No. 20-35499

In the United States Court of Appeals for the Ninth Circuit

LUCAS BURWELL, et al.,

Plaintiffs-Appellants,

v.

PORTLAND SCHOOL DISTRICT NO. 1J BY AND THROUGH THE PORTLAND SCHOOL BOARD, AN OREGON PUBLIC SCHOOL ENTITY,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the District of Oregon, The Hon. Karin J. Immergut (Dist. Ct. No. 3:19-cv-00385-JR)

BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* certify that the Institute for Free Speech is a nonprofit corporation, has no parent company, subsidiary, or affiliate, and that no publicly held company owns more than 10 percent of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection and defense of the First Amendment rights of speech, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

Protecting individuals from being compelled to speak in violation of their conscience is a core aspect of the Institute's organizational mission.

SUMMARY OF THE ARGUMENT

As the panel acknowledged, this Court would never tolerate religious coercion in a public school. But because the subject of the teacher-assigned performative rituals was political rather than religious, the panel washed the government's hands of any responsibility for

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All parties have provided written consent to the filing of this brief.

implementing a coercive program of official indoctrination that steamrolls students' First Amendment rights of conscience and dissent.

The panel's error is profound. The line between religious and political coercion is illusory, but the line between teaching students about controversial subjects, and "asking" them to demonstrate fealty to official political dogma by word and deed is quite bright. School officials trampled that line here, along with the students' First Amendment rights. The panel opinion greenlights the further conversion of the city's schools to political indoctrination centers, which can only undermine much of the public's confidence in its schools. This case warrants another look.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS TEACHERS FROM COMPELLING STUDENTS TO ENGAGE IN POLITICAL PERFORMANCE.

"When speech is compelled"—when "individuals are coerced into betraying their convictions"—"additional damage is done" beyond that seen in cases of mere censorship. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law

commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Id.* (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943)) (other citation omitted).

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). That includes the freedom against compelled political speech. Children are vulnerable to compulsion by adult authorities, but they are not "mere creature[s] of the State." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). They "are possessed of fundamental rights which the state must respect," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), including the right to maintain a belief system that is true to their own values. "School officials do not possess absolute authority over their students." *Id.* When a school "compels students to endorse a particular viewpoint, strict scrutiny applies." *Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014).

That *Barnette* memorably crystallized the First Amendment's proscription of compelled speech in a school setting—barring a school from compelling students to recite the Pledge of Allegiance at the height of World War II—is fitting. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. The public entrusts its schools with "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). An essential part of this preparation is ensuring students develop tolerance of the divergent religious or political views of others, *Bethel School District v. Fraser*, 478 U.S. 675, 681 (1986), a value fundamentally at odds with compelling dissenters to recant.

Teachers may be expected to "promote civic virtues and understanding in their classes," *Ambach*, 441 U.S. at 80, but this does not empower them to operate "enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. Indeed, the right to hold to one's views, and refuse the

confession of false beliefs that betray one's conscience, is integral to academic freedom—"a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). "The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* (internal quotation marks omitted). It is not just teachers but also students who "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.*

II. TEACHER-DIRECTED WALKOUTS ARE COMPELLED SPEECH.

Justice Jackson's familiar words bear careful attention here: "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." *Barnette*, 319 U.S. at 642.

Yet per the panel, the government may compel children to attend schools where officials direct them to shout particular political slogans

that offend the students' values, and assign them to physically demonstrate for particular political causes that the students oppose—and this is somehow *not* "forc[ing] citizens to confess by word or act their faith" in "what shall be orthodox in politics . . . or other matters of opinion." The panel labeled the drafting of kids into political demonstrations as mere "teaching by persuasion and example," slip op. 6 (internal quotation marks omitted), and declared that teacher-sponsored bullying is only constitutionally problematic in the religious context, *id.* at 6-7

Neither position is correct. "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (footnote and citations omitted). As educators often recognize, there is simply no comparing politicized civil disobedience and demonstration with classroom instruction. Students cannot but feel compelled to submit to the dominant political narrative when asked to do so by an authority figure, especially with their peers standing ready to enforce conformity. Moreover, neither law nor logic support the

notion that political compulsion is any less oppressive than its religious analogue.

