No. 25-1442

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

KYLE FELLERS; ANTHONY FOOTE; NICOLE FOOTE; ELDON RASH,

Plaintiffs - Appellants,

v.

MARCY KELLEY, Superintendent of Schools, State Administrative Unit 67, in her official and individual capacities; MICHAEL DESILETS, Athletic Director, Bow High School, in his official and individual capacities; MATT FISK, Principal, Bow High School, in his official and individual capacities; BOW SCHOOL DISTRICT,

Defendants - Appellees,

PHILIP LAMY, Lieutenant, Bow Police Department, in his individual capacity; STEVE ROSSETTI, Soccer Referee, New Hampshire Interscholastic Athletic Association, in his individual capacity,

Defendants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF OF AMICI CURIAE WILLIAM P. HAMLEN AND ROBERT CHARLES SUPPORTING PLAINTIFFS-APPELLANTS

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, *amici curiae* William P. Hamlen and Robert ("Bobby") Charles state that they are natural persons with no parent corporations or stockholders.

INTEREST OF *AMICI*[1]

Plaintiffs-Appellants consent to the filing of this amicus brief. Defendants-Appellees do not consent.

Amici curiae William P. Hamlen and Robert ("Bobby") Charles are private citizens engaged in public life. Hamlen is a resident of New Hampshire who frequently comments and writes opinion editorials on matters of public interest. He was a candidate for Congress in 2024 from New Hampshire's Second Congressional District. Hamlen has two adult daughters who are lifelong competitive athletes. One daughter also competed in college women's athletics, fostering Hamlen's concern with the issue of sex-separate sports.

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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 *amici* or their counsel has made monetary contributions to its preparation and submission.

Bobby Charles is a resident of Maine. Charles is a candidate for the 2026 Maine gubernatorial election. In the past, Charles has often spoken and published political opinion and commentary on issues of public debate, including Title IX and women's sports.[2] Transgender athlete participation in women's sports is a prominent public issue in Maine. The controversy has divided the State legislature,[3] implicating free speech rights of the people's representatives on behalf of their constituents. The subject promises to remain salient through the gubernatorial campaign.

As participants in public politics, amici seek freedom of speech from government suppression, both for themselves as candidates and for their fellow citizens. Appellants' cause for parental free speech rights aligns

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[2] *E.g.*, Robert "Bobby" Charles, *Democrats Are Wrong on Title IX — Girls Matter*, THE MAINE WIRE (Feb. 17, 2025), available at https://www.themainewire.com/2025/02/democrats-are-wrong-on-title-ix-girls-matter/

[3] *See Libby v. Fecteau*, No. 24A1051, *injunction granted pending appeal*, 605 U.S. ___, 145 S. Ct. 1378 (Mem.) (U.S. May 20, 2025) (Member of Maine state legislature barred from speaking or voting in chamber, after commenting on transgender participation in women's sports).

therefore with amici's desire to remove obstacles impeding, and maximize avenues for, proper remedies against improvident government action.

As political leaders and parents of athletes, amici share concern over precedent to be set in this appeal, bringing unique insights about the broader implications for political discourse and parental advocacy.

SUMMARY OF ARGUMENT

This case comes before the Court in the wake of the Supreme Court's denial of certiorari from the Court's ruling in *L.M. v. Town of Middleborough*, 103 F.4th 854 (1st Cir. 2024), *cert. denied*, 605 U.S. —-, 145 S. Ct. 1489 (May 27, 2025). While that denial does not affirm the Court's opinion on the merits, *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.) ("denial of a writ of certiorari imparts no expression of opinion upon the merits of the case"), the dissents of two Justices do point out significant errors in this Court's approach to First Amendment rights.[4] 145 S. Ct. 1489 (Mem.) (Thomas and Alito, JJ., dissenting).

[4] The dissents from denial of certiorari appear as Addendum (Add.), *infra*.

The errors highlighted by Justices Thomas and Alito persist; and those errors now spread beyond student speech to the sensitive context of adult speech. This case presents an opportunity for the Court to correct its precedent.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews "the district court's grant or denial of a preliminary injunction for abuse of discretion," but applies de novo review to its First Amendment analysis. *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004). In First Amendment cases, "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) (per curiam).

When cases implicate core First Amendment concerns, the Court's review "is plenary so that we may reduce the likelihood of a forbidden intrusion on the field of free expression." *AIDS Action Comm. v. MBTA*

[AAC], 42 F.3d 1, 7 (1st Cir. 1994); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

Strict scrutiny applies if "the restriction focuses on content, that is, if it applies to particular speech because of the topic discussed or the idea or message expressed." *Rideout v. Gardner*, 838 F,.3d 65, 71 (1st Cir. 2016) (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Accordingly, the Court must determine "whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id*. (cleaned up); *Sindicato Puertorriqueño*, 699 F.3d at 10-11 ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis."). Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the analysis of the likelihood of success on the merits will often be dispositive.

