

No. 23-601

In the
Supreme Court of the United States

JOHN AND JANE PARENTS 1, ET AL.,
Petitioners,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

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

**BRIEF OF *AMICUS CURIAE* INSTITUTE
FOR FAITH AND FAMILY
IN SUPPORT OF PETITIONERS**

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**IDENTITY AND INTEREST
OF *AMICUS CURIAE*¹**

Amicus curiae urges this Court to grant the Petition for Certiorari and reverse the decision of the Fourth Circuit.

The Institute for Faith and Family is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See <https://iffnc.com>. IFFNC is engaged in fighting policies like the one challenged here.

INTRODUCTION AND SUMMARY

Transgender ideology is invading many areas of American life at a rapidly escalating rate. The “Gender Identity” Guidelines issued by the Montgomery County Board of Education (“MCBE”) contains a “Parental Exclusion Policy.” *Amicus curiae* urges the Court to consider the alarming First Amendment violations inherent in this type of policy, a growing national trend that has spawned numerous legal challenges. *See, e.g., Parents Defending Educ. v. Linn Marr Cmty. Sch. Dist.*, 83 F.4th 658, *14-15 (8th Cir. 2023). The Policy threatens First Amendment rights by demanding use of a minor child’s preferred name and pronouns—not

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 curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

only without parental consent but intentionally deceiving parents and excluding them from their child's "gender support plan." This coerced acceptance of transgender ideology exacerbates the Policy's massive intrusion on parental rights.

The Policy's combination of speech and viewpoint compulsion is a formula for tyranny that cannot be salvaged by appealing to MCBE's right to determine the content of educational curriculum. 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. This aspect of speech touches a matter of public concern. Parents, students, and school personnel do not sacrifice their constitutional rights as a condition of participating in public education. Not everyone accepts transgender ideology or believes that a person can transition from one sex to the other. The First Amendment safeguards the rights of personnel, students, and parents to think and speak according to each one's own beliefs, even in public schools.

ARGUMENT

I. THE POLICY VIOLATES THE FIRST AMENDMENT BY COMPELLING SPEECH.

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), citing Robert Bolt, *A Man For All Seasons: A Play in Two Acts* (1st ed., Vintage Int'l 1990) (1962). Thomas More, a faithful Catholic, could not sign.

Five centuries later, MCBE has created a conundrum that is no less momentous than Thomas More's predicament. Under the Policy, school personnel *must* use a child's preferred name and pronouns. Additionally, personnel *must* deceive the parents, if they are deemed "unsupportive," by withholding information and reverting to the child's legal name and correct sex in communications with them. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 126 (S.D. Md. 2022); *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 637-638 (4th Cir. 2023) (Niemeyer, J., dissenting). The Policy reeks 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, *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 Policy does not implicate curriculum but does reflect the deep divisions over what position public schools should assume concerning sexuality. These divisions impact the speech of everyone involved in public education.

Compelled speech is anathema to the First Amendment, particularly where government mandates conformity to its preferred viewpoint. *Barnette*, *Wooley*, *NIFLA* and other "eloquent and powerful opinions"

stand as “landmarks of liberty and strong shields against an authoritarian government’s tyrannical attempts to coerce ideological orthodoxy.” Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 266; *Barnette*, 319 U.S. 624; *Wooley v. Maynard*, 430 U.S. 705 (1977); *National Institute of Family & Life Advocates v. Becerra* (“*NIFLA*”), 138 S. Ct. 2361 (2018). The Policy demands conformity to the government’s controversial transgender ideology.

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

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*, 137 S. Ct. 1744, 1764 (2017) (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 remain silent—to *not* express viewpoints a speaker hates. Compelled expression is even worse than compelled silence because compelled speech affirmatively associates the speaker with a viewpoint he does not hold.

The Policy “[m]andates speech” many “would not otherwise make” and “exact[s] a penalty” for noncompliance. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The Policy demands that

personnel and students make assertions they know are false, such as using *male* pronouns for a biological *female* or *female* pronouns for a biological *male*—all based on the command of a gender-confused child. This viewpoint-based mandate requires endorsement of transgender ideology regardless of conscience or faith. It is not an adequate response to suggest the absence of names and pronouns when speaking to a transgender student, or using the plural “they” instead of singular pronouns. *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 629 F. Supp. 3d 891, 909-910 (S.D. Ia. 2022). Nor is it reasonable to presume “students will not interact, again, intentionally and unintentionally, with students with whom they fundamentally disagree or whose lifestyles they do not agree with.” *Id.*, 910. This severe limitation on association flouts “diversity” and “inclusion,” creating the very discrimination the Policy purportedly eliminates.