A. Given the immense power that teachers hold over their students, the teacher-student relationship is inherently coercive—including with respect to walk-out protests.

"[I]n the eyes of a child, a teacher's authority can be very great." *John R. v. Oakland Unified Sch. Dist.*, 48 Cal.3d 438, 449 (1989). For one thing, "teachers can exercise coercive power over their students because they control their students' grades," *Judd v. Weinstein*, 967 F.3d 952, 957 (9th Cir. 2020), and grading is a subjective exercise which allows for the injection of bias. Amanda Parrish Morgan, *Is it Time to Reexamine Grading?*, JStor Daily, Sept. 2, 2020, https://bit.ly/3xshhWJ.

The inherently coercive nature of the teacher-student relationship is readily accepted in various contexts. For example, teachers are cautioned when recruiting students as test subjects, because "[r]egardless of how well a classroom teacher presents the recruitment and option not to participate, students may feel compelled to participate, or risk having their non-participation impact their grade or relationship with the teacher." Teachers College Columbia University, *Conducting Research With Your Own Students*, June 5, 2021, https://bit.ly/3zsrgNL.

> Parents and students will always feel compelled to participate, in spite of your intentions and assurances, or they may perceive some intangible benefit to participation that does not exist. As a result, the NYC Department of Education IRB expressly forbids their teachers from using their own students as research participants.

Id.

This understanding extends to walk-out protests. Nationally recognized training materials for education professionals instruct that walkout protests are acts of civil disobedience that no educator should join no matter how strongly they feel on the subject, at least in part because "students with differing views might feel alienated or compelled to participate against their will if school officials are perceived as supporting the protest." National Association of Secondary School Principals, *Considerations for Principals when Students are Planning an Organized Protest or Walkout*, (Feb. 23, 2018), ttps://bit.ly/3gCNQur.

The nation's high school principals are not opposed to "teaching by persuasion and example." Slip op. 6 (internal quotation marks omitted). Yet their association acknowledges the stark difference between instruction and walkout demonstrations, which are pure political activism. To be sure, all political action, including outright indoctrination, may be euphemistically styled as education. *See, e.g.,*

Xinhuanet, *Trainees in Xinjiang education, training program have all graduated: official*, Dec. 9, 2019, https://bit.ly/3vB3CeL (communist government description of "vocational education and training centers in northwest China's Xinjiang Uygur Autonomous Region"). But *Barnette* employed the phrase "persuasion and example" to describe ordinary classroom and school activities—it did not suggest that public school teachers can assign students to work on political campaigns and attend political demonstrations.

And even within the context of ordinary school activities, the mere control of student speech must be "reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (footnote omitted); *see also Tennison v. Paulus*, 144 F.3d 1285, 1288 (9th Cir. 1998). What was the legitimate pedagogical concern here? Teaching students to march and yell correctly?

The panel's equation of political activism with classroom instruction is inherently inconsistent with *Barnette*'s essential holding—that the First Amendment prohibits "prescrib[ing] what shall be orthodox in politics." *Barnette*, 319 U.S. at 642. "Compelling individuals to mouth support for views they find objectionable violates that cardinal

constitutional command." *Janus*, 138 S. Ct. at 2463. The enactment of a particular political agenda is not, like broad civic concepts such as "[n]ational unity," a legitimate "end which officials may foster by persuasion and example." *Barnette*, 319 U.S. at 640. And even "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (footnote omitted).

Portland school officials would doubtless have understood this point if some teacher, rather than direct students to participate in a politically correct rally such as that for gun control, had directed students to attend a *pro*-gun rights rally, or a Trump MAGA demonstration calling to overturn the results of the 2020 election.

