No. 24-410

# In the Supreme Court of the United States

L.M., A MINOR, BY AND THROUGH HIS FATHER AND STEPMOTHER AND NATURAL GUARDIANS, CHRISTOPHER AND SUSAN MORRISON,
*Petitioner*,

*v.*

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS, ET AL.

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

## BRIEF FOR *AMICUS CURIAE* INDEPENDENT WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER AND REVERSAL


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NOVEMBER 12, 2024

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

It was in the context of an elementary school classroom that this Court said:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

*West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The sentence immediately following that pronouncement is often forgotten: "If there are any circumstances which permit an exception, they do not now occur to us." *Ibid.*

But the First Circuit believes it has found a new exception to that fixed star for student speech that risks "negative psychological impacts" on issues relating to gender and "characteristics of personal identity." App. 34a-35a. But the potential for offense alone is not enough to justify the exclusion of student speech. A school district cannot punish a student who expresses a sincere belief that sex is binary simply because he may contradict the beliefs and self-conceptions of other students.

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of the intent of *amicus curiae* to file this brief.

*Amicus* Independent Women's Law Center (IWLC) is a non-profit organization that fights for the equal opportunity women are promised in law, individual liberty, and the continued legal relevance of biological sex. *Amicus* IWLC is committed to preserving the freedom of men, women, and children to express their belief that biological sex matters and thus urges this Court to grant certiorari and reverse.

## SUMMARY OF ARGUMENT

The petition ably explains several reasons this case merits the Court's review and, ultimately, reversal. *Amicus* IWLC writes separately to emphasize two additional reasons.

First, *amicus* emphasizes that protection for the expression of unpopular viewpoints on school campuses applies to issues of sex, gender identity, and personal identity. While the First Circuit acknowledged the clear directive in this Court's precedent to protect unpopular and controversial student expression even when it may risk offending other students, App. 38a, the First Circuit carved out a special exception to this case law for issues relating to personal identity due to the potential for "negative psychological impact[s]," App. 35a. In so doing, the First Circuit ignored this Court's repeated admonition that the potential for offense alone is not enough to justify the exclusion of student speech, undermined the role of schools in preparing students to engage in civic discourse, and defied the facts and holding of *Tinker* itself.

Second, *amicus* explains that even the First Circuit's novel material disruption test does not justify

the prohibition of L.M.'s shirt because it was not "demeaning." L.M.'s shirt silently and passively conveyed a message of "pure ideology" without targeting any individuals or criticizing those who held opposing opinions. Such a message is not "demeaning" just because it contradicts the beliefs and self-conceptions of other students. Nor does the decision to express himself via a t-shirt render otherwise protected speech regulable. Where, as here, a school district encourages pro-LGBTQ+ messaging on t-shirts but prohibits students from wearing t-shirts that state "there are only two genders," the school district commits unconstitutional viewpoint discrimination.

## ADDITIONAL REASONS FOR GRANTING THE PETITION

### I. The First Circuit Departed from This Court's Precedent When It Permitted Prohibition of Passive, Silent, and Non-aggressive Student Speech Solely Because It Related to Issues of Gender Identity.

As this Court said in its landmark school-speech case, "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)). As such, no school official "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), nor can they "confine[]" students "to the expression of those sentiments that are officially approved," *Tinker*, 393 U.S. at 511.

Rather, *Tinker* establishes that student speech can be regulated by schools only if it "materially disrupts" the operation of school functions or "inva[des] * * * the rights of others." 393 U.S. at 513. This foundational principle is just as valid and necessary today as it was 55 years ago. Nevertheless, the First Circuit concluded that schools can prohibit certain student speech, even when it is made passively, silently, and non-aggressively, if the content of that speech touches on "characteristics of personal identity" and risks potential "negative psychological impact[s]." App. 34a-35a. This Court should grant certiorari and reverse the First Circuit's holding to clarify that the protections of *Tinker* apply to student speech even when that speech addresses the sex binary.

### A. This Court's Precedent is Clear that Schools Must Permit Expression of Unpopular and Controversial Viewpoints.

*Tinker* itself involved students who wore black armbands of mourning to school to protest the Vietnam War. At the time, the validity of the United States' engagement in the war was a "highly emotional subject." *Tinker,* 393 U.S. at 518 (Black, J., dissenting). In this context, the Court noted that "[a]ny variation from the majority's opinion may inspire fear" and that "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance." *Id.* at 508. Nevertheless, the Court concluded that "our Constitution says we must

take this risk." *Ibid.* (citing *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949)).

As a result, the Court emphasized that school officials cannot "suppress 'expressions of feelings with which they do not wish to contend,'" *Tinker*, 393 U.S. at 511 (quoting *Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Rather, "to justify prohibition of a particular expression of opinion, [school officials] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 508-509.