“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, *No-Compelled-Speech*, 99 Neb. L. Rev. 58, 59 (2020) (emphasis added). The Policy combines the worst of two worlds—compelled speech and viewpoint discrimination.

Freedom of thought is the “indispensable condition” of “nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784

(1969). This freedom undergirds the First Amendment and merits “unqualified attachment.” *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The distinction between compelled speech and compelled silence is “without constitutional significance.” *Riley*, 487 U.S. at 796. These two are “complementary components” of the “individual freedom of mind.” *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 637. Together they guard “both the right to speak freely and the right to refrain from speaking at all.” *Wooley*, 430 U.S. at 714; *Barnette*, 319 U.S. at 633-634; *id.*, at 645 (Murphy, J., concurring). A system that protects the right to promote ideological causes “must also guarantee the concomitant right to decline to foster such concepts.” *Wooley*, 430 U.S. at 714; Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 63.

The Policy is a government demand that 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. A government edict that commands “involuntary affirmation” demands “even more immediate and urgent grounds than a law demanding silence.” *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018), citing *Barnette*, 319 U.S. at 633 (internal quotation marks omitted). Even a legitimate and substantial government purpose “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Wooley*, 430 U.S. at 716-717, citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The Policy cannot jump this hurdle.

A. The Policy is a paradigmatic example of compelled speech that is anathema to the First Amendment.

Compelled speech “invades the private space of one’s mind and beliefs.” Richard F. Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 275. While “ordinary authoritarians” merely demand silence, “[t]otalitarians insist on forcing people to say things they know or believe to be untrue.” *Id.*, quoting Robert P. George.² The Policy issues a totalitarian demand to adopt a distorted view of reality that aligns with whatever “gender identity” any child demands. Many cannot in good conscience comply.

B. The Policy transgresses liberties of religion and conscience.

In addition to speech, the Policy encroaches on religious liberty and conscience. 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) (cleaned up). Convictions about sexuality are integrally intertwined with religion and conscience, as many faith traditions have strong teachings about sexual morality, marriage, and the distinction between male and female. Compelled speech—that a boy is a

² Robert P. George, Facebook (Aug. 2, 2017), Professor of Jurisprudence at Princeton, <https://www.facebook.com/RobertPGeorge/posts/10155417655377906>.

girl or a girl is a boy—tramples deeply held religious beliefs and attacks conscience.

The vast majority of state constitutions expressly define religious liberty in terms of conscience.³ A few do not use the term “conscience” but nevertheless protect their citizens against state compulsion.⁴ Some limit religious liberty only by licentiousness or threats to public morals, peace and/or safety.⁵ Several essentially duplicate the federal Constitution.⁶ Oklahoma provides for “perfect toleration of religious sentiment” and

³ See A.R.S. Const. Art. II, § 12; Ark. Const. Art. 2, § 24; Cal. Const. art. I, § 4; Colo. Const. Art. II, Section 4; Del. Const. art I, § 1; Ga. Const. Art. I, § I, Para. III-IV; Idaho Const. Art. I, § 4; Illinois Const., Art. I, § 3; Ind. Const. Art. 1, §§ 2, 3; Kan. Const. B. of R. § 7; Ky. Const. § 1; ALM Constitution Appx. Pt. 1, Art. II; Me. Const. Art. I, § 3; MCLS Const. Art. I, § 4; Minn. Const. art. 1, § 16; Mo. Const. Art. I, § 5; Ne. Const. Art. I, § 4; Nev. Const. Art. 1, § 4; N.H. Const. Pt. FIRST, Art. 4 and Art. 5; N.J. Const., Art. I, Para. 3; N.M. Const. Art. II, § 11; NY CLS Const Art I, § 3; N.C. Const. art. I, § 13; N.D. Const. Art. I, § 3; Oh. Const. art. I, § 7; Ore. Const. Art. I, §§ 2, 3; Pa. Const. Art. I, § 3; R.I. Const. Art. I, § 3; S.D. Const. Article VI, § 3; Tenn. Const. Art. I, § 3; Tex. Const. Art. I, § 6; Utah Const. Art. I, § 4; Vt. Const. Ch. I, Art. 3; Va. Const. Art. I, § 16; Wash. Const. art. 1, § 11; Wis. Const. Art. I, § 18; Wyo. Const. Art. 1, § 18.

⁴ Alabama Const. Art. I, Sec. 4; Iowa Const. Art. I, § 3; Md. Dec. of R. art. 36; W. Va. Const. Art. III, § 15.

