

No. 26-8

IN THE
Supreme Court of the United States

KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.,

Respondents.

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

**BRIEF OF NC VALUES INSTITUTE AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae respectfully urges this Court to grant the Petition and reverse the Fourth 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>.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Montgomery County Board’s “Guidelines for Student Gender Identity,” coupled with the Fourth Circuit’s blatant evasion of this Court’s precedents, assaults both core parental rights and the related First Amendment rights of public educators. As a dissenting Eleventh Circuit judge recently asked, “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) (Tjoflat, J., dissenting). This Court’s answer must be a resounding “yes!” after its rulings in *Mahmoud v.*

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

Taylor, 606 U.S. 522 (2025) and *Mirabelli v. Bonta*, 146 S. Ct. 797 (2026). Yet the Fourth Circuit’s “unjust ultimatum” evades both *Mahmoud* and *Mirabelli*, “compel[ing] speech on a noncurricular matter.” *Polk v. Montgomery County Public Schools*, 166 F.4th 400, *39 (4th Cir. 2026) (Wilkinson, J., dissenting). *Mahmoud* and *Mirabelli* concentrated on the urgent need to safeguard parental rights. This case examines the other side of the coin—the School Board’s attempt to muzzle a conscientious teacher, demanding that she *lie* to a child’s parents as a condition of employment.

Transgender ideology has invaded American life at an alarming rate. The need for this Court’s review is nowhere more urgent than in cases where public schools adopt policies to secretly transition young students from one sex to the other. The shocking proliferation of such policies, and the multitude of lawsuits filed by outraged parents, underscores the need for review. This case, like *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). Indeed, two recently denied Petitions for Certiorari highlight the urgent need for review. See *Littlejohn v. Sch. Bd. of Leon Cty.*, 132 F.4th 1232 *cert. denied*, 224 L. Ed. 2d 525 (04/27/26); *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, *cert. denied*, 224 L. Ed. 2d 547 (04/20/26). The Court should grant this Petition to stop the “bleeding” presented by these horrendous cases. Too much damage has already occurred.

Equally alarming is the focus of this *amicus curiae* brief—the Board’s demand that school personnel actively deceive parents about their own children’s gender confusion. The Board’s unconscionable Guidelines jeopardize basic rights to 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 that a person can transition from one sex to the other. The First Amendment safeguards the rights of teachers *and* parents *and* students to speak according to each one’s own beliefs, even in public schools. The Guidelines generate one of the most pernicious constitutional violations imaginable—the combination of compelled speech and viewpoint discrimination. The Guidelines demand 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, i.e., to *lie*—particularly if they do not affirm their *child’s* life-altering decision to transition. School teachers are required to surreptitiously facilitate a major life decision that is virtually guaranteed to cause irreparable harm. The Guidelines turn family structure on its head. Teachers *must* use students’ preferred pronouns and deceive parents. “Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information.” *Polk*, 166 F.4th at *4, quoting from the Guidelines’ “Privacy and Disclosure of Information.” Instead of children requiring parental permission,

parents require their *child's* permission in this upside-down world of gender ideology. Teachers like Petitioner Kimberly Polk are placed in a straight-jacket and forced to comply with the scam, risking their livelihoods if they dare to speak the truth.

ARGUMENT

I. THE GUIDELINES COMPEL 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 Montgomery County School Board has created a conundrum that is no less momentous than Thomas More’s predicament. Its Guidelines 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 everyone involved in public education. The intrusion on parental and teachers’ rights here—“unconsented

facilitation of a child’s gender transition” exceeds “the introduction of LGBTQ storybooks [this Court] considered sufficient to trigger strict scrutiny in *Mahmoud*.” *Mirabelli*, 146 S. Ct. at 802.

This Court has repeatedly “extolled the especially egregious nature of compelled speech.” *Polk*, 166 F.4th at *43 (Wilkinson, J., dissenting). Flouting that precedent, the Fourth Circuit majority gave “short shrift” to “this detail.” *Id.* at *40 (Wilkinson, J., dissenting). But “we stand on a dangerous precipice” when the government acts as ventriloquist and “seeks to coopt an individual’s voice” to voice its message. *Id.* at *44 (Wilkinson, J., dissenting). Just recently this Court emphatically denounced a law that “censors speech based on viewpoint,” explaining that “the First Amendment stands as a shield against any effort to enforce orthodoxy in thought or speech in this country.” *Chiles v. Salazar*, 146 S. Ct. 1010, 1029 (2026).

