No. 23-1535, 23-1645

United States Court of Appeals for the First Circuit

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison,

Plaintiff-Appellant,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS; MIDDLEBOROUGH SCHOOL COMMITTEE; CAROLYN J. LYONS, Superintendent, Middleborough Public Schools, in her official capacity; HEATHER TUCKER, Acting Principal, Nichols Middle School, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Massachusetts, Eastern Division
Case No. 1:23-cv-11111-IT

BRIEF OF INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S LAW CENTER
1802 Vernon Street NW
Suite 1027
Washington, DC 20009
(202) 807-9986

GENE C. SCHAERR
Counsel of Record
SCHAERR | JAFFE LLP
1717 K Street NW Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae

October 2, 2023

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Independent Women's Law Center states that it is a project of Independent Women's Forum, a nonprofit, non-partisan 501(c)(3) organized under the laws of the State of Virginia. Independent Women's Law Center has no parent corporation and does not issue stock, and no publicly held company has a 10% or greater interest in Independent Women's Law Center.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[1]

It was in the context of an elementary school classroom that the Supreme 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.

W. Va. 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." *Id.*

But Defendants think they've found a new exception to that fixed star: a school administrator's subjective belief that student speech "targets" another student's identity. Defendants use the word "targets" loosely to encompass generalized statements of social, political, and scientific significance that may offend other students. Here, Defendants assert a right to punish a student who expresses the widely held, and

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members and counsel, made any monetary contribution toward the brief's preparation or submission. All parties have consented to the filing of this brief.

long taken for granted, assumption that sex is binary—simply because some students who identify as something other than their biological sex might feel invalidated by this statement.

This Court should unequivocally reject Defendants' attempt to use subjective offense as a justification to censor a particular viewpoint expressed on a student t-shirt.

STATEMENT

L.M., a seventh-grade honors student at a Massachusetts public middle school, wore a t-shirt to school that read, "There Are Only Two Genders," indicating his belief that sex is binary.[2] App.18. The school's

[2] As *amicus* has explained elsewhere, "sex" is the appropriate word to use when talking about either of the two categories of individuals (male or female) that occur in many species. "Gender" is a term borrowed from grammar that refers to cultural expectations regarding females and males. *See* Jennifer C. Braceras, *Sex Is Better than Gender*, Indep. Women's L. Ctr. (Sept. 7, 2022), https://tinyurl.com/nfav6bx6; *see also* Milton Diamond, *Sex and Gender: Same or Different?*, 10 Feminism & Psych. 46, 47 (2000) ("General usage of the term *gender* began in the late 1960s and 1970s, increasingly appearing in the professional literature of the social sciences. The term came to serve a useful purpose in distinguishing those aspects of life that were more easily attributed or understood to be of social rather than biological origin.") In other words, "gender is to sex as feminine is to female and masculine to male.'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting)).

dress code did not categorically prohibit clothing bearing slogans or messages of political or social significance. App.49.[3] L.M.'s shirt prompted no disruption and no protest—yet L.M. was removed from class and sent home. App.28.

L.M. and his family raised objections with the district superintendent and with the School Committee and even obtained counsel to contact the school district. App.29–30, 55–61. Their concerns fell on deaf ears, and at each turn they were told that L.M.'s shirt "targeted" students of a protected class. App.55, 63–64. L.M. then wore a

---

Despite the differences in meaning, many Americans (and, indeed, many American laws) today inadvertently use the word "gender" as a synonym for "sex." And it is clear that, here, L.M.'s shirt used the phrase "There Are Only Two Genders" to convey the widely-held view that sex is binary. Of course, whether L.M.'s shirt would be more linguistically accurate if it read "There Are Only Two Sexes" is not relevant to the question of whether Appellants violated his First Amendment Rights when they punished him for wearing his shirt.

[3] All references to "App." are to Appellant's Appendix, and all references to "Add." are to the Addendum filed with Appellant's opening brief.

shirt that read "There are [censored] genders," but school administrators required him to remove that shirt as well. App.31.

L.M. sought a preliminary injunction against the school district's policies. The district court denied that motion, holding that a shirt communicating the idea that sex is binary violates the rights of "students who identify differently" to avoid "being confronted by messages attacking their identities" at school. Add.11.

SUMMARY OF ARGUMENT

The statement that "there are only two genders" is protected speech. Defendants cannot censor that speech by claiming an abstract, unevidenced fear of "disruption." Nor can they conjure up a right of students to avoid being "confronted" with viewpoints they find offensive, even where those viewpoints may relate to personal identity. This Court should reverse.