⁵ Conn. Const. Art. I., Sec. 3; Fla. Const. Art. I, § 3; Md. Dec. of R. art. 36; Miss. Const. Ann. Art. 3, § 18.

⁶ Alaska Const. Art. I, § 4; HRS Const. Art. I, § 4; La. Const. Art. I, § 8; Mont. Const., Art. II § 5; S.C. Const. Ann. Art. I, § 2.

prohibits any religious test to exercise civil rights. Okl. Const. Art. I, § 2.

The Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. *Girouard v. United States*, 328 U.S. 61, 68 (1946). Courts have an affirmative “duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.” *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Policy assaults liberty of thought and conscience, compelling participants in public education “to contradict [their] most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts”—by affirming the lie that a biological female is a male (or a biological male is a female). *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring); see Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 65-66.

C. The Policy exemplifies the blatant viewpoint discrimination characteristic of tyrannical government.

“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).

Viewpoint discrimination ushers in an Orwellian system that destroys liberty of thought. As Justice Kennedy cautioned, “The 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, *Dark Arts*, 32 Regent U. L. Rev. at 265. The Policy imperils these liberties.

“[T]he history of authoritarian government . . . shows how relentless[ly] authoritarian regimes . . . stifle free speech.” *NIFLA*, 138 S. Ct. at 2379 (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).

Every speaker must decide “what to say and what to leave unsaid.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), quoting *Pacific Gas & Electric Co. v. Public Utilities Comm’n*, 475 U.S. 1, 11 (1986) (plurality opinion) (emphasis in original). An individual’s “intellectual autonomy” is the freedom to say what that person believes is true and to refrain from saying what is false. Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 85. A speaker’s choice “not to propound a particular point of view” is “beyond the government’s power to control,” regardless of the speaker’s rationale. *Hurley*, 515 U.S. at 575. There is “no more certain antithesis” to free speech than a government mandate imposed to produce “orthodox expression.” *Id.* at 579. Such a

restriction “grates on the First Amendment.” *Id.* “Only a tyrannical [School Board] “requires one to say that which he believes is not true,” e.g., that “two plus two make five.” *Id.* Here, the Policy requires personnel (and students) to make false statements about the sex of a gender-confused student.

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, *No-Compelled-Speech*, 99 Neb. L. Rev. at 78; see *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298 (2023). But that is precisely what the Policy 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 the current cultural acceptance of transgenderism, MCBE’s interest in disseminating that ideology “cannot outweigh [a student’s or teacher’s] First Amendment right to avoid becoming the courier for such message.” *Wooley*, 430 U.S. at 717. *Barnette*, *Wooley*, and *303 Creative* all solidify the principle that government lacks the “power to compel a person to speak, compose, create, or disseminate a message on any matter of political, ideological, religious, or public concern.” Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 63-64. The Policy is even more intrusive than in *Wooley*, where the state did not “require an individual to speak any words, affirm any beliefs, or create or compose any expressive message,” but rather to serve as a “mobile billboard” for

an ideological message obviously attributable to the state. *Id.* at 63. Even this passive display violated the First Amendment because it “usurp[ed] speaker autonomy.” *Id.* at 76.

D. 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*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

Citizens who hold competing views on public issues may use the political process to enact legislation consistent with their views, but under *Barnette* and *303 Creative*, the government may not “insist that the victory of one side, of one creed or value, be memorialized by compelling the defeated side to literally give voice to its submission.” Duncan, *Dark Arts*, 32 Regent U. L. Rev. at 278, quoting Horwitz, *A Close Reading of Barnette*, 13 FIU L. REV. at 723. “Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.” *Janus*, 138 S. Ct. at 2464.

“Generally, the government may not compel a person to speak its own preferred messages.” *303 Creative*, 143 S. Ct. at 2312. 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 Policy is “a paradigmatic example of the serious threat presented when government seeks to impose its own message,” replacing individual expression. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring). The Policy’s viewpoint-based compulsion to speak seeks not only to control content (names and pronouns) but also to promote an ideology unacceptable to many students, their families, and school personnel. Such coerced compliance attacks dignity. “Freedom of thought, belief, and speech are fundamental to the dignity of the human person.” Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 59. “The framers designed the Free Speech Clause of the First Amendment to protect the freedom to think as you will and to speak as you think.” *303 Creative*, 143 S. Ct. at 2310 (cleaned up).

The Policy 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 the government must respect a wide range of diverse 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.

