of gender identity). Duncan, *Defense Against the Dark Arts*, 32 Regent U. L. Rev. at 283. The Guide does both, mandating compliance with the school’s transgender ideology and a gender-confused child’s viewpoint about his/her sex.

Matal, a landmark case about viewpoint discrimination, explains that “[g]iving offense [to a transgender child] is a viewpoint.” *Matal*, 582 U.S. at 243. After *Matal*, this Court struck down a ban on “immoral or scandalous” trademarks because it “disfavor[ed] certain ideas.” *Iancu v. Brunetti*, 588 U.S. at 390. The Court’s approach “indicated that governmental viewpoint discrimination is a per se violation of the First Amendment.” Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L.

Rev. F. at 33. The viewpoint-based Guide is unquestionably a “per se violation of the First Amendment.”

III. THE GUIDE’S VIEWPOINT-BASED SPEECH MANDATES ARE NOT JUSTIFIED AS APPLIED TO ANYONE IN THE PUBLIC SCHOOL SYSTEM.

Public schools are not a haven where educators can ignore the First Amendment with impunity. Neither students nor teachers “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). The Guide impermissibly infringes the protected speech of faculty, students, and parents.

Pronouns are an integral part of everyday speech based on objective biological reality and often coupled with the belief that each person is created immutably male or female. The School District may not regulate this aspect of speech. Many do not accept transgender ideology, but the Constitution safeguards the right to speak about it, even in public schools.

A. Government employees are citizens—not robots.

Even as an employer, *the government is still the government*, subject to constitutional constraints. Even as government employees, *citizens are still citizens*, and they “do not surrender all their First Amendment rights by reason of their employment.” *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). The

Constitution does not permit a public school to “leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Id.* at 419; see *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government”).

In *Pickering*, this Court crafted a test that balances “between the [free speech] interests of [a] teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Bd. of Educ. of Township High School District 205*, 391 U.S. 563, 568 (1968). *Pickering*’s balancing test does not warrant compelled expression of any employee’s *personal* agreement on a controversial public issue. *Janus*, 585 U.S. at 905 (“prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed”).

The Guide imposes unconstitutional conditions on public employment by infringing on school employees’ “constitutionally protected interest in freedom of expression.” *Garcetti*, 547 U.S. at 413; see *Connick*, 461 U.S. at 142; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering*, 391 U.S. 563; *Perry v. Sindermann*, 408 U.S. at 597. There was a time when “a public employee had no right to object to conditions placed upon the terms of employment,” even restrictions on constitutional rights. *Garcetti*, 547

U.S. at 417, quoting *Connick*, 461 U.S. at 143. That theory has been “uniformly rejected.” *Pickering*, 391 U.S. at 568; *Keyishian*, 385 U.S. at 605-606; *Lane v. Franks*, 573 U.S. 228, 236 (2014).

B. A school employee’s use of specific pronouns does not constitute government speech.

Government (public) speech occurs where a public employee speaks in an official capacity and “there is no relevant analogue to speech by citizens who are not government employees.” *Garcetti*, 547 U.S. at 424. Here there is an obvious analogue because pronouns are a nearly unavoidable feature of everyday language. Under *Garcetti*, the “critical question” is whether a public employee’s speech is “ordinarily within the scope of [his] duties.” *Lane*, 573 U.S. at 240 (2014). But even when public officials deliver public speeches, “their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity.” *Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting). A teacher’s view of biological sex is “embedded within” the pronouns he uses. As *Garcetti* acknowledged, “expression related to . . . classroom instruction” might not fall within “customary employee-speech jurisprudence.” *Garcetti*, 547 U.S. at 425; see *Meriwether*, 992 F.3d at 506.

C. The Guide’s speech mandates cannot be justified as “professional” speech.

The School Board could not salvage its mandates by characterizing employee speech as “professional.” With narrow exceptions not relevant here, this Court has explicitly declined to recognize “professional speech” as a separate category entitled to diminished First Amendment protection. *NIFLA*, 585 U.S. at 768. “The dangers associated with content-based regulations of speech are also present in the context of professional speech” (*id.* at 771), including “the inherent risk” that the government seeks “to suppress unpopular ideas or information.” *Turner Broad. Sys.*, 512 U.S. at 641.