Compelled speech is particularly abhorrent to the First Amendment when government mandates conformity to its preferred viewpoint. *Barnette*, *Wooley*, *NIFLA*—and now *Chiles*—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 hardly a more contentious “matter of public concern” than gender identity, “a controversial [and] sensitive political topic[] . . . of profound value and concern to the public.” *Janus v. AFSCME, Council 31*, 585 U.S. 878, 913 (2018) (cleaned up). It is unquestionably “a highly contentious and significant issue in our social and political zeitgeists. See *Darlingh v. Maddaleni*, 142 F.4th 558, 565 (7th Cir. 2025).” *Polk*, 166 F.4th at *46 (Wilkinson, J., dissenting). The Guidelines mandate speech that “communicate[s] 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. Even Polk’s “silence—her refusal to use preferred pronouns—conveys a distinct point of view.” *Polk*, 166 F.4th at *42 (Wilkinson, J., dissenting). The right to remain silent and the right to speak are “complementary components of the broader concept of ‘individual freedom of mind.’” *Wooley*, 430 U.S. at 713 (quoting *Barnette*, 319 U.S. at 637).

It is not the business of *any* government official to coerce *any* person’s viewpoint on this matter. But—contrary to logic and prior court rulings—the Fourth Circuit erroneously concluded that “how Polk addresses individual students within an early-elementary school classroom” is “not a matter of ‘public concern.’” *Polk*, 166 F.4th at 37. The concern is

quite public and even more urgent when children fall victim to government-mandated orthodoxy.

B. Schools can assure the safety of every student without sacrificing any person's constitutional liberties.

In the factually similar *Mirabelli* case, “[e]veryone agree[d] that children’s safety [wa]s the overriding equity,” and the stay this Court granted “promote[d] child safety by guaranteeing fit parents a role in some of the most consequential decisions in their children’s lives.” *Mirabelli*, 146 S. Ct. at 803. The State had argued “that its policies advance[d] a compelling interest in student safety and privacy.” *Id.* at 802. Rejecting that rationale, this Court observed that those policies “cut out the primary protectors of children’s best interests: their parents.” *Id.* at 802, citing *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000). In *Polk*, the Board’s alleged objective was “supporting and protecting the safety of the students whose parents may object to their decision to transition” by “hiring staff who w[ould] treat and nurture every student equally.” *Polk*, 166 F.4th at *28. But as in *Mirabelli*, the Guidelines intentionally “cut out” the parents—“the primary protectors of children’s best interests.” Also as in *Mirabelli*, the Board could achieve its goal by allowing religious exemptions while simultaneously “precluding gender-identity disclosure to parents who would engage in abuse.” 146 S. Ct. at 802-803. Such a policy would also preserve the rights of fit parents.

C. Title IX does not require a school to comply with a child's demands concerning his/her name and/or pronouns.

The Fourth Circuit found the Guidelines “rationally related to [the school’s] obligations under Title IX, which prohibits discrimination against transgender students at school.” *Polk*, 166 F.4th at 27, citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020). *Grimm*, relying on this Court’s then-recent decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), had “little difficulty” concluding that a school bathroom policy discriminated “on the basis of sex” in prohibiting a biological female student from using the boys’ bathroom. *Grimm*, 972 F.3d at 616.

But *Grimm*’s rationale is no longer valid. The ink is barely dry on this Court’s rejection of a recent attempt to redefine “sex” under Title IX. “The term sex in the 1972 Title IX statute . . . cannot plausibly be interpreted to refer to anything other than biological sex.” *West Virginia v. B.P.J.*, 2026 U.S. LEXIS 2884, *20 (2026). *Bostock* concerned employment, a “vastly different” factual context. *Id.* at *25-26. Indeed, *Bostock* itself “d[id] not purport to address bathrooms, locker rooms, or anything else of the kind.” 590 U.S. at 681. *Bostock* deliberately and specifically stated that the Court was *not* deciding whether its reasoning applied to Title IX. The Fourth Circuit wrongly over-extended its reasoning to Title IX in *Grimm*. Title IX does not demand that a school compel its personnel to use a child’s preferred pronouns.

