23-1645

United States Court of Appeals
for the First Circuit

L. M.

Plaintiff-Appellant

v.

Town of Middleborough, Massachusetts, et al,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF LIFE LEGAL DEFENSE FOUNDATION AND YOUNG AMERICA'S FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* Life Legal Defense Foundation and Young America's Foundation certify that they are non-profit corporations with no stock or parent corporations.

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STATEMENT OF *AMICI CURIAE*[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation that provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

LLDF is concerned with recent attempts in public-schools and on college campuses to equate speech with violence, suggesting that pure speech alone, without more, can cause harm sufficient to justify suppression of speakers. With the overturning of *Roe v. Wade,* 410 U.S. 113 (1973) and the return of the issue of abortion "to the people and their elected representative in the democratic process" (*Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2310 (2022)), the need to protect the ability of pro-life citizens to exercise their First Amendment rights to persuade their fellow citizens has taken on new urgency. Courts cannot

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for amici represent that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

waver on this fundamental right of citizens to freely express their opinions in order to effect public discourse on this hot button issue and must resist all attempts of lawmakers to twist words to suit their own ends.

Amicus Young America's Foundation (YAF) is a nonprofit organization whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. In part, YAF fulfills its mission through student-led Young Americans for Freedom chapters on campuses and through individual membership. Freedom members are consistently berated, penalized, and banned by school actors who label their speech as harmful, hateful, or otherwise problematic.

This case is important to YAF because it presents the court an opportunity to check viewpoint-based censorship by school officials. School children should not be punished or treated differently for expressing a view that conflicts with the common orthodoxy of their classmates or teachers. If the government is permitted to regulate speech based on viewpoint, classrooms will miss out on profitable discussions, and individual students will self-censor for fear of reprisal. In adulthood, these students will find it hard to believe in the American experiment because government actors will have stripped them of fundamental freedoms in their formative years.

Pursuant to Federal Rule of Civil Procedure 29(a)(2), *Amici* have obtained consent from the parties to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court has held that the First Amendment protects the free speech rights of public-school students even when the thoughts they express might prove offensive to some listeners, provided the speech does not cause a substantial disruption of school functioning. Nevertheless, the Supreme Court has allowed censorship of some non-disruptive student speech under a variety of rationales, e.g., avoiding the appearance of endorsement by the school itself, discouraging the use of illegal drugs, and preventing minors from being exposed to profane sexual innuendo.

But in no case has censorship of student speech been permitted where a school presses one view of a controversial topic on students, and a student expresses a different view.

In the instant case, L.M.'s school engaged in a pervasive campaign of promotion and celebration of non-heterosexual orientations and gender fluidity, a campaign unrelated to the educational mission of the school. When L.M. expressed a different viewpoint, he was censored.

Cloaked in the guise of concern over student safety, the school's actions were nothing less than the muscle-flexing of an aspiring totalitarian system over those under its control. The District Court opinion should be reversed, and a preliminary injunction issued to prevent any further abrogation of L.M.'s constitutional right to freedom of expression.

ARGUMENT

I. The District Court's decision to allow the Defendants to censor L.M.'s non-disruptive political speech empowers school districts to become virtual "enclaves of totalitarianism."

The Supreme Court has repeatedly upheld the right of public-school students to exercise freedom of speech while in school. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969) (upholding the right of students to wear black arm bands protesting the Vietnam War at school). Public schools "are educating the young for citizenship" and therefore should exhibit "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." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943) (enjoining enforcement of a West Virginia Regulation requiring students to participate in the flag salute and Pledge of Allegiance). If schools are allowed to suppress disfavored opinions without evidence of "substantial disruption of or material interference with school activities," they will become the "enclaves of totalitarianism" against which the Court warned rather than training grounds for democratic citizenship. *Tinker* at 511, 514.

Although students possess the right of freedom of speech in public school, that right is not "coextensive with the rights of adults in other settings." (*Bethel School District v. Fraser*, 478 U.S. 675, 682, 684-85 (1986) (upholding sanctions imposed on a student by the school district for his sexually vulgar and lewd speech; the speech would "undermine the school's basic educational mission," and the school had an interest in protecting minors from exposure to vulgar and offensive language). *See also Morse v. Frederick*, 551, U.S. 393 (2007) (upholding school's right to censor student speech promoting illegal drug use because such language conflicted with school's policy to discourage such activity);[2] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding school's decision to delete articles about pregnancy and divorce from the school newspaper; school had the right to exercise editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions were reasonably related to legitimate pedagogical concerns). Accordingly, a school district may censor speech "that intrudes upon the work of the schools or the rights of other students." *Id*. at 680 (*quoting Tinker* at 508). The First Amendment does not prohibit "reasonable

[2] This case is distinguishable from *Morse* because in the latter, the school's anti-drug policy was for the purpose of protecting students from engaging in illegal and dangerous drug use. L.M.'s speech did not advocate either illegal or dangerous activities.

regulation of speech-connected activities in carefully restricted circumstances." *Tinker*, at 513-14.