MCBE may not enhance the dignity of transgender students by censoring the protected expression of other persons or compelling regurgitation of the state's preferred message. That is exactly what the Policy attempts, but this purpose is "insufficient to override First Amendment concerns." *Goldberg, "Good Orthodoxy"*, 13 FIU L. Rev. at 664. Even when it is appropriate to regulate harmful discriminatory conduct, the state may not require that some citizens—either personnel or young students—"communicate a message of tolerance that affirms the dignity of others." *Id.* Dignity is an interest "so amorphous as to invite viewpoint-based discrimination, antithetical to our viewpoint-neutral free speech regime, by courts and legislatures." *Id.* at 665.

As *Hurley* teaches, the state must guard against "conflation of message with messenger" because "a speaker's objection to speaking or disseminating a particular ideological message is at the core of the no-compelled-speech doctrine." Duncan, *No-Compelled-Speech*, 99 Neb. L. Rev. at 64. The trial judge in *Hurley* erroneously reasoned that the parade organizer's rejection of a group's *message* was tantamount to "discrimination on the basis of the innate *personhood* of the group's members." *Id.* (emphasis added). The First Amendment guards a speaker's autonomy to "discriminate" by favoring viewpoints he wishes to express and rejecting other viewpoints. *Id.* Rejecting a *message* is not equivalent to rejecting a *person* who prefers that message. Similarly, rejecting transgender ideology that conflicts with biological reality is not tantamount to rejecting a *person* who is confused about his or her gender.

E. The prohibition of viewpoint discrimination, now firmly entrenched in 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). A few years after *Abrams*, 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.*; 303 *Creative*, 143 S. Ct. at 2311. Justice Kennedy echoed the thought: “The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . . To permit viewpoint discrimination . . . is to permit Government censorship.” *Matal*, 137 S. Ct. at 1767-1768 (Kennedy, J., concurring). Justice Kennedy’s comments “explain why viewpoint discrimination is particularly inconsistent with free speech values.” Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 36.

Since *Barnette*, this Court has further refined the concept 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. A year later this Court affirmed that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” and “must afford all points of view an equal opportunity to be heard.” *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

Further development occurred in the 1980's. Both the majority and dissent in *Perry Education Ass'n v. Perry Local Educators' Ass'n* agreed that viewpoint discrimination is impermissible, with the dissent explaining that such discrimination “is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of free speech.” 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). It 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. Three years later, the Court struck down a viewpoint-based regulation based on coerced association with the views of other speakers. *Pacific Gas & Electric*, 475 U.S. at 20-21 (plurality opinion). At the end of this decade, the Court affirmed the “bedrock principle underlying the First Amendment . . . that the 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) (striking down Texas statute that made it a crime to desecrate a venerated object, including a state or national flag).

Justice Scalia authored a key decision in the early 1990's striking down a Minnesota 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). This 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))), effectively placing the principle "at the very heart of serious free speech protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25. As Justice Scalia observed, 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.

During this same time frame, this Court held that the government may not discriminate against speech solely because of its religious perspective. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394 (1993) (policy for use of school premises could not exclude film series based on

its religious perspective); *Rosenberger*, 515 U.S. at 829 (invalidating university regulation that prohibited reimbursement of expenses to student newspaper that “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality”); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001) (striking down regulation that discriminated against religious speech).

Government speech mandates often implicate viewpoint discrimination by either compelling a speaker to express the government’s viewpoint (*Wooley*, *NIFLA*, *303 Creative*) (transgender ideology in this case) 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. After *Hurley*, “the constitutional ideal of intellectual autonomy for speakers, artists, and parade organizers, which originated in *Barnette*, now had the support of a unanimous Supreme Court.” *Id.* at 282; *Hurley*, 515 U.S. 557. Even when the government’s motives are innocent, there is a residual danger of censorship in facially content-based statutes because “future government officials may one day wield such statutes to suppress disfavored speech.” *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015).

Just recently, this Court condemned Colorado’s attempt to “excis[e] certain ideas or viewpoints from the public dialogue.” *303 Creative*, 143 S. Ct. at 2313, quoting *Turner Broad. Sys. v. FCC*, 512 U. S. 622, 642 (1994). Previously, *Matal* was “th[is] Court’s most important decision in the anti-viewpoint-discrimination line of cases.” Bloom, *The Rise of the Viewpoint-*

Discrimination Principle, 72 SMU L. Rev. F. at 29. As the case at issue in this Petition illustrates, “[g]iving offense [to a transgender student] is a viewpoint.” *Matal*, 137 S. Ct. at 1763. MCBE may not escape the charge of viewpoint discrimination “by tying censorship to the reaction of [the student’s] audience.” *Id.* at 1766. Shortly after *Matal*, this Court struck down a provision forbidding “immoral or scandalous” trademarks because the ban “disfavors certain ideas.” *Iancu v. Brunetti*, 139 S. Ct. at 2297. 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. MCBE’s viewpoint-based Policy is unmistakably a “per se violation of the First Amendment.”