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

The Guidelines combine the worst of two worlds—compelled speech and viewpoint discrimination. This case is “a paradigmatic example of viewpoint discrimination.” *Polk*, 166 F.4th at *44 (Wilkinson, J., dissenting). Petitioner is forced to say what she believes is false about a student’s sex.

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 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 Guidelines “[m]andate[] speech” Petitioner “would not otherwise make” and “exact[] a penalty” for her refusal to comply. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Petitioner could not in good conscience comply with the Guidelines, and as a result she lost her position as

a substitute teacher. This tracks the policy at issue in *Mirabelli*, where “accurate communication with parents wa[s] permitted *only if* the child first g[ave] its consent to the school.” *Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1203 (S.D. Cal. 2023). The Guidelines require *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 Guidelines’ mandatory speech is based not only on *content* but also *viewpoint*, demanding endorsement of transgender ideology. This policy 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 Guidelines violate liberties of religion and conscience.

The Guidelines force teachers to become “instrument[s] for fostering . . . an ideological point of view” many find “morally objectionable.” *Wooley*, 430 U.S. at 714-715. Polk contends that she would be “lying to children” and “would act unethically”—contrary to the primary responsibilities of parents—“if she affirmatively assisted children to present as

other than their God-given sex.” *Polk*, 166 F.4th at *6 n. 3. This glaring viewpoint discrimination assaults religious liberty and conscience. 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 deeply held 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).

The Fourth Circuit brushed over the blatant violations of conscience and religious liberty. The Guidelines were allegedly “neutral” because, on their face, “there is no mention of anything about religion.” *Polk*, 166 F.4th at *20. The circuit court reasoned that the Guidelines “ha[d] no object that infringes upon or restricts practices *because* of their religious motivation.” *See Alive Church of the Nazarene v. Prince William Cnty.*, 59 F.4th 92, 108 (4th Cir. 2023) (citation modified). But there is nothing neutral about a policy that so openly and obviously defies commonly held religious convictions about the nature of sexuality. People of faith will inevitably challenge laws forcing them to abandon their core religious convictions. The Board’s failure to foresee these religious conflicts parallels the “reckless disregard” standard used in other contexts. Even where the law does not appear to intentionally target religion—or where officials successfully conceal their hostility—

there is a “reckless disregard” for the obvious, inevitable conflicts with religion.

B. The Guidelines create an Orwellian scheme 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 Guidelines imperil 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. Erica Goldberg, “*Good Orthodoxy*” and *the Legacy of Barnette*, 13 FIU L. Rev. 639, 643 (2019). “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 saying what they believe is true, “[t]otalitarians insist on forcing people to say things they know or believe to be untrue.” *Id.*, quoting Robert P. George. The Board adopts a totalitarian mode by demanding 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*—“requires one to say that which he believes is not true,” e.g., that “two plus two make five.” *Id.* Here, the Guidelines mandate 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 Guidelines require, 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 Board’s interest in disseminating that ideology “cannot outweigh [a teacher’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 Guidelines are “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 Guidelines not only control content (names and pronouns) but also promote an ideology unacceptable to many families and faculty. “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 Guidelines contravene “[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.” *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This is dangerous to a free society where the government must respect a wide range of 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 Guidelines censor protected expression and compel public school personnel to regurgitate the Board’s preferred message. This wars against the First Amendment, which guards a speaker’s autonomy to favor and express some viewpoints but reject and decline to express others.

D. The prohibition of viewpoint discrimination, now firmly established by this Court’s precedent, is a necessary component of the Free Speech Clause.

A century ago, this Court affirmed a conviction under the Espionage Act, which criminalized publication of “disloyal, scurrilous and abusive language” about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today,

no doubt “the statute itself would be invalidated as patent viewpoint discrimination.” Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21 (2019). 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). This Court eventually 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 Guidelines do both, mandating compliance with the Board’s transgender ideology and a gender-confused child’s viewpoint about his/her sex.

Matal, a landmark viewpoint discrimination case, 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”—like the Guidelines at issue here—“is a per se violation of the First Amendment.” Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 33.