The First Circuit evaluates preliminary injunctions using a four factor test: (1) the likelihood of success on the merits; (2) irreparable harm in the absence of preliminary injunctive relief; (3) a balancing of the equities

between the parties; and (4) the public interest. *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 7-8 (1st Cir. 2002).

De novo review applies to the district court's First Amendment analysis. *AAC.*, 42 F.3d at 7 ("*De novo* review of the trial court's application of a First Amendment standard to the facts before it ensures that the federal courts remain zealous protectors of First Amendment rights.") (citation omitted); *Rideout v. Gardner*, 838 F.3d at 70 ("The presence of a First Amendment claim significantly restricts the district court's discretion."). *See also L.M.*, 103 F.4th at 866 ("where First Amendment interests are implicated, our review must be more searching.") (cleaned up).

For this appeal, de novo review applies to these aspects of the challenged ruling: Whether the forum was properly characterized; whether viewpoint discrimination occurred; and whether the restriction was reasonable. *Ridley v. MBTA*, 390 F.3d 65, 75 (1st Cir. 2004) (de novo review of ultimate conclusions of law and mixed questions of law and fact in First Amendment cases).

Clear error review applies only to the factual findings below. This includes what actually happened at the school sporting event and what the displayed symbols meant in context.

The likelihood of success being the "linchpin" factor, any First Amendment violation diminishes the significance of the remaining factors. *Sindicato Puertorriqueño*, 699 F.3d at 11 ("irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim.").

II. The District Court's Decision Constitutes Viewpoint Discrimination That Threatens Core First Amendment Values.

Viewpoint discrimination by government authority violates the First and Fourteenth Amendments. *McCullen v. Coakley*, 573 U.S. 464, 511 (2014) (Alito, J., concurring) (If the "law discriminates on the basis of viewpoint, it is unconstitutional."); *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004). "The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another." *Id*. *See also Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)

(viewpoint discrimination occurs when speech is regulated where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

The district court conceded this command: "In a limited public forum, the government's restrictions on speech … must not discriminate against speech on the basis of viewpoint." Appellant Br. Add. 28 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)). But the court erroneously accepted the school's characterization that the "XX" symbol inherently conveys harassment, when it simply represents biological reality. Appellant Br. Add. 34.

It is " a constitutionally protected form of expression … to advocate a particular political position by wearing an emblem." *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997); *see Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 576 (1987); *Tinker v. Des Moines Indep. Commty. Sch. Dist.*, 393 U.S. 503, 505 (1969). Wrongful intent surfaces where the government "adopted the policy because of, and not despite, its discriminatory impact." *McGuire v. Reilly*, 386 F.3d at 63.

Differential treatment by the school of symbols based on ideological message further underscores the viewpoint discrimination at work. A distinction is unconstitutionally viewpoint-based if it "denies access to a speaker solely to suppress the point of view he espouses." *Cornelius v. NAACP Leg. Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *Ridley*, 390 F.3d at 82. The authorities in Bow were taking sides in a contested public debate.

"The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses." *Ridley*, 390 F.3d at 65; *see Rosenberger*, 515 U.S. at 829. This is classic viewpoint discrimination, and not content neutrality. "Regardless of actual motivation, grave damage is done if the government … even appears to be discriminating in an unconstitutional fashion." *AAC*, 42 F.3d at 12.

The district court improperly deferred to the school's subjective interpretation of the XX symbol, rather than applying objective First Amendment analysis. Appellant Br. Add. 34 (declining "to substitute this

court's judgment for the School District's"). Government cannot declare one side of a debate inherently harmful. *Ridley*, 390 F.3d at 82 (unlawful viewpoint discrimination "is a government intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic"); *McGuire*, 386 F.3d at 62.

The "rule that viewpoint-based restrictions on speech are almost never allowed is not a new principle proclaimed only in 'recent decisions.'" Add., *infra,* at 10. Rather, "viewpoint neutrality has long been seen as going to 'the very heart of the First Amendment.'" *Id*. (citation omitted). In taking and following that stance, the district court and this Court are "wrong to expel this bedrock constitutional safeguard from our schools." *Id*.

III. Adult Citizens Retain Full First Amendment Rights at School-Sponsored Public Events.

Adult citizens' rights in public forums cannot be reduced to student speech standards. "That is because free speech is the rule, not the exception." Add., *infra,* at 14. The forum analysis must account for adult speakers. But the district court conflated student speech cases, including *L.M.v. Middleborough*, with adult speech rights. Appellant Br. Add. 33.