Here, the school did not offer evidence of, and the district court explicitly did not rely on, any actual disruption or interference with school activities in denying the preliminary injunction. Addendum to Appellant's Opening Brief ("Add.") at 13, n.4. Instead, both relied on a hazy and malleable concept of intrusion on the rights of other students.

A. L.M.'s pure political speech, which included no vulgar or offensive language or symbols, cannot, consistent with *Tinker*, be censored simply because of the subjective reactions of some students and staff.

The District Court decision was based on the assertion that L.M.'s simple, biologically correct statement that there are only two genders infringed on the rights of others to a safe and secure educational environment:

> Plaintiff has not established a likelihood of success on the merits where he is unable to counter Defendants' showing that enforcement of the Dress Code was undertaken to protect the invasion of the rights of other students to a safe and secure educational environment. School administrators were well within their discretion to conclude that the statement 'THERE ARE ONLY TWO GENDERS' may communicate that only two gender identities-male and female-are valid, and any others are invalid or nonexistent,[3] and to conclude that students who identify differently, whether they do so openly or not, have a right to attend school without being confronted by messages attacking their identities.

Add.016.

Although the record shows that unidentified students and staff made several complaints regarding the t-shirt's message, mere disagreement, even to the level of "discomfort," with a message is insufficient to justify suppression of speech, even in the public-school context. *Tinker*, at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."). While the message conveyed an idea that might be offensive to those who embrace transgender ideology, the freedom to express ideas that others might find offensive is what the First Amendment exists for. "[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.' *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 655, 655 (1929) (Holmes, J., dissenting)).

To support its conclusion that L.M.'s t-shirt invaded the rights of others, the school asserted that a group of potentially vulnerable students would not feel safe. Add.012. But this argument cuts both ways. Traditional and religious students could also claim that the school's own promotion of transgender ideology invaded their rights because their identities were being attacked as invalid for adhering to the traditional Christian belief in the gender binary. For instance, if L.M. had worn a t-shirt with the message "So God created mankind in his own image, in the image of

God he created them; male and female he created them. (Genesis 1:27)", the school's censorship of the t-shirt would seem to run afoul of both the First Amendment and the state law prohibiting discrimination against students on the basis of religion. Mass. Gen. Laws, Title XII, ch. 71, § 370. By doing so, under the school's own interpretation of its policy and of state law, it would be guilty of creating a discriminatory and unsafe environment for conservative religious students. Yet, L.M.'s t-shirt conveyed the same proposition as does one citing Genesis 1:27.

L.M.'s decision to wear the t-shirt and the support he received from other students (Add.005) could reasonably be interpreted as proof that the school's messaging marginalized these students, based on religious, political, or scientific beliefs. The school wishes to have the freedom to engage in speech that marginalizes some students or groups of students, and at the same time suppress speech on the grounds that it will marginalize others. But "[i]n 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." *Tinker* at 511.

Ultimately the district court relied on a collection of inapposite cases to find that the school administrators had acted within their discretion in finding an infringement of rights. Add.012.

One case simply affirmed that school officials may restrict speech that is "vulgar, lewd, obscene, and plainly offensive." *Chandler v. McMinnville Sch. Dist*., 978 F.2d 524, 529 (9th Cir. 1992). Significantly, and basing its analysis on *Fraser,* the court used *objective*, rather than *subjective*, means to determine that the word "scab" as it was used on the students' buttons to refer to strikebreakers, could not reasonably be considered "per se vulgar, lewd, obscene, or plainly offensive." *Chandler* at 530 (citing definitions contained in cases and statutes, one of which found the term to be offensive, while the other did not).