III. THE POLICY DOES NOT CONCERN CURRICULUM OR ANY OTHER LEGITIMATE PURPOSE.

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton*, 364 U.S. at 487. Even if MCBE had a legitimate purpose for the Policy, it “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Id.* at 488. The First Amendment facilitates the free flow of information and ideas. “The Nation’s future depends upon leaders trained through wide exposure” to a “robust exchange of ideas” that “discovers truth out of a multitude of tongues” rather than “authoritative selection.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

A. Transgender ideology is a matter of intense public concern.

Speech on matters of public concern merits heightened 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*, 138 S. Ct. at 2476 (cleaned up). Every person has a fundamental right to speak on this matter. The Policy “use[s] 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. It is not the business of *any* government official in *any* position to coerce *any* person’s chosen perspective on this—including public school faculty and students.

B. MCBE has no legitimate purpose in suppressing any person’s viewpoint about “gender identity” or compelling expression of a view the person does not hold.

Speech and beliefs about sexuality merit constitutional protection no matter how profoundly school officials—or even society generally—might disagree. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. at 414.

The district court concluded that “parents do not have a constitutional right to dictate a public school’s curriculum.” *John & Jane Parents 1*, 622 F. Supp. 3d at 13. But the Policy is not a regulation of curriculum, unlike some prior cases. *See, e.g., Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (school curriculum included books depicting same sex relationships); *Mozert v. Hawkins County Bd. of Education*, 827 F.2d 1058, 1059 (6th Cir. 1987) (textbooks had no coercive effect that operated against plaintiff’s religion). The Policy is also not about “academic assignments” that educators may require students to complete. *Brown v. Li*, 308 F.3d 939, 949 (9th Cir. 2002). Students do not have free reign to alter a school assignment and receive credit. *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (Batchelder, J., concurring) (research paper).

MCBE adopts one side of the contentious transgender debate and shuts down further inquiry, demanding compliance with its preferred viewpoint. But the Constitution protects unpopular minority viewpoints. *Dale*, 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397 (burning American flag); *Doe v. University of Michigan*, 721 F. Supp. 852, 863 (E.D. Mich. 1989) (University could not “establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed,” nor could it “proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people”). This is particularly true in a changing social environment—“the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a

different view.” *Dale*, 530 U.S. at 660. “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).

Schools are not a haven where educators can ignore the First Amendment with impunity. Public schools cannot invade the protected liberties of faculty, students, or parents. It is well settled that “censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.” *Barnette*, 319 U.S. at 633 (allowing students to quietly forego the compulsory flag salute presented no “clear and present danger”). To affirm the Fourth Circuit’s ruling, this Circuit would be “required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.” *Id.* at 634. Such compulsion “invades the sphere of intellect and spirit” which the First Amendment “reserve[s] from all official control.” *Id.* at 642.

The Policy compels school personnel 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 MCBE cannot compel anyone to affirm a viewpoint that collides 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.”); *Pacific*

Gas & Electric, 475 U.S. at 16 ([I]f “the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker’s freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.”); *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.”)

C. Schools can affirm the dignity of every student without sacrificing the constitutional liberties of either faculty or other students.

It is a critical to “affirm[] the equal dignity of every student,” so as to create the best environment for learning. Goldberg, “*Good Orthodoxy*”, 13 FIU L. Rev. at 666. At the same time, “students need to tolerate views that upset them, or even disturb them to their core, *especially from other students.*” *Id.* (emphasis added). 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. at 590. Indeed, students attending required classes are exposed to “ideas they find distasteful or immoral or absurd or all of these.” *Id.* at 591. Transgender students are not exempt but must learn to tolerate the views of those who disagree with them.

Public schools have a role in “educat[ing] youth in the values of a democratic, pluralistic society.” *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378

(6th Cir. 1999). Rigorous protection of constitutional liberties is essential to preparing young persons for citizenship, so that we do not “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. Our Nation’s deep commitment to “safeguarding academic freedom” is “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Meriwether*, 992 F.3d at 504-505, 509, quoting *Keyishian*, 385 U.S. at 603.

CONCLUSION

Amicus curiae urges the Court to grant the Petition and reverse the Fourth Circuit ruling.

Respectfully submitted,

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