Parents attending public school events retain full First Amendment protections. *Berner*, 129 F.3d at 26 ("the Free Speech Clause of the First Amendment is designed to protect political expression by a broad spectrum of symbolic acts"); *see also Sindicato Puertorriqueño*, 699 F.3d at 11 (burdens on "political speech ordinarily are subject to strict scrutiny").

Public school facilities used for athletic events are limited public forums mandating viewpoint neutrality. Appellant Br. Add. 28 (court and all parties "agree that the Bow soccer field and its immediate environs qualify as a limited public forum"). The Court has adopted the view that "content discrimination is prohibited even in a nonpublic forum … because it gives rise to an appearance of viewpoint discrimination." *AAC*, 42 F.3d at 10 ("We find this argument persuasive.").

L.M. v. Middleborough's student speech framework is inapplicable to the adults in this case. The Court has explicitly stated this narrow focus of its ruling in the *L.M.* opinion itself. 103 F.4th at 867 n.2 ("The public school setting is fundamentally different from other contexts" and "this distinction results in different legal standards in some instances.") (cleaned up).

IV. The "Contextual Harm" Standard Creates an Unconstitutional Heckler's Veto.

The court's ruling allows government actors to ban speech based on speculative psychological harm. Appellant Br. Add. 39. Speculative psychological harm cannot justify speech restrictions — "in order to be considered a valid manner restriction, a regulation cannot be aimed at the communicative impact of expressive conduct." *AAC*, 42 F.3d at 8.

The standard dilutes First Amendment protections and allows ideological opponents to silence speech by claiming offense. This creates a 'heckler's veto' where those who claim offense can silence protected political speech. The *L.M.* test "demands that a federal court abdicate its responsibility to safeguard students' First Amendment rights and instead defer to school officials' assessment of the meaning and effect of speech." Add., *infra*, at 13. But "the loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Sindicato Puertorriqueño*, 699 F.3d at 10-11.

In a public forum, "the government may not selectively … shield the public from some kinds of speech on the ground that they are more offensive than others." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014); *Erzoznik v. Jacksonville*, 422 U.S. 205, 209 (1975). The ban on the XX pink wristbands "would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech upon its audience or listeners' reaction to speech." *Coakley*, 573 U.S. at 481. If the wristbands "caused offense or made [viewers] uncomfortable, such offense or discomfort would not give the [government] a content-neutral justification to restrict the speech." *Id*.

Political speech on matters of public concern requires strongest protection. *AAC*, 42 F.3d at 12 ("First Amendment litigation of this kind has consequences that go far beyond the individual parties."); *Rideout*, 838 F.3d at 71 ("Content-based regulations are subject to strict scrutiny"); *Bl(a)ck Tea Soc'y*, 378 F.3d at 11-12 ("Freedom of expression, especially expression of political views, ranks near the top of the hierarchy of constitutional

rights."). The decision below threatens free public participation in ongoing debates about biological sex and sports.

V. This Ruling Dangerously Chills Parental Advocacy and Public Discourse.

Parents have fundamental rights to advocate for their children's safety and fairness in sports. They must be free to advocate for their children's interests. Yet the lower courts are divided on how to apply a "material disruption standard in a context like this one, and the decision below underscores the pressing need" for correction. Add., *infra*, at 8 n.1 (listing circuit split cases).

The decision below effectively silences one viewpoint from an important public policy debate. This lopsided result perverts the public square from a deliberative forum seeking truth, to an oppressive show trial.

The impact of these restrictions on political candidates and public discourse is a slippery slope to broader censorship. The First Amendment, if it means anything, is designed to prevent and deter these harms.

Freedom of expression

> is designed to remove governmental restriction from the area of public discussion, putting the decisions as to who shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Bl(a)ck Tea Soc'y, 378 F.3d at 12, quoting *Cohen v. Calif.*, 403 U.S. 15, 24 (1971).

The Court now has before it the opportunity in this case, to take heed of the errors identified by Justices Thomas and Alito, and to correct this Court's *L.M. v. Middleborough* precedent.

CONCLUSION

The Court should reverse and remand.

June 26, 2025

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CERTIFICATE OF COMPLIANCE

This document complies with the 6,500-word limit established by FED. R. APP. P. 32(a)(7) and 29(a)(5) because it contains 2,806 words. This document complies with the typeface and typestyle requirements of FED. R. APP. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, Palatino, and set as 14 point or larger.