As in *Chandler,* L.M. did not use any vulgar, lewd, obscene or plainly offensive language to refer to transgender people. His message used inoffensive language to convey a proposition that some students and staff found offensive. The school based its decision to censor L.M.'s speech on the possible *subjective reactions* of certain unnamed individuals. Add.011. The District Court did not attempt to determine whether, as an objective matter, the message conveyed was "per se" offensive. Such a finding would be extraordinary, as most Americans share L.M.'s belief regarding the objective existence of only two genders.[3] In addition, many

[3] Public Religion Research Institute poll (PRRI) shows sixty-five percent of Americans believe there are only two genders. Mark Murray, "Poll Shows Sharp Divides over Gender Identity, Pronoun Use," *NBC News,* June 8, 2023, 4:00 AM PDT, https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-shows-sharp-divides-gender-identity-pronoun-use-rcna88058.

academics and professionals are also of the same mindset, including the American College of Pediatricians,[4] evolutionary biologist Richard Dawkins,[5] and Canadian psychologist Jordan Peterson.[6] Had the District Court employed an *objective* analysis of L.M.'s message "There are only 2 genders" it should have arrived at the same result as the court in *Chandler* that, although possibly discomfiting to some, it was not "per se vulgar, lewd, obscene, or plainly offensive" and so did not infringe on the rights of other students. *Id.* at 530.

The other two cases cited by the District Court involved the display of the Confederate flag and are distinguishable from the current case on two grounds. *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000); *Scott v. School Bd. of Alchua Cty*., 324 F.3d 1246, 1247 (11th Cir. 2003). First, L.M. did not

[4] "Sex is binary, biologically determined at conception, revealed in utero and acknowledged at birth. . . .No child is born 'trans.'" American College of Pediatricians, "Deconstructing Transgender Pediatrics," https://acpeds.org/topics/sexuality-issues-of-youth/gender-confusion-and-transgender-identity/deconstructing-transgender-pediatrics (last visited September 20, 2023)

[5] "Richard Dawkins Insists That It's 'Absolutely Clear' That Sex is Binary" *Fox News* (Aug. 1, 2023) https://www.foxnews.com/video/6332249868112

[6] "[T]he idea that identity is subjectively defined is utterly preposterous. . . " "Jordan Peterson's Thoughts on Gender Identity", *YouTube* (Jan. 9, 2023), https://www.youtube.com/watch?v=tnYr12hB5kU

use any potentially offensive symbols,[7] or any symbols at all, on his t-shirt message. His t-shirt conveyed an idea in completely neutral, objective, and G-rated terms. Second, the Appeals Court in *Scott* relied on the reasoning in *Denno v. School Bd. of Volusia County,* 218 F.3d 1267 (11th Cir. 2000), which in turn relied on the reasoning of the District Court in *Derby.* In *Scott,* the court found that the ban of the Confederate flag was permissible where *there was no evidence that a school had suppressed civil debate* on racial matters, but only wanted to preclude the use of offensive symbols in that debate. *Scott* at 1249 (quoting *Denno,* 218 F.3d at 1273, citing *West v. Derby Unified School Dist. No. 260,* 23 F.Supp.2d 1223, 1233-34 (D.Kan.1998), *aff'd* 206 F.3d 1358 (10th Cir. 2000)).

By contrast, in the instant case, the school has officially taken sides in the gender debate by publicly promoting transgender ideology, including observing Pride Week and Pride Month so students can express their support as well by, *inter alia*, wearing "Pride gear," and seeking to promote an "outlook that bolsters . . . LGBT rights." App.53. Nothing in the record indicates that the school has

[7] The "offensiveness" of the Confederate flag appears to be highly contextual, rooted as it is in our nation's history of slavery and segregation. Jennifer Agiesta, *Poll: Majority sees Confederate flag as Southern pride symbol, not racist,* CNN (July 2, 2015), https://www.cnn.com/2015/07/02/politics/confederate-flag-poll-racism-southern-pride/index.html (57% of Americans see the Confederate flag as a symbol of regional pride rather than racism, but that percentage varies dramatically among races, less dramatically according to educational level.)

encouraged open civil discussion of both sides of the issue of the existence of more than two genders. On the contrary, by censoring L.M.'s speech, the school has stifled student debate on this issue on which it has taken a decisive stance. The school clearly intends to suppress debate on the issue, not simply assure that any debate is carried on civilly, without the use of offensive language or symbols.

B. Under *Tinker*, the school cannot create an "enclave of totalitarianism" in violation of its educational mission to educate students to function in a civil democratic society.