ARGUMENT

I. The Statement that There Are Only Two "Genders" Expresses a Widely Held Viewpoint of Political, Social, and Scientific Importance.

The belief that sex is binary, as expressed by the t-shirt worn by L.M., is not only held by the majority of adults,[4] but also, until quite recently, was taken for granted as scientific fact. Indeed, the belief in the sex binary is so common that language reflecting this assumption has been adopted by every branch of the Federal Government—including the Supreme Court and every Circuit Court of Appeals—as well as by Defendants.

A. The Statement that There Are Only Two "Genders" Is Common among the Public and in Academic Literature.

The belief that sex is binary[5] (or that "there are only two genders") is not unusual. In fact, until quite recently,[6] the idea that human beings,

---

[4] *See, e.g.*, PRRI Staff, *The Politics of Gender, Pronouns, and Public Education*, PRRI (June 6, 2023), https://tinyurl.com/3y7wffek (finding 50% of adults "[f]eel *strongly* that there are only two genders, man or woman" and another 15% "[t]hink there are only two genders, but do not feel strongly about it").

[5] *See, e.g.*, Colin Wright, *A Biologist Explains Why Sex Is Binary*, Wall St. J. (Apr. 9, 2023), https://tinyurl.com/tdax8jzp.

[6] *See, e.g.*, Richard Dawkins, *Why Biological Sex Matters*, New Statesman (July 26, 2023), https://tinyurl.com/4enbrf6a, ("In 2011, I was

like other mammals, fall into one of two sex categories (male and female) that can only perform one of two reproductive roles was accepted as scientific fact.[7]

Biological differences between males and females persist across species and consistently fall upon a binary.[8]

A tiny percentage of humans (between .02 and .1%) are born with congenital conditions characterized by atypical development of chromosomal, gonadal, or anatomic sex. Once referred to as 'intersex,' individuals with disorders (or differences) of sexual development ("DSD conditions") are not a third sex. They are a variation on the sex binary, the exception that proves the rule.[9]

---

invited to . . . a visit to Christopher Hitchens in Texas to conduct what turned out to be his last interview. I didn't ask him, 'What is a woman?' In 2011, it wouldn't have occurred to anyone to ask such a daft question.").

[7] J. Gordon Betts et al., *Anatomy and Physiology*, at 27.3 (2d ed. 2022).

[8] *See, e.g.*, Adam C. Davis & Steven Arnocky, *Darwin Versus Wallace: Esthetic Evolution and Preferential Mate Choice*, 13 Frontiers Psych. 862385 (2022); Nigel Barber, *The Evolutionary Psychology of Physical Attractiveness: Sexual Selection and Human Morphology*, 16 Ethology & Sociobiology 395 (1995).

[9] *See* Braceras, *supra* note 2, at 2.

Not unsurprisingly, then, in light of the literature's finding, the majority of American adults continue to believe that all human beings are either male or female.[10] In fact, 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.[11] The increase is even sharper among younger generations, rising by 14 percentage points for Generation Z and 9 percentage point for Millennials between 2021 and 2023.[12]

B. School Policies, as well as State and Federal Legislation, Regulations, and Precedent also Assume the Sex Binary.

Ironically, Defendants' own sexual harassment policy states that it applies to conduct targeted at "*either* gender" (meaning two) App.167 (emphasis added). Given the Defendants' own use of language that suggests a sex binary, they can hardly fault L.M. for using similar language.

L.M. and the Defendants are in good company: The Supreme Court

---

[10] *See* PRRI Staff, *supra* note 4.

[11] PRRI Staff, *supra* note 4.

[12] *Id.*

itself has referred to "both genders" and to "both sexes"—again, indicating two—on multiple occasions.[13] So too has this Court and its members.[14] And every one of this Court's sister circuits has likewise spoken of "both genders," "either gender," or "the two genders" without questioning the validity of that binary framing.[15]

---

[13] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 546 (1996); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621 (1984); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979).

[14] *See, e.g.*, *Cohen v. Brown Univ.*, 101 F.3d 155, 174–78 (1st Cir. 1996) (making multiple reference to "both genders" in Title IX case); *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 586 n.25 (1st Cir. 2016) (Stahl, J., concurring in part) (noting "[b]oth genders were prohibited from wearing" some items, while "males" and "females" also had their own unique restrictions under employer dress code).