June 26, 2025

/s/ Theodore M. Cooperstein
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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. Counsel for all parties will be served by the CM/ECF system.

June 26, 2025

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ADDENDUM

SUPREME COURT OF THE UNITED STATES

L. M., A MINOR, BY AND THROUGH HIS FATHER AND STEPMOTHER AND NATURAL GUARDIANS, CHRISTOPHER AND SUSAN MORRISON *v.* TOWN OF MIDDLEBOROUGH, MASSACHUSETTS, ET AL.

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

No. 24–410. Decided May 27, 2025

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, dissenting from the denial of certiorari.

In *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), this Court held that public-school officials may not restrict a student's freedom of speech unless his behavior "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.*, at 513. I have previously explained why *Tinker*'s holding is "without basis in the Constitution" and should be "dispense[d] with . . . altogether." *Morse* v. *Frederick*, 551 U. S. 393, 410, 422 (2007) (concurring opinion); see *id.*, at 410–422; *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. 180, 216–217 (2021) (dissenting opinion). But, unless and until this Court revisits it, *Tinker* is binding precedent that lower courts must faithfully apply.

For the reasons explained by JUSTICE ALITO, the First Circuit decision below flouts *Tinker* and its progeny. *Post*, at 6–13 (opinion dissenting from denial of certiorari). Petitioner L. M. plainly did not create a "materia[l] disrupt[ion]," *Tinker*, 393 U. S., at 513, by wearing t-shirts reading "There Are Only Two Genders"—and, later, after his school barred that shirt—"There Are CENSORED Genders," 103 F. 4th 854, 860 (2024). In holding otherwise, the First Circuit distorted this Court's First Amendment case law in significant ways that warrant this Court's review. I therefore join JUSTICE ALITO's opinion and respectfully dissent from the denial of certiorari.

SUPREME COURT OF THE UNITED STATES

L. M., A MINOR, BY AND THROUGH HIS FATHER AND STEPMOTHER AND NATURAL GUARDIANS, CHRISTOPHER AND SUSAN MORRISON *v.* TOWN OF MIDDLEBOROUGH, MASSACHUSETTS, ET AL.

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

No. 24–410. Decided May 27, 2025

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting from the denial of certiorari.

This case presents an issue of great importance for our Nation's youth: whether public schools may suppress student speech either because it expresses a viewpoint that the school disfavors or because of vague concerns about the likely effect of the speech on the school atmosphere or on students who find the speech offensive. In this case, a middle school permitted and indeed encouraged student expression endorsing the view that there are many genders. But when L. M., a seventh grader, wore a t-shirt that said "There Are Only Two Genders," he was barred from attending class. And when he protested this censorship by blocking out the words "Only Two" and substituting "CENSORED," the school prohibited that shirt as well.

The First Circuit held that the school did not violate L. M.'s free-speech rights. It held that the general prohibition against viewpoint-based censorship does not apply to public schools. And it employed a vague, permissive, and jargon-laden rule that departed from the standard this Court adopted in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969).

The First Circuit's decision calls out for our review.

I

A

In March of 2023, L. M. was a seventh grader at Nichols Middle School (NMS or the School) in Middleborough, Massachusetts. Inside and outside the classroom, NMS promotes the view that gender is a fluid construct and that a person's self-defined identity—not biological sex—determines whether that person is male, female, or something else. See App. to Pet. for Cert. 98a–99a, 125a–126a. NMS also encourages students to embrace and express this viewpoint, including during the school's "PRIDE Spirit Week." *Id.*, at 119a; see also *id.*, at 101a–102a.

L. M., however, sees things differently. His "understanding of basic biology" has led him to believe that "there are only two sexes, male and female, and that a person's gender . . . is inextricably tied to sex." *Id.*, at 90a. Nor is L. M. alone in this regard. Several of his peers take issue with NMS's position on questions of human identity, sex, and gender, but they remain silent due to the social consequences of disagreeing with the School's authority figures. *Id.*, at 99a–100a, 126a.

To register his dissent and start a dialogue on the topic, L. M. wore a shirt to school that read, "There Are Only Two Genders." 103 F. 4th 854, 860 (CA1 2024). But NMS censored L. M.'s speech no sooner than it started.

The school principal removed L. M. from his first-period gym class after a teacher called to report the shirt. The teacher expressed concern for the "physical safety" of the student body and claimed that "multiple members of the LGBTQ+ population at NMS . . . would be impacted by the t-shirt message" and could "potentially disrupt classes." Joint App. in No. 23–1535 etc. (CA1), p. 86. After haling L. M. into her office, the principal explained that other students had "complained" that the shirt "made them upset." App. to Pet. for Cert. 103a, 127a. She then told L. M. that he could not return to class unless he changed clothes.