The First Amendment embraces not only the freedom to believe but also “the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 62, 736-737 (2014) (Kennedy, J., concurring). The “larger community” includes a citizen’s place of employment.

D. There is no legitimate pedagogical purpose for applying the Guide’s speech restrictions to other students.

It would be impossible to orchestrate the School Board’s massive deception without imposing it on a gender-confused student’s classmates. But that would infringe on the free speech rights of those students.

Public school students do not sacrifice their constitutional rights as a condition of attending public school. There is nothing “legitimate” or “pedagogical” about forcibly altering student speech about the sex of other students. Such speech compulsion cannot be salvaged by appealing to cases that allow narrowly crafted student speech restrictions. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 409 (2007) (speech promoting illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (school-sponsored speech); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (sexually explicit speech). These narrow exceptions do not warrant a demand that students set aside personal convictions and make statements they believe are false. Public schools are not “enclaves of totalitarianism” and “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.” *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring), quoting *Tinker*, 393 U.S. at 511. Nor may students be punished “merely for expressing their personal views on the school premises.” *Hazelwood*, 484 U.S. at 266.

The School Board may not demand compliance with its ideology or shut down further inquiry. The Constitution protects unpopular minority viewpoints, particularly in a changing social environment. *Dale*, 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397. “Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.” *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957). Even elementary schools may not prohibit speech merely “to avoid the discomfort and

unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509.

The Guide compels public school participants to either dishonestly affirm a belief they do not hold or alter their beliefs under state compulsion. Both alternatives gut the First Amendment. Decades of precedent drive the conclusion that the School Board cannot compel faculty, students, or parents to affirm the morality of conduct that collides with their own convictions. *Wooley*, 430 U.S. at 715 (“The First Amendment protects the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable.”); *Hurley*, 515 U.S. at 575 (“[T]he choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government’s power to control.”)

IV. THE CIRCUIT COURT APPLIED AN ILLOGICAL, JUDICIALLY CRAFTED SHOCKS-THE-CONSCIENCE TEST THAT ANNIHILATED THE LITTLEJOHNS’ ABILITY TO VINDICATE THEIR PARENTAL RIGHTS.

The Eleventh Circuit employed a judicially invented “shocks-the-conscience” test that is best described as “comically vacuous,” “infinitely malleable—and thus manipulable.” *Littlejohn*, at 1280 (Newsom, J., concurring). This “illogical, unauthorized, and atextual” test “denies the Littlejohns the ability to vindicate their fundamental right to raise their child.” *Id.* at 1308 (Tjoflat, J., dissenting).

A. The “shocks-the-conscience” test is based on a single footnote and purportedly applies when a due process challenge arises from *executive* rather than *legislative* action.

The test applied here originated from a footnote stating that “in a due process challenge to *executive action*, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *County of Sacramento v. Lewis*, 523 U.S. 833, 848 n.8 (1998) (emphasis added). In *Lewis*, a reckless driver rapidly fleeing the police was killed in the ensuing high-speed chase. This Court reasonably concluded that the policeman did not violate the driver’s constitutional right to life. But then, on the thin reed of a single footnote, courts crafted a rule applying “the shocks-the-conscience test to *all* challenges to executive actions, *including those that affect fundamental rights*.” *Littlejohn*, 132 F.4th at 1286 (Newsom, J., concurring) (emphasis added). But “[a]s [this Court] ha[s] said many times, the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation.” *Lewis*, 523 U.S. at 864 (Scalia, J., concurring) (internal citations and quotation marks omitted). Applying the *Lewis* footnote to “*all* challenges to executive actions”—including parental rights—results in “a liability regime that is totally bizarre.” *Littlejohn*, 132 F.4th at 1286 (Newsom, J., concurring) (emphasis added).