But if political rallies are now non-coercive, fair pedagogical game, such a teacher might well have a valid First Amendment academic freedom claim were he disciplined for doing exactly that. Or perhaps school board elections would determine whether high school students will be "asked" to march for Democratic or Republican candidates.

The panel has set the schools on an unconstitutional and dangerous path.

B. The teachers' coercion of plaintiffs was aggravated.

Under normal circumstances, given a generic time and place and with respect to a generic topic, the basic parameters of the teacher-student relationship and the plainly coercive nature of teacher-led walkout protests would suffice to warrant vacating the panel's error and rehearing the matter en banc. But the situation is yet more extreme—and pressing.

First: not least considering the repeated attempts to destroy the city's federal courthouse, it is well-within judicial notice that Portland's political atmosphere is not renowned for its tolerance of opposing views, measured discourse, and respect for nuance. In a city featuring near-nightly riots and frequent brawls between opposing political factions, it strains credulity to suppose that activists who see *nothing wrong* with drafting students under their care to support their pet political causes would remain fully objective and dispassionate when grading those students who dare dissent.

Indeed, a bad grade might be the least of a student's concerns in disagreeing with her teacher's politics. "Over the course of the summer unrest, police arrested at least five [Portland and other area] school teachers for riot-related crimes." Christopher F. Rufo, *The Child Soldiers of Portland*, City Journal, Spring 2021, https://bit.ly/3wrPLIR. And Portland school walk-outs are no picnics. "The Youth Liberation Front, one of the most active and violent protest groups in Portland . . . has armed itself with shields, weapons, gas masks, and explosives. [It] organized a walkout of Portland high schools and then rioted for more than 100 consecutive nights" last year. *Id.*

How many kids feel truly free to declare their opposition to the Youth Liberation Front's next walkout?

Second: the walkout here did not concern proposed amendments to the Employee Retirement Income Security Act of 1974 or price supports for next year's broccoli crop. It concerned the incendiary subject of gun control/gun rights, on which newspaper opinions carry titles such as, "Republican Party Thrives on Blood Money From the NRA." *See* article by Paul Dunn, The Pilot (NC), Feb. 17, 2018, https://bit.ly/35q0CHx. The protest at issue stemmed from a movement launched by students

who made their mark accusing their opponents of callousness to, if not complicity in, the murder of children. *See, e.g.,* Eileen Connelly, *Florida shooting survivors troll Rubio over NRA donations*, New York Post, Mar. 24, 2018, https://bit.ly/3cO6KgK.

Of course, some people are able to politely disagree when discussing these topics, but the bullying plaintiffs experienced for declining to endorse their teachers' anti-gun views was so obviously predictable that it might fairly be viewed as having been intended by the teachers. And in any event, the First Amendment's compelled speech doctrine instructs that students should not have to worry whether the teacher who directs them to politically demonstrate for gun control is among the many who would think they are actually evil for disagreeing. With grades and college recommendation letters in the balance, who would take that risk?

C. Peer pressure is a tool of unconstitutional compulsion, whether directed toward religious or political objectives.

The Supreme Court has had the opportunity to declare that the First Amendment prohibits coercion in matters of religion, including coercion effected by a student's peers acting under official auspices. *Lee v. Weisman*, 505 U.S. 577 (1992). But just because the Court was called

upon to address and prohibit peer pressure in the religious context does not mean that government officials may use peer pressure to effect an equally unconstitutional program of political compulsion.

The First Amendment bars the compelled profession of political ideologies as much as it bars compelled participation in religious ceremony. The panel faithfully followed circuit law in holding otherwise, slip op. 6-7 (citing *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1039 (9th Cir. 2010), but in doing so, it erred under the Supreme Court's compelled speech doctrine, which has no "peer pressure" exception. The Court should take the opportunity presented here to revisit and repair circuit law.