L. M. declined, so he was sent home.

A week and a half later, L. M.'s father emailed the superintendent of the Middleborough Public School System and inquired why his son could not wear the "Two Genders" shirt. L. M.'s father noted that the shirt was not "directed to any particular person" and "simply stated [L. M.'s] view on a . . . topic that is being discussed in social media, schools, and churches all across our country." *Id.*, at 121a. He also pointed out that many NMS students make political statements "every day" through "their choice of clothes, pins, posters, and speech." *Ibid.*; see, *e.g.*, Reply Brief 12 (NMS social-media post featuring a student wearing a shirt that reads, "HE SHE THEY IT'S ALL OKAY"). L. M.'s father explained that L. M. just wanted to do the same. In response, the superintendent explained that the shirt violated the school dress code by "target[ing] students of a protected class; namely in the area of gender identity." App. to Pet. for Cert. 122a.

Frustrated that he was not allowed to express his views on an issue of personal and national concern—especially when other students and NMS officials routinely espouse the opposite position during school hours—L. M. wore a redacted version of the shirt in protest. It read: "There Are CENSORED Genders." 103 F. 4th, at 860. But this shirt fared no better. Moments after L. M. arrived to his first class, he was summoned to the principal's office and told that the "CENSORED" shirt was also banned. Rather than miss another day of school, L. M. acquiesced and changed clothes.

B

L. M., by and through his parents and natural guardians, filed suit under Rev. Stat. §1979, 42 U. S. C. §1983, in the District of Massachusetts against the town, school committee, superintendent, and principal. He alleged violations of

his First and Fourteenth Amendment rights and, as relevant here, claimed that NMS engaged in viewpoint discrimination and breached his free-speech rights under this Court's decision in *Tinker*. Soon after filing the complaint, L. M. moved for a preliminary injunction.

The District Court denied relief. See 677 F. Supp. 3d 29, 41 (2023). It acknowledged that students retain their First Amendment rights while at public school. But under *Tinker*, the District Court explained, the Constitution allows schools to restrict student expression that (1) "'materially disrupts classwork or involves substantial disorder'" or (2) "'inva[des] . . . the rights of others.'" 677 F. Supp. 3d, at 37 (quoting *Tinker*, 393 U. S., at 513). The District Court then concluded that L. M.'s shirts ran afoul of *Tinker*'s "rights of others" limitation. With respect to the first shirt, the court reasoned that the "[s]chool administrators were well within their discretion to conclude that" gender-nonconforming students "have a right to attend school without being confronted by messages attacking their identities," and L. M.'s "Two Genders" shirt "may communicate that only two gender identities—male and female—are valid, and any others are invalid or nonexistent." 677 F. Supp. 3d, at 38. With respect to the second shirt, the court found that the NMS administrators "could reasonably conclude" that the "CENSORED" shirt "did not merely protest censorship but conveyed the 'censored' message and thus invaded the rights of the other students" too. *Id.*, at 39.

At the parties' request, the District Court converted its preliminary-injunction decision into a final judgment, and L. M. appealed. L. M. argued that his expression did not target or harass any particular student, that NMS administrators lacked sufficient evidence to reasonably predict that the shirts would cause a material disruption, and that NMS could neither suppress his speech for viewpoint-based reasons nor condone a heckler's veto of his speech.

On appeal, the First Circuit affirmed on an alternative ground. See 103 F. 4th 854. Instead of holding that the shirts infringed the "rights of others," as had the District Court, the First Circuit relied on the other justification mentioned in *Tinker*: speech that "materially disrupts classwork or involves substantial disorder." 393 U. S., at 513. The court acknowledged that L. M.'s shirts—like the black armbands in *Tinker*—expressed his views "passively, silently, and without mentioning any specific students." 103 F. 4th, at 860. But the court saw a material difference between L. M.'s speech and that of the students in *Tinker*. According to the First Circuit, L. M.'s expression—unlike the speech in *Tinker*—"demean[ed] characteristics of personal identity, such as race, sex, religion, or sexual orientation" that "other students at the school share." 103 F. 4th, at 860, 867. After surveying decisions from other Circuits that have encountered similar situations, the First Circuit fashioned a bespoke two-pronged test to apply in this context:

> "[S]chool officials may bar passive and silently expressed messages by students at school that target no specific student if: (1) the expression is reasonably interpreted to demean one of those characteristics of personal identity, given the common understanding that such characteristics are unalterable or otherwise deeply rooted and that demeaning them strike[s] a person at the core of his being; and (2) the demeaning message is reasonably forecasted to poison the educational atmosphere due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to symptoms of a sick school—symptoms therefore of substantial disruption." *Id.*, at 873–874 (citations and internal quotation marks omitted).