The conscience-shocking liability regime applies only to executive action, not legislative. The Eleventh Circuit, reasoning that the Littlejohns “challenge executive, not legislative,² action,” applied this test rather than strict scrutiny. *Littlejohn*, 132 F.4th at 1238. The rationale underlying the executive-legislative dichotomy is not abundantly clear. Legislation “affects the liberty of an entire class of persons,” while executive actions involve “isolated and unauthorized conduct by individual rogue executive agents against individual citizens.” *Littlejohn*, 132 F.4th at 1286 (Newsom, J., concurring), citing *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 n.1 (10th Cir. 2015) (internal quotation marks omitted). Executive action is granted more leeway but has the greater potential for abuse because it is “individual, targeted, and one-off, rather than broadly and generally applicable.” *Littlejohn*, 132 F.4th at 1287 (Newsom, J., concurring), citing *Hillcrest Prop., LLP v. Pasco County*, 915 F.3d 1292, 1311 (11th Cir. 2019) (Newsom, J., concurring in the judgment). Perhaps the order should be reversed, subjecting executive action to greater scrutiny because of its greater potential for abuse.

B. The “shocks-the-conscience” test is fuzzy at best.

The Eleventh Circuit interpreted *Lewis* as requiring the “conscience shocking” inquiry as “a

² The majority admits “the Guide itself is arguably ‘legislative,’” *Littlejohn*, 132 F.4th at 1242.

threshold question" that "precedes any fundamental-rights analysis." *Littlejohn*, 132 F.4th at 1240, citing *Lewis*, 523 U.S. at 848 n.8. This approach imposes a high hurdle to vindicating fundamental rights infringed by the executive branch. Equally concerning is the lack of clarity about the phrase "shock the conscience."

The circuit court blithely dismissed the Littlejohns' parental rights challenge because the school "did not force the *child* to attend a Student Support Plan meeting, to not invite the Littlejohns to that meeting, or to socially transition at school," and in fact "did not force the Littlejohns' *child* to do anything at all." *Littlejohn*, 132 F.4th at 1245 (emphasis added). The court flatly rejected the idea that it would "shock the conscience in a constitutional sense" for the school to defy the *parents'* instructions—instead, the *child* reigns supreme. *Ibid.* This is nonsense. It was the *parents'* rights—not the *child's* rights—that were infringed.

What exactly does it mean to "shock the conscience"? *Whose* conscience? "The reasonable person's? An unelected judge's? The Borg's? I have no idea." *Littlejohn*, 132 F.4th at 1281 (Newsom, J., concurring). "[T]he Littlejohns assert a *fundamental* interest" that "ought to be protected from unnecessary government interference"—period—"regardless of whether that interference is 'conscience shocking.'" *Id.* at 1291-1292 (Tjoflat, J., dissenting). But this malleable phrase is manipulated like silly putty to uphold a disastrous policy that surreptitiously annihilates parental rights. "The shocks-the-conscience standard simultaneously

means nothing and everything—it's utterly and totally in the eye of the beholder.” *Littlejohn*, 132 F.4th at 1281 (Newsom, J., concurring). It is an “*incoherent*” doctrine “that courts have cobbled together to implement” substantive due process claims. *Id.* at 1279 (Newsom, J., concurring).

“Shocks-the-conscience” is a concept introduced in *Rochin v. California*, 342 U.S. 165, 172 (1952), where Justice Frankfurter described it as “offend[ing] the community’s sense of fair play and decency”—but never suggesting it was a threshold requirement for due process challenges. *Littlejohn*, 132 F.4th at 1292 (Tjoflat, J., dissenting), quoting *Rochin*, 342 U.S. at 173. Here, it should “offend the community’s sense of fair play and decency”—and it should shock the conscience—when a public school intentionally deceives parents and covertly assists a child’s attempt to transition to the opposite sex.