[15] *See, e.g.*, *Patterson v. County of Oneida*, 375 F.3d 206, 217 (2d Cir. 2004) (noting "individuals of both genders and all races" had not completed probationary period); *Wilcher v. Postmaster Gen.*, 441 F. App'x 879, 882 (3d Cir. 2011) ("[T]he comparator employees are of multiple races and both genders . . . ."); *Knussman v. Maryland,* 73 F. App'x 608, 616 (4th Cir. 2003) (requiring that a family-leave provision apply "equally to both genders"); *Clarke v. Commodity Futures Trading Comm'n,* 74 F.4th 627, 640 (5th Cir. 2023) (describing Title IX as an "obligation for federally funded schools to equally accommodate both genders"); *McIlwain v. Dodd*, No. 22-5219, 2022 WL 17169006, at *4 (6th Cir. Nov. 22, 2022) (using "either gender"); *Lewis v. City of Chicago*, 496 F.3d 645, 652 (7th Cir. 2007) (using "both genders"); *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005) (same); *Zetwick v. County of Yolo*, 850 F.3d 436, 446 (9th Cir. 2017) (describing "the hugging conduct toward the two genders"); *Doe v. Univ. of Denver*, 952 F.3d 1182, 1196 (10th Cir. 2020) (using "both genders"); *Trawick v. Allen*, 520 F.3d 1264, 1268 (11th Cir.

The judiciary is not alone among government instrumentalities in using language that presumes the existence of only two sexes. In recent years, legislators of both major parties have proposed bills that use binary framing. For example, thirteen Senate Democrats in 2023 introduced a bill that references "*both* genders." *See* REAADI for Disasters Act, S. 1049, 118th Cong. § 9 (2023) (emphasis added) (proposing to add language to the Public Health Service Act).

Likewise, Title IX, the landmark civil rights legislation which prohibits sex discrimination in education, speaks of "both sexes," 20 U.S.C. § 1681(a)(2) But this sort of binary framing is also common

2008) (using "either gender"); *Arnoldi v. Bd. of Trustees*, 557 F. Supp. 3d 105, 119 (D.D.C. 2021) (using "both genders"), *aff'd*, No. 21-5182, 2022 WL 625721 (D.C. Cir. Mar. 1, 2022); *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1356 (Fed. Cir. 2010) (discussing "reliance on gender ratios of two groups" in sex-discrimination case).

throughout the federal code, including in statutes regarding the Youth Conservation Corps,[16] the Peace Corps,[17] and Indian healthcare.[18]

State statutes—including statutes from the states of this Circuit—similarly make frequent reference to a binary view of sex or "gender[19]

---

[16] 16 U.S.C. § 1702(b) (The Youth Conservation Corps "shall be open to youth . . . of both sexes").

[17] 22 U.S.C. § 2511(c)(1) ("Persons appointed as members of the Council shall be broadly representative of the general public, including . . . both sexes.")

[18] 25 U.S.C. § 1665g(a) ("The program shall include regional treatment centers . . . for both sexes"); *id.* § 1667(a)(3) (congressional finding that "for 2005, suicide was the second-leading cause of death for Indians and Alaska Natives of both sexes").

[19] *See, e.g.*, Mass. Gen. Laws ch. 69, § 1L (health and sex education programs should have "incentives for participation by students of both sexes"); N.H. Rev. Stat. Ann. § 571-B:1 (defining obscene content harmful to children to include "[s]exual conduct . . . whether alone or between members of same or opposite sex"); *id.* § 155:79 (providing that accommodations for people with disabilities must be such that they "can be used by a person of either sex"); Me. Stat. tit. 13, § 2865 ("A person of either sex . . . may become a member of a parish or religious society . . ."); *id.* tit. 18-C, § 1-201 (defining a "Testator" as an "individual of either sex who has executed a will"); 16 R.I. Gen. Laws § 16-38-1.1 ("[S]chools may . . . [p]rohibit female participation in all contact sports provided that equal athletic opportunities which effectively accommodate the interests and abilities of both sexes are made available."); *id.* § 16-53-2 ("[T]here shall be appropriate representation of both sexes, racial, and ethnic minorities, and the various geographic regions of the state [on the Board of Trustees of on Career and Technical Education].").