When both prongs are satisfied, the First Circuit explained, a court can be confident "that speech is being barred only

for reasons *Tinker* permits and not merely because it is 'offensive' in the way that a controversial opinion always may be." *Id.*, at 874 (citing *Tinker*, 393 U. S., at 509).

Applying this standard to the facts at hand, the First Circuit resolved both prongs in favor of the School. Specifically, it determined (1) that NMS reasonably interpreted L. M.'s shirts as asserting that anyone who identifies as anything other than male or female is "'invalid or nonexistent,'" which would "demean the identity of transgender and gender-nonconforming NMS students"; and (2) such an affront on the very "existence" of these students would "'materially disrupt [their] ability to focus on learning.'" 103 F. 4th, at 879–883. In making the latter determination, the court deferred to the School's prior experiences with the "'LGBTQ+ population at NMS,'" particularly "the serious nature of the struggles, including suicidal ideation, that some of those students had experienced." *Id.*, at 882. Given the "'vulnerability'" of these students, the court saw no reason to second guess NMS's prediction that the shirts "would so negatively affect the[ir] psychology" that their academic performance and class attendance would decline. *Ibid.*

Finally, the First Circuit sidestepped L. M.'s viewpoint-discrimination arguments. Rather than fully engage with those arguments on the merits, the court, in a footnote, declined to import this Court's broader viewpoint-discrimination jurisprudence into the school context. See *id.*, at 883, and n. 9; see also *id.*, at 886, n. 11.

II

I would grant the petition for two reasons.

First, we should reaffirm the bedrock principle that a school may not engage in viewpoint discrimination when it regulates student speech. *Tinker* itself made that clear. See 393 U. S., at 511 ("Clearly, the prohibition of expression of one particular opinion . . . is not constitutionally permissible"). Curiously, however, the First Circuit declined to

follow *Tinker* in this regard, instead cherry-picking which First Amendment principles it thought worthy of allowing through the schoolhouse gates. By limiting the application of our viewpoint-discrimination cases, the decision below robs a great many students of that core First Amendment protection.

Second, we should also grant review to determine whether the First Circuit properly understood the rule adopted in *Tinker* regarding the suppression of student speech on the ground that it presents a risk of material disruption. We have described this standard as "demanding." *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. 180, 193 (2021). But the First Circuit fashioned a rule that is anything but. The lower courts are divided on how to apply *Tinker*'s "material disruption" standard in a context like this one,[1] and the decision below underscores the pressing need for clarification.

A

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police*

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[1] See, *e.g.*, *Zamecnik* v. *Indian Prairie School Dist. No. 204*, 636 F. 3d 874, 875 (CA7 2011) (upholding a student's right to wear a shirt that read, "Be Happy, Not Gay"); *Nuxoll* v. *Indian Prairie School Dist. No. 204*, 523 F. 3d 668, 670 (CA7 2008) (same); *Sypniewski* v. *Warren Hills Regional Bd. of Educ.*, 307 F. 3d 243, 246 (CA3 2002) (upholding a student's right to wear a shirt "inscribed with 'redneck' jokes"); see also *Harper ex rel. Harper* v. *Poway Unified School Dist.*, 445 F. 3d 1166, 1171 (CA9 2006) (upholding a school's ban of a shirt that read, "HOMOSEXUALITY IS SHAMEFUL"), vacated as moot, 549 U. S. 1262 (2007); *Parents Defending Education* v. *Olentangy Local School Dist. Bd. of Educ.*, 109 F. 4th 453, 464 (CA6) (holding that a school could satisfy *Tinker*'s material-disruption standard by relying on "common-sense conclusions based on human experience" to punish students for the "dehumanizing and humiliating effects of non-preferred pronouns" (internal quotation marks omitted)), reh'g en banc granted, 120 F. 4th 536 (CA6 2024).

Dept. of Chicago v. *Mosley*, 408 U. S. 92, 95 (1972). Otherwise, the government could purge entire topics from the public discourse. And as our cases recognize, these freedom-of-speech harms become "all the more blatant" when the government "targets not subject matter, but particular views taken by speakers on a subject." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829 (1995).