In its subsequent school-speech cases, this Court has continually reaffirmed that schools must not only permit, but protect, the expression of unpopular and controversial opinions. See *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986) (Students have "undoubted freedom to advocate unpopular and controversial views in schools."); *Morse* v. *Frederick*, 551 U.S. 393, 409 (2007) (Explaining that past cases "should not be read" to allow prohibition of "any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some."); *Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021) ("[T]he school itself has an interest in protecting a student's unpopular expression.").

Thus, the foundational principle of this Court's precedent on school speech is that schools must protect the non-disruptive expression of unpopular ideas so that students learn to live in a pluralistic society and civilly engage in political discourse.

### B. Exposure to Diverse Viewpoints at School Prepares Students to Civilly and Actively Engage in a Pluralistic Society.

Protection for unpopular student expressions of political or religious belief is necessary because "America's public schools are the nurseries of democracy." *Mahanoy*, 594 U.S. at 190. By not only permitting, but protecting, the expression of unpopular viewpoints on issues of political, social, and religious importance, public schools play an important role in preparing students to subsequently participate in and contribute to our diverse government and society.

First, exposure to unpopular viewpoints at school teaches students to value free speech, a bedrock principle of our Constitution. The more schools punish student expression, the more they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ.*, 319 U.S. at 637. For this reason, schools have a "strong interest" in protecting student speech and thereby "ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy*, 594 U.S. at 190.

Second, exposure to unpopular viewpoints teaches students how to civilly engage in political discourse. Indeed, it is "[t]he role and purpose of the American public school system * * * to inculcate the habits and manners of civility as values in themselves * * * indispensable to the practice of self-government." *Fraser*, 478 U.S. at 681 (cleaned up). These "'habits

and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Ibid.* By permitting advocacy for "unpopular and controversial views" in a controlled environment, schools teach students to express and engage with these views within the "boundaries of socially appropriate * * * political discourse." *Ibid.*

Third, exposure to diverse and unpopular viewpoints at school increases students' mental engagement and motivation. Much research has been conducted on the benefits of diversity in educational environments. Importantly, that research notes that "[s]tructural diversity is * * * by itself, usually not sufficient to produce substantial benefits."[2] Instead, students need to "learn about each other * * * in informal interaction[s] outside of the classroom."[3] This exposure to people "who hold different religious or political viewpoints or personal values appears to contribute to learning. Even engaging in conversations about differences may lead to gains in learning."[4]

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[2] Patricia Gurin, *Selections from* The Compelling Need for Diversity in Higher Education*, Expert Reports in Defense of the University of Michigan*, *Expert Report of Patricia Gurin*, 32 Equity & Excellence in Educ. 36, 41 (1999), https://tinyurl.com/yfsu6r9k.

[3] *Ibid.*

[4] Kathleen M. Goodman, *The Effects of Viewpoint Diversity and Racial Diversity on Need for Cognition*, 58 J. Coll. Student Dev. 853, 855 (2017) (citations omitted), https://tinyurl.com/4b3dpe43; see also Gurin, *supra* note 2, at 45 ("Students who had experienced the most diversity in classroom settings and in informal interactions with peers showed the greatest engagement

Fourth, exposure to unpopular viewpoints at school can promote better long-lasting mental health in students. One argument in favor of restrictions on student speech is that schools should shield students from ideas that may be psychologically damaging for them. However, censoring a student's speech to protect a classmate's emotional safety ultimately harms their personal emotional and psychological development. Rather than teaching students critical thinking skills and tools to cope with distressing comments or viewpoints, "[a] campus culture devoted to policing speech and punishing speakers is likely to engender patterns of thought that are surprisingly similar to those long identified by cognitive behavioral therapists as causes of depression and anxiety."[5]

Ultimately, the research shows that those students who are exposed to a diversity of viewpoints "in classrooms and in the broad campus environment will be more motivated and better able to participate in a heterogeneous and complex society."[6]

### C. These Principles Apply Even to Issues of Sex, Gender, and Personal Identity.

Questions of gender identity have been at the forefront of political and social debate in recent years.

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in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.").

[5] Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, The Atlantic (Sept. 2015), https://tinyurl.com/bdh9zv3m.

[6] Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. Soc. Issues 17, 19 (2004), https://tinyurl.com/3jk26h48.

See PRRI Staff, *The Politics of Gender, Pronouns, and Public Education: Findings From the 2023 Gender and Politics Survey*, PRRI (2023), https://tinyurl.com/3y7wffek; Kim Parker et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, Pew Rsch. Ctr. (2022), https://tinyurl.com/y5xv8fw2.