And the executive branches of the federal government and myriad states refer to "both" or "two" sexes throughout their regulations and administrative guidance.[20]

[20] *See, e.g.*, 6 C.F.R. § 17.105(r) (describing schools that "admit[] students of both sexes without discrimination"); 15 C.F.R. § 8a.300(c)(4) (allowing pre-admission inquiry regarding marital or parental status only if applied equally to "applicants of both sexes"); 21 C.F.R. § 56.107(b) (requiring universities to consider "qualified persons of both sexes" for IRB service); *id.* § 312.42(b)(v) (describing drugs for a "condition that affects both genders"); 40 C.F.R. § 191, app. B, tbl. B.1 n.1 ("The values are considered to be appropriate for protection for individuals of both sexes and all ages."); 43 C.F.R. § 26.5(a)(1) (requiring an "equal opportunity for both sexes" in recruitment); 45 C.F.R. § 618.230(b)(2) (describing schools that "admit[] students of both sexes"); Exec. Order No. 13,165, 65 Fed. Reg. 49,469 (Aug. 9, 2000) ("The National Household Survey on Drug Abuse issued in 1999 found that in just 1 year's time the rate of steroid use among young people rose roughly 50 percent among both sexes and across all age groups."); Okla. Admin. Code § 310:670-3-1 (requiring "visual separation between the two genders" in prisons); D.C. Mun. Regs. tit. 4, § 517 ("Insurance plans . . . shall provide for equal benefits for members of both sexes . . . ."); 2-4 Vt. Code R. § 100:308.4(A) ("Where both sexes are employed, separate facilities shall be provided."); Cal. Code Regs. tit. 5, § 4922(a) (listing standards for "determining whether equivalent opportunities are available to both sexes in athletic programs"); Ill. Admin. Code tit. 23, § 200.80(a)(1) ("[S]tudents of both sexes shall have equal access to all extracurricular programs"); 02-395-4 Me. Code R. § 1 (providing single person bathrooms "shall be permitted for use by both sexes"); 05-071-4 Me. Code R. § 4.11(B) (requiring schools to provide "equal athletic opportunity for both sexes").

If the Supreme Court, this Court, federal and state statutes, federal and state regulations, and even Defendants themselves can all speak casually of "two" or "both" sexes (or "genders") one must ask: Why can't L.M.?

II. To Prepare Students to Live in a Pluralistic Society, Schools Must Expose Students to A Variety of Viewpoints.

As the Supreme Court said in *Tinker*, "[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. Bd. of Regents*, 385 U.S. 589, 603 (1967)). And the exchange of ideas comes not only through formal instruction, but also through "inevitable" personal contact and communication between students. *Id.* at 512–13. The more schools punish student expression—particularly expression that adults worry will offend or hurt the feelings of other students—the less prepared young people will be to live in a diverse and pluralistic society. *See Barnette*, 319 U.S. at 637 (when schools punish speech, they encourage students to devalue free speech and freedom of expression "as mere platitudes").

Censoring a student's speech to protect a classmate's emotional "safety" not only fails to prepare students for the duties of citizenship, it

infantilizes them and ultimately harms their personal emotional and psychological development. Rather than teaching students critical thinking skills and tools to cope with distressing comments or viewpoints, Defendants here are fostering distorted thinking and encouraging students to accept the authority of their emotions over reason. This acquiescence to emotion not only promotes a culture of victimhood but arguably exacerbates the already high incidence of anxiety and depression among today's young people.[21]

III. Censoring Speech that Asserts that Sex or "Gender" Is Binary Constitutes Unconstitutional Viewpoint Discrimination.

In seeking to protect certain students from linguistic and scientific reality, Defendants here have engaged in textbook viewpoint discrimination in violation of the First Amendment of the United States Constitution. While the government required L.M. to leave school because he wore a t-shirt expressing the binary nature of sex, it is doubtful that the school would likewise remove a student who wore a shirt that said "there are more than two genders." And none of the narrow

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

reasons that might justify limited viewpoint discrimination in the public schools are present here.

To the contrary, the Supreme Court has made clear that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). That principle, oft-repeated by the Supreme Court,[22] remains in effect beyond the schoolhouse gates. Indeed, if students did have such a right, *Tinker* would have come out the other way. *See* Appellants' Br. at 28–29.