Nor is there a carveout from this principle for controversial, offensive, or disfavored views. For example, we recently held unconstitutional a statute prohibiting the registration of "immoral or scandalous" trademarks, explaining that "a law disfavoring 'ideas that offend'" is "the 'essence of viewpoint discrimination.'" *Iancu* v. *Brunetti*, 588 U. S. 388, 393, 396 (2019) (quoting *Matal* v. *Tam*, 582 U. S. 218, 223, 249 (2017)). Indeed, the presumption against viewpoint discrimination is of such importance to our constitutional order that we have even applied it to categories of speech—like fighting words—that do not enjoy full First Amendment protection. See *R. A. V.* v. *St. Paul*, 505 U. S. 377, 391 (1992). So, for example, Congress could ban all fighting words, but it could not ban only those fighting words directed toward Protestants.

Unsurprisingly, the viewpoint-neutrality rule also applies to student speech. Students do not relinquish their First Amendment rights at school, see *Tinker*, 393 U. S., at 506, and by extension, a school cannot censor a student's speech merely because it is controversial, see *Mahanoy*, 594 U. S., at 190. As *Tinker* itself made clear, the viewpoint-neutrality rule plays an important role in safeguarding students' First Amendment right to express an "unpopular viewpoint" at school. 393 U. S., at 509. There, in holding unconstitutional the decision to prohibit students from wearing black armbands to protest the Vietnam War, we emphasized that the school authorities "did not purport to

prohibit the wearing of all symbols of political or controversial significance." *Id.*, at 510. "[S]tudents in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism." *Ibid.* The schools allowed this speech but not the armbands. We concluded that such viewpoint discrimination "is not constitutionally permissible." *Id.*, at 511.

L. M. raised a viewpoint-discrimination argument below. See Brief for Appellant in No. 23–1535 etc. (CA1), pp. 54–55, 64. Namely, he argued that NMS had endorsed and favored the expression of the view that "gender is identity-based" while "barring [his] contrary view that gender is sex-based." *Id.*, at 55. L. M. also noted our recent reaffirmation of the viewpoint-neutrality principle in cases like *Matal* v. *Tam* and *Iancu* v. *Brunetti*. Yet the First Circuit rejected that important argument in a footnote, stating: "We see no reason to take up L.M.'s invitation to be, as far as we can tell, the first court to import recent decisions that clearly did not contemplate the special characteristics of the public-school setting into that setting." 103 F. 4th, at 883, n. 9 (citing *Matal*, 582 U. S. 218; *Iancu*, 588 U. S. 388); see also 103 F. 4th, at 886, n. 11.

The court below erred, and badly so: the rule that viewpoint-based restrictions on speech are almost never allowed is not a new principle proclaimed only in "recent decisions" like *Matal* or *Iancu*. 103 F. 4th, at 883, n. 9. To the contrary, viewpoint neutrality has long been seen as going to "the very heart of the First Amendment." *Morse* v. *Frederick*, 551 U. S. 393, 423 (2007) (ALITO, J., concurring); cf. *Rosenberger*, 515 U. S., at 829–830. The First Circuit was wrong to expel this bedrock constitutional safeguard from our schools.[2]

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[2] See *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (explaining that teachers and administrators cannot "prescribe what

B

The First Circuit also watered down the test adopted in *Tinker* for determining whether a school's restriction of student speech is allowed. Because free speech is the default and censorship the exception, *Tinker* set forth a "demanding standard." *Mahanoy*, 594 U. S., at 193. We held that a school can restrict speech when it has "evidence" that such restrictions are "necessary" to "avoid material and substantial interference with schoolwork or discipline."[3] *Tinker*, 393 U. S., at 511. Thus, absent a "specific showing" of such a disruption—like "threats or acts of violence on school premises"—this justification for suppressing student speech does not apply. *Id.*, at 508, 511.

Under this standard, NMS had no right to censor L. M. Like the black armbands in *Tinker*, L. M.'s shirts were a "silent, passive expression of opinion, unaccompanied by

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shall be orthodox in politics, nationalism, religion, or other matters of opinion"); *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 681 (1986) (affirming the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms"); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved"); *Morse*, 551 U. S., at 409 (rejecting the argument that student "speech is proscribable [when] it is plainly 'offensive'" because "much political and religious speech might be perceived as offensive to some"); *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. 180, 190 (2021) ("[S]chools have a strong interest in 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'"); *id.*, at 210 (ALITO, J., concurring) ("Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting"); *Lee* v. *Weisman*, 505 U. S. 577, 590 (1992) ("To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse").