In the *Fraser* case, the Supreme Court in part based its decision upholding the school's prohibition of vulgar and offensive language on the fact that the speech was "unrelated to any political viewpoint." *Id*. At 685. The Court stated that the school district had "permissible authority" to not allow a student's speech to "undermine the school's basic educational mission" and to be sure to disassociate the school from the vulgar and lewd speech that was "wholly inconsistent with the 'fundamental values' of public-school education" *Id*. at 685-686. Here, the school's decision was related to a political/religious viewpoint and was biased in favor of the school's preferred ideology. Therefore, it did not further the goal of preparing students to engage in civil discussion in a democratic society. The school cannot on the one hand create an "enclave of totalitarianism" for its chosen ideology and on the other hand try to justify censorship of L.M.'s t-shirt on the basis of its educational mission to prepare students for democracy. The two are mutually exclusive. As it is impossible

to participate in civil debate if only one side is permitted to speak, the school's decision prepares students to function in a totalitarian state, not a democracy.

In the face of the school's public embrace and promotion of transgender ideology, it has given students two options -- join in if they agree and be silent if they do not. The state of affairs thus created more resembles the totalitarian society described in 1978 by Vaclav Havel, the Czechoslovakian dissident, in his famous book *The Power of the Powerless* than it does a democratic society for which schools are supposed to be preparing students. Regarding the necessary lies told by the regime, which is captivated by its own ideology, i.e., the "secularized religion," Havel says, "[i]ndividuals need not believe all these mystifications, but they must behave as though they did, or they must at least tolerate them in silence, or get along well with those who work with them. For this reason, however, they must live within a lie."[8]

Alexander Solzhenitsyn, the famous Soviet dissident, addressed the solution to this state of affairs found in totalitarian regimes in his 1974 essay, "Live Not by Lies" in which he encouraged Soviet citizens to oppose the regime. He said, "For violence has nothing to cover itself with but lies . . . . It demands of us only . . . a

[8] Vaclav Havel, "The Power of the Powerless" 9, https://www.nonviolent-conflict.org/wp-content/uploads/1979/01/the-power-of-the-powerless.pdf (last visited Sept. 21, 2023)

daily participation in deceit. . . . And therein we find . . . the simplest, the most accessible key to our liberation: a *personal nonparticipation in lies!"*[9]

The school has required that L.M. and other similarly dissenting students participate in what they believe to be a lie by remaining silent while the school publicly endorses the ideology that there are more than two genders. In so doing, the school is not teaching students how to engage in civil debate in a democratic society. Rather, it is teaching students like L.M. how to live under tyranny by teaching them to suppress their thoughts in the face of government words or actions with which they disagree, or else face reprisal from the "regime."

This "daily participation in deceit" (Solzhenitsyn, s*upra)* through enforced silence will undoubtedly impact their thoughts, words, and actions in the future. "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. *The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (invalidating two prohibitions of the Child Pornography Prevention Act of 1996 for overbreadth) (emphasis added). The Court cited this important connection between freedom of speech and freedom of thought when it

[9] Alexander Solzhenitsyn, "Live Not by Lies," https://www.solzhenitsyncenter.org/live-not-by-lies (last visited Sept. 21, 2023)

invalidated the West Virginia ordinance requiring students to participate in the flag salute and Pledge of Allegiance in *Barnette,* "That they [Boards of Education] 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." *Id*. at 637. The school's decision to censor L.M. is indeed an attempt to strangulate his mind, not just his words.

Not only has the school deprived L.M. and those who agree with him of their right to speak, but also the school has deprived the rest of the student body and staff of the right to receive information, which is the necessary corollary component of the right to freedom of speech. *Stanley v Georgia,* 394 U.S. 557 (1969). "[T]he Constitution protects the right to receive information and ideas. . . .This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Id*. at 564 (citations omitted). The "enclave of totalitarianism" the school has created therefore engulfs everyone – speaker as well as audience. This type of school environment prepares students for a future civic life in which those who have dissenting opinions will think twice before speaking, and those who are in the majority, or who possess power of some sort, will feel free to censor dissenters. The latter will not have been taught the necessary skills to civilly discuss matters of public importance which are also of vital concern to them. After being sheltered from

any ideas deemed too unsettling by their custodians, students who embrace the thought and lifestyle of transgenderism will be ill-equipped to live in a society in which sixty-five percent of their fellow citizens believe that one's gender aligns with one's biological sex. PRRI, *supra* fn. 3.