III. THE GUIDELINES’ VIEWPOINT-BASED SPEECH MANDATE IS NOT JUSTIFIED AS APPLIED TO ANYONE IN PUBLIC EDUCATION.

Public schools are not a haven where administrators 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 Guidelines impermissibly infringe 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 State 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* who “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 State 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”).

The Board contends that its Guidelines merely “establish[] the official duties of a public-school teacher” and therefore the pronoun mandate is unrelated to a teacher’s speech as a private citizen. *Polk*, 166 F.4th at *31-32. The Fourth Circuit effectively dictates that the First Amendment’s constraints on compelled speech “evaporate the second a teaches passes through these gates and meets a student.” *Id.* at *49 (Wilkinson, J., dissenting). That reasoning clashes with decisions of this Court explaining that expression within the work environment is “not automatically exposed to restriction” by a public employer (*Garcetti*, 547 U.S. at 421), and not by itself “dispositive” (*Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530 (2022)); *Polk*, 166 F.4th at *49 (Wilkinson, J., dissenting).

This Court’s speech doctrine, which “safeguards public debate,” ensures that teachers retain their right as citizens to speak freely about matters of public concern. *Ibid.*, citing *Pickering v. Bd. of Educ. of Twp. High Sch.*, 391 U.S. 563, 568 (1968). 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.” *Id.* at 568. *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 Guidelines impose unconstitutional conditions on public employment by infringing Polk’s “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). The Board erroneously contends otherwise.

B. A school employee’s use of pronouns is not *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). Even when public officials deliver 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 used. As *Garcetti* acknowledged, some of the “expression related to . . . classroom instruction” may not fall within “customary employee-speech jurisprudence.” *Garcetti*, 547 U.S. at 425; see *Meriwether*, 992 F.3d at 506.

C. The Guidelines’ mandated pronouns are not “professional” speech.

The Board could not salvage its mandate 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 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. Here, the Board advances transgender ideology and suppresses opposing “ideas or information.”

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.

“History is littered with examples of official efforts to manipulate professional speech.” *Chiles*, 146 S. Ct. at 1015. These efforts serve to “increase state power” and muzzle “unpopular ideas.” *Ibid.*, quoting *NIFLA*, 585 U.S. at 771.

D. The Guidelines serve no legitimate pedagogical purpose.

A teacher’s use of pronouns is not “curricular” speech that the Board could rightly regulate. “Noncurricular matters, including whether to use preferred pronouns or a student’s last name, do not implicate the same need for state control as curricular ones.” *Polk*, 166 F.4th at *51 (Wilkinson, J., dissenting). *Polk* is not “demanding the right to teach a different curriculum from the one that [s]he was hired to teach,” but objecting to “compelled speech on

a highly divisive, ideological issue that violated[s] [her] religious faith.” *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 742 (Va. 2023). “[C]ompelled speech on noncurricular matters” is best analyzed using “the *Pickering* balancing test we have used for over half a century—a test which *Garcetti* sought to clarify, not render obsolete.” *Polk*, 166 F.4th at *52 (Wilkinson, J., dissenting).

Free expression—in contrast to the Board’s ideological compulsion—does serve legitimate pedagogical purposes. Schools at all levels have become “hotbeds of vehement sociopolitical debate,” and “[s]tudents must learn to challenge and debate topics in a respectful, civil manner, but this learning cannot occur if access to ideas, even government-disfavored ones, is not preserved.” *Polk*, 166 F.4th at *53 (Wilkinson, J., dissenting). Indeed, “[t]he 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 students, parents, *and faculty*. 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.

Respectful debate can be encouraged without sacrificing the dignity of any student. It is a “critical part of a [teacher’s] job” to “affirm[] the equal dignity of every student,” so as to create the best learning environment. Goldberg, “*Good Orthodoxy*” and the *Legacy of Barnette*, 13 FIU L. Rev. at 666. But

“students need to tolerate views that upset them, or even disturb them to their core.” *Id.* Students must 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).

It would be impossible to orchestrate the Guidelines’ massive deception without imposing it on a gender-confused student’s classmates. But that would infringe on the free speech rights of those students, who 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, 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 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 Guidelines compel all participants in public education 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 State 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.”)

CONCLUSION

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

Respectfully submitted,

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