Within this debate, the belief that sex is binary is not unusual. That belief is often expressed as the statement that "gender" is binary, given that many people use "gender" interchangeably with "sex" to avoid awkwardly using the intercourse synonym. IWLC opposes this linguistic switch, which gives rise to confusion about the binary nature of sex. Regardless, the switch is prevalent, and recent polling indicates that American adults have become *more* likely to say that there are only two "genders" in recent years—rising from 59% in 2021 to 65% in 2023. See PRRI Staff, *supra*, at 3. The increase is even sharper among younger generations, rising by fourteen percentage points for Generation Z and nine percentage points for Millennials between 2021 and 2023. *Id.* at 4 fig. 1.

Despite the prevalence of a belief in the sex binary, the Middleborough School District nevertheless concluded that L.M.'s passive, silent, and non-aggressive expression of this belief could not be permitted on school grounds due to the possibility of a "negative psychological impact on students." App. 35a. And the First Circuit upheld this prohibition, concluding that an exception should be made to *Tinker*'s general rule of protecting unpopular and controversial student expressions for issues relating to "characteristics of personal identity." App. 34a.

But reading *Tinker* to exclude student expressions that might have a "negative psychological impact" on students defies the facts of *Tinker* itself. In the 1960s, the topic of the Vietnam War was not only politically charged, but also "highly emotional." *Tinker*, 393 U.S. at 518 (Black, J., dissenting). Indeed, the dissent argued that the school's prohibition on black armbands protesting the Vietnam War should have been upheld because "disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues [e]ver have. Of course students * * * cannot concentrate on [school] when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors." *Id.* at 524 (Black, J., dissenting). It is hard to imagine a more negative psychological impact on a student than to be regularly and consistently reminded, throughout the school day, of a wounded or dead friend or family member.

Thus, *Tinker* addressed head on student expressions that might have "negative psychological impact[s]" and "strike[] a person at the core of his being," App. 34a-35a (cleaned up), and concluded that even *those* expressions cannot be prohibited by school officials without evidence of a material disruption of school activities or an invasion of the rights of others, *Tinker*, 393 U.S. at 513. So, too, should the court have protected L.M.'s expression here.

## II. The First Circuit's Own Test Does Not Justify the Prohibition of L.M.'s Speech.

*Tinker* establishes that student speech can be regulated by schools only if it "materially disrupts" the operation of school functions or "inva[des] * * * the rights of others." 393 U.S. at 513. In its opinion, the First Circuit adopted a novel interpretation of the "materially disrupts" prong and concluded that schools "may bar passive and silently expressed messages * * * that target no specific student if: (1) the expression is reasonably interpreted to demean [a] * * * characteristic[] of personal identity * * * and (2) the demeaning message is reasonably forecasted" to have a "serious negative psychological impact on students with the demeaned characteristic[.]" App. 34a-35a (citations omitted).

While petitioner L.M. ably explains why the court's adopted test is incorrect and spawns multiple circuit splits, *amicus* IWLC writes separately to emphasize that even under the First Circuit's own test, L.M.'s speech was not demeaning.

Throughout its opinion, the First Circuit repeatedly describes L.M.'s speech as a "passive and silent expression that does not target any specific student or students." App. 20a; see also App. 4a, 22a, 23a, 34a, 37a. L.M.'s speech is thus distinguishable from "bullying speech." App. 22a; see also *Cohen* v. *California*, 403 U.S. 15, 20 (1971) ("No individual actually or likely to be present could reasonably have regarded the words * * * as a direct personal insult."). Nor did L.M.'s shirt use words or images that were intentionally "hateful or bigoted." App. 48a. Finally, the parties do not dispute that L.M.'s expression of

opinion was "unaccompanied by any disorder or disturbance on the part of" L.M. himself. App. 37a (quoting *Tinker*, 393 U.S. at 508). Instead, L.M. described his shirt's message as a "purely ideological" message that "summarized [his] beliefs at a high level of generality without criticizing opposing views." App. 48a.

In spite of all this, the school district *still* concluded that L.M.'s shirt was "demeaning." The First Circuit deferred to this determination, stating that it need not "tak[e] charge of defining the precise words that do or do not" render a message "demeaning" as long as the school district's determination was "reasonabl[e]." App. 47a. Ultimately, the court defers to two reasons given by the school district for why L.M.'s shirt was "demeaning": First, because "the message expresses the view that students with different beliefs * * * are wrong," App. 48a (cleaned up), and second, because the statement was made on a t-shirt and was thus lasting rather than "fleeting" or "nuance[d]." App. 49a. Neither reason justifies prohibiting L.M.'s statement of pure political ideology.

### A. A Statement of Political Belief is Not "Demeaning" to Students Just Because It Disagrees with Them.

The court's first reason for upholding the prohibition on L.M.'s shirt is the most problematic: The court concluded that L.M.'s shirt was "demean[ing]" because it "expresses the view that students with different 'beliefs about the nature of [their] existence' are wrong," App. 48a.