In a democratic society, it should be a given that people will have differences of opinion, which will necessarily include disputing the validity or rationality of the opinions of others. Either side is free to change views or to peacefully agree to disagree. The freedom to dialogue openly is the cornerstone of democracy. "Any 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. But our Constitution says we must take this risk." *Tinker* at 508 (citing *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949) (("[F]reedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce *a clear and present danger of a serious substantive evil*.") (emphasis added)) The wisdom of maintaining this "hazardous freedom" (*Tinker* at 508) and rejection of the "heckler's veto" is that it allows individuals, rather than the "regime," to make decisions as to what to say, what to hear, and ultimately how to think. The folly of the totalitarian state is in believing that it alone knows best how to direct the thoughts, words, and lives of others.

The issue of transgenderism poses no exception to the rule that open debate is best. The testimonies of "detransitioners," individuals who once identified as transgender and reversed course, illustrate the need for continued openness to discussion. In the case of one detransitioner, the pivotal moment came for her the first time someone challenged her belief system. She went to a doctor seeking a referral to have her female organs removed, and the doctor refused. She now credits that doctor with saving her life. "My pro-transition activist friends often said that contesting their gender identity risked driving them to suicide. Yet, for me, it was only when I began to be challenged, and challenge myself and the gender-spin I'd been fed, that my own suicidal feelings finally began to abate." Charlie Bentley-Astor, *If I Had Gone Through with a Gender Transition, I Would Have Committed Suicide*, The Telegraph, (July 28, 2022 6:31 PM).[10] Allowing freedom of speech could make the difference between life and death for an individual.

[10] https://www.telegraph.co.uk/news/2022/07/28/had-gone-gender-transition-would-have-committed-suicide/?fbclid=IwAR3r6TarNV7uJqx8bafSDTdlLEfIBa74rOd769oMGc5VozLzSJcEsNhAdT0

II. Falsely equating speech with violence or harm, as has become popular on campuses and in some segments of the media, is not a justification for the suppression of unpopular speech.

The totalitarian model of suppressing the speech of those who disagree with those in power is at the heart of the current movement equating the expression of opinion with bullying, harassment, threats, and violence. Both the school and the district court participated in this sort of false identification of pure speech with bad conduct. Specifically, the district court found that the balance of equities and public interest favored the district over L.M. because L.M.'s message "would prevent [other students] from attending school without harassment." Add.015. The court also agreed with the school's argument that allowing L.M. to wear his T-shirt would infringe other students' "right be to secure and to be let alone," Add.016, and cause the school to violate various Massachusetts mandates requiring that schools provide a "safe environment," free of "discrimination, bullying, or harassment based on gender identity." *Id*.

Encouraging junior high and high school students to equate speech with bullying, harassment, and violence undoubtedly leads to the type of victim entitlement mentality so prevalent today in higher education. This mentality frequently does not content itself with censorship, but, ironically, also manifests itself in acts of harassment and violence directed at those who question the prevailing opinions.

For example, last May a professor at New York's Hunter College confronted completely peaceful pro-life students hosting an information table on campus, telling them that their information was "f*ing propaganda," "violent" and "bullsh*t." At the end of the exchange, she pushed some of their pamphlets off the table. Allie Griffin, "NYC College Professor Shellyne Rodriguez Cursed Out Anti-Abortion Students Tabling at School," New York Post (May 24, 2023, 9:31 AM).[11] In a classic case of the pot calling the kettle black, the same professor was later shown in a video holding a machete or kitchen knife to the neck of a reporter who knocked on her apartment door to ask her about the previous incident. Reuven Fenton and Emily Crane, "Shellyne Rodriguez, Unhinged NYC College Professor Who Cursed Out Anti-Abortion Students, Holds Machete to Post Reporter's Neck," New York Post (May 24, 2023, 9:38 AM).[12]

In March of 2023, Young Americans for Freedom (YAF) at the University at Buffalo (UB) announced their intent to bring conservative commentator Michael Knowles to speak on the topic "How Radical Feminism Destroys Women (And Everything Else)." A group of professors claimed that Knowles' speech would "effectively [be] a *call for genocidal violence* against members of the transgender

[11] https://nypost.com/2023/05/22/nyc-hunter-college-professor-cursed-out-anti-abortion-students-tabling-at-school/
[12] https://nypost.com/2023/05/23/nyc-college-professor-shellyne-rodriguez-holds-machete-to-post-reporters-neck/

community." *New Guard*, *University at Buffalo Leftists Try to Derail Plans for Michael Knowles Lecture; Administrators Denounce His "Opinions Contrary to University Values"* (July 19, 2023) (emphasis added).[13] The school released a statement to the effect that "speakers sometimes hold opinions contrary to university values or make polarizing comments." *Id.* University President Tripathi released an email that indicated great distaste for the First Amendment restrictions:

> When faced with the prospect of intolerant and hateful speech directed at transgender people entering the campus dialogue, I understand that espousing our university's values and clarifying the First Amendment may ring hollow — and, indeed, feel wholly inadequate," Tripathi said. "But let me reassure you: These values of diversity, equity, inclusion and respect keep us grounded. They guide our every action. As the bedrock of our university, they most certainly do not crumble when confronted with dehumanizing, transphobic rhetoric.