C. The “shocks-the-conscience” test should not apply to fundamental rights.

The Eleventh Circuit insists that this Court has “clarified” that the shocks-the-conscience test “governs all substantive-due-process claims involving executive action—even those involving fundamental rights.” *Littlejohn*, 132 F.4th at 1240, citing *Lewis*, 523 U.S. at 847 n. 8; *see also Paul v. Davis*, 424 U.S. 693, 701 (1976). The goal was to avoid reducing the Constitution to “a font of tort law.” *Lewis*, 523 U.S. at 847 n. 8. Perhaps that made sense in *Lewis*, where the complaint was essentially “a common law tort claim styled as a constitutional violation.” *Littlejohn*, 132 F.4th at 1295 (Tjoflat, J., dissenting). Unlike

Littlejohn, it was unrelated to vindicating a fundamental right. The tragic loss of life that occurred in the *Lewis* high-speed chase resulted from the defendant's "behavior in doing his job as a law enforcement officer." *Id.* at 1294 (Tjoflat, J., dissenting). The Eleventh Circuit inappropriately imported *Lewis*' reasoning into the much different *Littlejohn* context, reasoning that the school officials' behavior "naturally fell within their authority to implement the Guide" and thus was not "so egregious, so outrageous" as to "shock the contemporary conscience." *Id.* at 1296 (Tjoflat, J., dissenting). Something is radically wrong when a public school can deliberately trash the fundamental rights of parents and then contend that its policy does *not* shock the conscience.

A technical point adds to the dilemma. Where a fundamental right is implicated, case law is riddled with confusion as to whether (1) the government's infringement must *either* shock the conscience *or* implicate a fundamental right (disjunctive); OR (2) *both* shock the conscience *and* implicate a fundamental right (conjunctive). The Eleventh Circuit has ruled both ways. *See Waldman v. Conway*, 871 F.3d 1283, 1292 (11th Cir. 2017) (either option is an "independently sufficient basis" for a substantive-due-process claim); *Dacosta v. Nwachukwa*, 304 F.3d 1045 (11th Cir. 2002) (same); *see also Maddox v. Stephens*, 727 F.3d 1109, 1118-19 (11th Cir. 2013) ("only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense"—even if a fundamental right is violated). *Littlejohn*, 132 F.4th at 1282 (Newsom, J., concurring).

Contrary to the *Lewis* footnote, this Court stated in *United States v. Salerno* that "substantive due process prevents the government from engaging in conduct that shocks the conscience *or* interferes with rights implicit in the concept of ordered liberty." 481 U.S. 739, 746 (1987) (emphasis added) (internal citations and quotation marks omitted). This Court's "disjunctive framing" in *Salerno* indicates the absence of a threshold "shock-the-conscience" analysis to vindicate a fundamental right. *Littlejohn*, 132 F.4th at 1292 (Tjoflat, J., dissenting).

D. The "shocks the conscience" test violates the Constitution's separation of powers.

Creating a "shocks-the-conscience" threshold for claims against executive action "disserves Congress's purpose in enacting § 1983" and "all but eliminates § 1983 as a remedy to compensate citizens whose fundamental rights have been violated by state and local executive action." *Littlejohn*, 132 F.4th at 1300 (Tjoflat, J., dissenting). The test inserts a requirement into the statutory text. In addition to showing the deprivation of a right—parental rights in this case—the claimant must prove that "the person's actions also shocked the contemporary conscience." *Id.* at 1308 (Tjoflat, J., dissenting). This addition to the text is exactly the sort of "judicial overreach" that is "barred by the separation of powers doctrine." *Id.* at 1300, 1307 (Tjoflat, J., dissenting).

CONCLUSION

This Court should grant the petition and reverse the Eleventh Circuit ruling.

Respectfully submitted,

DEBORAH J. DEWART
Counsel of Record
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

TAMI FITZGERALD
NC VALUES INSTITUTE
9650 Strickland Rd.
Ste. 103-226
Raleigh, NC 27615

ROBERT H. TYLER
JULIANNE FLEISCHER
ADVOCATES FOR FAITH &
FREEDOM
25026 Las Brisas Road
Murrieta, CA 92562

Counsel for Amici Curiae
NC Values Institute
Advocates for Faith & Freedom