[3] *Tinker* also carves out student speech that "inva[des] . . . the rights of others," 393 U. S., at 513, but the First Circuit did not rely on that aspect of *Tinker*.

any disorder or disturbance on the part of petitione[r]." *Id.*, at 508. And just as in *Tinker*, some of L. M.'s classmates found his speech upsetting. Feeling upset, however, is an unavoidable part of living in our "often disputatious" society, and *Tinker* made abundantly clear that the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is no reason to thwart a student's speech. *Id.*, at 509. True, NMS also forecasted that L. M.'s shirts could lead to a "standoff" between students who support L. M.'s view and those who oppose it. 103 F. 4th, at 880. But the schools in *Tinker* were similarly worried that students "would wear arm bands of other colors" and that this could "evolve into something which would be difficult to control." 393 U. S., at 509, n. 3 (internal quotation marks omitted). If anything, the risk in *Tinker* was far less speculative than in this case. In *Tinker*, several students had already "made hostile remarks to the children wearing armbands," *id.*, at 508, and a math teacher "had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker" over her armband, *id.*, at 517 (Black, J., dissenting). Even so, *Tinker* deemed the schools' concern an "undifferentiated fear" that could not "overcome the right to freedom of expression." *Id.*, at 508 (majority opinion).

Instead of applying *Tinker*'s speech-protective standards, the court below crafted a novel and permissive test that distorts the "material disruption" rule beyond recognition. The First Circuit identified a special category of speech, *i.e.*, speech that can be interpreted as demeaning a deeply rooted characteristic of personal identity. And if student speech, as interpreted by the school, falls into this category, the school may ban that speech if the school "reasonably forecast[s]" that it may have a "serious negative psychological impact on students with the demeaned characteristic." 103 F. 4th, at 873–874.

This rule cannot be squared with *Tinker*. The black armbands in that case also involved an emotionally charged topic, and the students in the Des Moines public schools were not somehow immune from those intense feelings. Justice Black made precisely this point in his dissent, writing: "Of course students . . . cannot concentrate on lesser issues 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." 393 U. S., at 524; see also *id.*, at 518 ("[T]he armbands . . . took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war"). Indeed, a "former student of one of [the] high schools was killed in Viet Nam," and "[s]ome of his friends [were] still in school." *Id.*, at 509, n. 3 (majority opinion) (internal quotation marks omitted). The *Tinker* Court nevertheless held that this stress and these distractions did not trump the students' constitutional rights.

The First Circuit's test dilutes *Tinker* in other ways too. To name just a few, it defines "material disruption" to include anything that correlates with "a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school," whatever that means. 103 F. 4th, at 870 (internal quotation marks omitted). That is a highly permissive standard, and it certainly requires far less than that which *Tinker* suggested would constitute a "material disruption." See 393 U. S., at 508 ("aggressive, disruptive action"); *ibid.* ("threats or acts of violence on school premises"); *ibid.* ("group demonstrations"); cf. *Mahanoy*, 594 U. S., at 192–193.

Further, the First Circuit's test demands that a federal court abdicate its responsibility to safeguard students' First Amendment rights and instead defer to school officials' assessment of the meaning and effect of speech. The court below, for example, deferred to the School administrators'

determination that L. M.'s shirts conveyed a message that demeaned others' personal identity. 103 F. 4th, at 879–880. That court also deferred to the administrators' speculation about the likely effects of the t-shirts on students—even though L. M.'s speech resulted in no actual disruptions, and even though NMS "was not aware of any prior incidents or problems caused by th[e] [shirts'] message[s]." *Id.*, at 882. That approach defies *Tinker*, in which we performed our own "independent examination of the record" without trusting school administrators' self-serving observations. 393 U. S., at 509.

Tinker's "material disruption" standard is demanding by design. That is because free speech is the rule, not the exception. The First Circuit's test flips that principle on its head.

C

One final point deserves comment. The First Circuit repeatedly emphasized that L. M.'s speech occurred in a middle school where children ranged in age from 10 to 14 years old—a point respondents echo in their brief in opposition. That should not make a difference. Mary Beth Tinker was a 13-year-old student in junior high school, yet the *Tinker* Court applied the same "material disruption" test to her as it did to the 15- and 16-year-old high school petitioners, John Tinker and Christopher Eckhardt. See *id.*, at 504. If a school sees fit to instruct students of a certain age on a social issue like LGBTQ+ rights or gender identity, then the school must tolerate dissenting student speech on those issues. If anything, viewpoint discrimination in the lower grades is more objectionable because young children are more impressionable and thus more susceptible to indoctrination.

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"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). So long as the First Circuit's opinion is on the books, thousands of students will attend school without the full panoply of First Amendment rights. That alone is worth this Court's attention. The problem, however, runs deeper: as this case makes clear, some lower courts are confused on how to manage the tension between students' rights and schools' obligations. Our Nation's students, teachers, and administrators deserve clarity on this critically important question. Because the Court has instead decided to let the confusion linger, I respectfully dissent.