But the standard for regulation of student speech under *Tinker* has *never* been that the school district can regulate student speech just because it implies that students with different beliefs are wrong. Indeed, *Tinker* states the exact opposite, repeatedly emphasizing that schools cannot regulate speech just because it conveys an "unpopular viewpoint" that may cause "discomfort and unpleasantness" to others. 393 U.S. at 509. Rather, schools must show "something more" to "justify [the] prohibition of a particular expression of opinion." *Ibid.*

Here, however, there was no "something more." L.M.'s shirt included no intentionally derogatory terms or symbols. His shirt included no statement criticizing those who believed differently. Indeed, his shirt contained no statement directed at any *people* whatsoever. It was, as L.M. described it, a "purely ideological" statement of political and social belief. App. 48a.

This begs the question: Is there *any* shirt L.M. could have worn expressing a belief that gender is binary that the school would have permitted? Is there any way he could have expressed his beliefs more politely and thus rendered his shirt acceptable to the school district?

The inevitable conclusion is that no, there is no shirt expressing a belief in the sex binary that the school would have likely permitted. Both the school district and the First Circuit concluded that L.M.'s shirt was "demeaning" and therefore worthy of regulation solely because it contradicted the beliefs and self-conceptions of other students. Indeed, it was the belief itself, and nothing concerning L.M.'s

particular expression thereof, that the school found problematic.

### B. Exclusion of L.M.'s Speech Is Not Justified by the Fact that It Was Communicated Via Clothing.

The First Circuit attempts to avoid the inevitable conclusion that L.M.'s speech was suppressed solely because the school district disagreed with its message by emphasizing that "Middleborough interpreted the message in applying a dress code and thus in the context of assessing a particular *means* of expression that is neither fleeting nor admits of nuance." App. 49a. The court thus concludes that "Middleborough's assessment of the message's demeaning character does not necessarily reflect a categorical judgment that, whenever uttered, the message has such a character." *Ibid.* Instead, the court hypothesizes that Middleborough may still allow expressions of belief in the sex binary orally through "a stray remark on a playground" or a "point made during discussion." App. 51a-52a. But this heavy emphasis on the fact that the school was regulating apparel is misplaced for two reasons.

First, the First Circuit's conclusion that L.M.'s choice to express his beliefs on a shirt rendered his expression especially demeaning is at direct odds with this Court's conclusions in *Tinker*. There, the Court acknowledged that had "school officials forbidd[en] discussion of the Vietnam conflict * * * it would be obvious that the regulation would violate the constitutional rights of students." *Tinker*, 393 U.S. at 513. This Court went on to consider the implications of the students' choice to express themselves via

armbands and ultimately concluded that the school's regulation of the "silent, passive" witness of apparel "is no less offensive to the constitution's guarantees." *Id.* at 514. The Court concluded that where, as here, the form of expression caused "no interference with work and no disorder," the Constitution protects not only the substance of the student's expression but "their form of expression" as well. *Ibid.* Thus, this Court has already considered, and rejected, the conclusion that student speech which would be permitted verbally is otherwise regulable just because it is made via apparel.

Second, the First Circuit's conclusion that L.M.'s expression was especially demeaning because it was made via apparel blatantly ignores the fact that the school not only allowed, but encouraged, students to express the opposing viewpoint via their clothing. As explained in the petition, students in the Middleborough School District "often wear t-shirts and other apparel" with pro-trans and LGBTQ+ messaging. Pet. 4 (citing App. 100a-101a). In fact, during Pride Month, the school district "invites" students to show their support for transgender and gender nonconforming students "by donning rainbow colors and wearing Pride gear." *Ibid.* (cleaned up).

Where, as here, a school district encourages pro-LGBTQ+ messaging on t-shirts but prohibits students from wearing t-shirts that state "there are only two genders," the school district commits textbook viewpoint discrimination. This discrimination cannot be justified solely on the grounds that the regulated message contradicts the beliefs and self-conceptions of other students in a way that may make them feel

"discomfort and unpleasantness." *Tinker*, 393 U.S. at 509. In circumstances such as this—where a student adopts a passive, silent, and non-targeted means of communicating a message of pure ideology—"the prohibition of expression of one particular opinion * * * is not constitutionally permissible." *Id.* at 511.

## CONCLUSION

Our nation has long "repudiate[ed] * * * the principle that a State might so conduct its schools as to 'foster a homogenous people.'" *Tinker*, 393 U.S. at 511 (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1923)). Instead, schools must tolerate the appropriate expression of unpopular and controversial opinions. *Id.* at 513. These principles apply when a student passively, silently, and non-aggressively expresses an opinion on matters of sex, gender, and personal identity—even if that opinion contradicts the beliefs and self-conceptions of others.

For that and the other reasons explained above, *amicus* respectfully submit that the petition for certiorari should be granted and the decision of the First Circuit reversed.

Respectfully submitted,

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November 12, 2024