It should not be surprising that the Court has seen more Establishment Clause cases than cases involving compelled political speech. Religion permeates American life and tradition. Political indoctrination does not. "Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech." *Janus*, 138 S. Ct. at 2464. But the compelled speech doctrine is plain, and it applies in public schools without regard to the particular mode of

coercion a teacher might employ to drag students into political compliance and conformity.

With a background understanding that schooling will always have an element of coercion—"[c]hildren are coerced into doing all sort of things in school, such as learning to read and to solve mathematical problems," *Newdow*, 597 F.3d at 1038—this Court read the *Lee*'s prohibition on the use of peer pressure to effect coercion as limited to matters of religion. *Id.* at 1039. That reading is wrong.

As *Lee* noted, "[t]he First Amendment protects speech and religion by quite different mechanisms." 505 U.S. at 591. The government may not establish religion, but it can establish speech—including speech in school that students find "offensive." *Id.* That observation did not overrule *Barnette*. There is a world of difference between being subjected to disagreeable speech, a normal part of schooling; and being compelled to participate in offensive political demonstrations, a violation of one's First Amendment speech rights. The latter offends one's conscience surely as much as, and for many people, far more than being asked to sit through a public prayer. But there is no "hierarchy

among[] constitutional rights." *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 628 (1989).

And "there are heightened concerns with protecting *freedom of conscience* from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592 (emphasis added). Freedom of conscience is exactly the issue here. Moreover, to observe "that prayer exercises in public schools carry a particular risk of indirect coercion," *id.*, is not to reject that teacher-led walkout protests carry an arguably stronger risk of direct coercion. There is doubtless a greater call to action and more fervor stirred by the Portland school's direction of political protests than by a typical graduation prayer. The allegations here do not involve anything "subtle and indirect, [that] can be as real as any overt compulsion." *Id.* at 593. They relate "overt compulsion," plain and simple. If even "subtle and indirect" peer pressure is an unacceptable means of imposing upon one's conscience by subjecting a student to prayer, it is surely an unacceptable means of imposing upon her conscience by compelling her speech. Elementary or secondary school students do not likely measure the impact of peer pressure based on whether it relates to religion or politics.

Already in *Lee*'s day, "[r]esearch in psychology support[ed] the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Lee*, 505 U.S. at 593 (citations omitted). Technological developments have only strengthened concerns over peer pressure. Mohammed Saeed Azami and Farhad Taremian, *Victimization in traditional and cyberbullying as risk factors for substance abuse, self-harm and suicide attempts in high school students,* Child and Adolescent Psychiatry and Psychology, (2020; 8: 101-109), https://bit.ly/3wBtjx2. In traditional forms of bullying ostracization and public shaming was limited to a child's direct peer group. Chang Peng *et al.*, *Self-Harm, Suicidal ideation, and Suicide Attempts in Chinese Adolescents Involved in Different Sub-types of Bullying: A Cross-Sectional Study*, Frontiers of Psychiatry (2020; 11: 565364), https://bit.ly/3zylhXE. Now social media is being used by children to blacklist others, encourage hate groups, shun, and otherwise publicly shame peers. *Id.* A few "social influencers" in a peer group can bully from behind the relative safety of a digital media device and leverage the power of their "friend group" to humiliate others. Glenn Sterner and

Diane Felmlee, *The Social Networks of Cyberbullying on Twitter*, International Journal of Technoethics, 8(2), 1-15, https://bit.ly/3cOZSQc.

Teachers who declare that a particular political agenda is necessary to protect school children from murder, and call upon students to "March for Our Lives," obviously invite the application of extremely negative peer pressure on students who disagree with that framing. Even if peer pressure were the only form of compulsion here, it would suffice to state a valid First Amendment claim against compelled political speech.

CONCLUSION

Amicus curiae respectfully requests that the Court grant Plaintiffs' petition for rehearing en banc.

Dated: June 17, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Cir. R. 29-2(c)(2) because it contains 3274 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

/s/ Alan Gura
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing amicus curiae brief on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Dated: June 17, 2021 /s/ Alan Gura
Alan Gura