[22] *See Matal v. Tam*, 582 U.S. 218, 244 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" (quoting *Street v. New York*, 394 U.S. 576, 592 (1969))); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988); *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Tinker v. Des Moines Indep. Cmty. Sch, Dist.*, 393 U.S. 503, 509–14 (1969); *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 310–11 (1940); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

Here, L.M.'s t-shirt was a general statement, not "directed to the person of the [viewer]." *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). Just like the jacket saying "F*** the Draft" that was found to be protected speech in *Cohen v. California*, L.M.'s shirt presented a broad societal message, and "[n]o individual actually or likely to be present could reasonably have regarded the words . . . as a direct personal insult." *Cohen v. California*, 403 U.S. 15, 20 (1971). Even if it could be perceived as a personal attack, a rule that discriminates against particular viewpoints in itself is enough to violate the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393–94 (1992) (selective proscription of "fighting words . . . creates the possibility that the [government] is seeking to handicap the expression of particular ideas," which is sufficient to render a rule "presumptively invalid").

Individualized actual harassment, as opposed to potentially offensive political speech, is typified by personal insults rather than a mere ideological stance, and by direct targeting rather than incidental offense. *Cf. Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (First Amendment does not allow a student to "orchestrate a targeted attack on a [specific] classmate"). Accordingly, even generalized

but undoubtedly harmful accusations, directed at a small group but not a specific person, do not justify restricting protected speech. *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 21 (1st Cir. 2020) (upholding district court's finding that a student's First Amendment claim was likely to succeed where a note left in a bathroom stating there was a rapist at the school "did not specifically name an individual, did not use photos, and arguably targeted the administration . . . rather than the 'rapist.'" (quoting *A.M. by & through Norris v. Cape Elizabeth Sch. Dist.*, 422 F. Supp. 3d 353, 367 (D. Me. 2019), *aff'd on other grounds sub nom. Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020)).

Likewise, offense is no exception to that settled principle—not even when one student's speech contradicts another student's core beliefs about aspects of her identity, such as her religion, her sexuality, or her gender identity.

A ruling for Defendants would compel the conclusion that a host of other shirts bearing political, social, religious, or scientific slogans could be banned by school administrators. Conceivably, a school could ban a Muslim student from wearing a shirt that says "One God, One Religion,

One Humanity—Islam, Way of Life" as pictured below,[23] lest a Hindu student feel deeply hurt that her religious beliefs are being contradicted.

Likewise, a school could prohibit students from wearing a shirt like the one pictured here, reading "smash the patriarchy,"[24] to protect male students from harmful stereotypes about toxic masculinity.

[23] Ash Boutique, *One God-One Humanity-One Religion-Islam Men's T-Shirt*, Spreadshirt, https://tinyurl.com/4ph2nkvv (last visited Oct. 2, 2023).

[24] Patriarchy Shirt: EtheLabelCo, *Smash the Patriarchy T-Shirt*, Teepublic, https://tinyurl.com/2b3u4tez (last visited Oct. 2, 2023).

And under Defendants' proposed rule, a t-shirt promoting the band The Slants[25] could be prohibited to protect the feelings of Asian-American students—which courts might struggle to square with Supreme Court precedent.[26]

[25] Slants Shirt: The Slants, *Origami Letters*, Threadless, https://tinyurl.com/mrx32p8n (last visited Oct. 2, 2023).

[26] *See Matal*, 582 U.S. at 249 (Kennedy, J., concurring in part) (noting that rejecting that band's trademark because some may find it "offensive . . . is the essence of viewpoint discrimination").

To be sure, encountering negative messages will not always be easy for children and teens, just as it is not always easy for adults. Conflicts may arise as students, perhaps for the first time, confront ideas and messages they find hurtful. But as the Supreme Court held in *Tinker*, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508. After all, "[*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.* "But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this

relatively permissive, often disputatious, society." *Id.* at 508–09 (citation omitted).

CONCLUSION

L.M.'s t-shirt expressed a widely held belief that is expressed often, not only by individuals but by government institutions, including L.M.'s own school district. Defendants cannot claim that the expression of that viewpoint is a punishable offense, simply because they have now deemed it unfashionable. This Court should reverse.

Respectfully submitted,

JENNIFER C. BRACERAS
INDEPENDENT WOMEN'S LAW CENTER
1802 Vernon Street NW
Suite 1027
Washington, DC 20009
(202) 807-9986

/s/Gene C. Schaerr
GENE C. SCHAERR
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amicus Curiae
Independent Women's Law Center

October 2, 2023

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also 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 it has been prepared in a proportionally spaced typeface using Microsoft 365 in 14-point Century Schoolbook font.

/s/ Gene C. Schaerr
Gene C. Schaerr

Dated: October 2, 2023