Grant Ashley, *UB Won't Cancel Michael Knowles' On-campus Speech over CPAC 'Transgenderism' Remarks Despite Backlash from University Community,* The Spectrum (March 7, 2023, 2:39 PM EST).[14] It appears that the "values of diversity,

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[13] https://yaf.org/news/university-at-buffalo-leftists-try-to-derail-plans-for-michael-knowles-lecture-administrators-denounce-his-opinions-contrary-to-university-values/

[14] https://www.ubspectrum.com/article/2023/03/ub-wont-cancel-michael-knowles-on-campus-speech-over-cpac-transgenderism-remarks-despite-backlash-from-university-community

equity, inclusion and respect" are in danger of supplanting constitutional freedoms, at least at UB.

In response to a successful YAF-sponsored lecture by conservative speaker Matt Walsh at the New Mexico State University, a New Mexico state senator and eight other state, county and municipal officials sent a letter to the university's president opposing the decision to allow Mr. Walsh to speak and questioning "the rationale for allowing this type of event that would *knowingly frighten and harm* part of the student population." Nick Baker, *State Senator Wants to Ban Conservative Speakers After Successful Matt Walsh YAF Lecture,* (Sept. 1, 2023) (emphasis added).[15] It is very concerning that public officials who are sworn to uphold the Constitution would advocate the suppression of free speech at a public university on the basis of the subjective reactions of certain listeners.

In advance of another Matt Walsh lecture, also sponsored by YAF, at Saint Louis University (SLU), faculty and students at SLU's School of Social Work launched a change.org petition in which they stated, "For women, racial minorities, and the LGBTQIA+ community, *his words may instill further fear: fear of participating in a classroom with his supporters, fear of expressing identity at a school that supports these beliefs*, and so much more." Julia Johnson, '*Keep Matt*

[15] https://yaf.org/news/state-senator-wants-to-ban-conservative-speakers-after-successful-matt-walsh-yaf-lecture/

Walsh Off Our Campus': Leftist Faculty and Students Urge Event Cancellation in Petition to SLU President, (July 19, 2023) (emphasis added).[16] The irony is that the Catholic Church's official teaching is in line with Matt Walsh's beliefs on marriage, abortion and gender. United States Conference of Catholic Bishops, "*Gender Theory" / "Gender Ideology"" -- Select Teaching Resources*, , (August 7, 2019).[17]

This trend has been going on for several years and has spawned discussion in the media regarding whether speech that some feel to be equal to "violence" should be censored. In 2017, right wing commentator Milo Yiannopoulos was invited to speak on campus by the Berkeley College Republicans. Unlike the YAF speakers previously mentioned, his speech was canceled, and he was evacuated by the UC Police Department due to an "organized violent attack and destruction of property at UC Berkeley's Martin Luther King Jr. Student Union." *Milo Yiannopoulos Event Canceled After Violence Erupts*," Berkeley News, February 1, 2017.[18] In an expletive-laden opinion piece, one student justified the violence by equating the predicted contents of his speech with "violence." The writer stated, "If I know that you are planning to attack me, I'll do all I can to throw the first punch," and "asking

[16] https://yaf.org/news/keep-matt-walsh-off-our-campus-leftist-faculty-and-students-urge-event-cancellation-in-petition-to-slu-president/
[17] https://www.usccb.org/resources/Gender-Ideology-Select-Teaching-Resources_0.pdf
[18] https://news.berkeley.edu/2017/02/01/yiannopoulos-event-canceled (last visited September 19, 2023)

people to maintain peaceful dialogue with those who legitimately do not think their lives matter is a violent act." She ended her piece with the thrust "[T]here are those of us who know that our grandparents and parents survived hate only through the grace of violent action." Nisa Dang, *Check Your Privilege When Speaking of Protests*, The Daily Californian, (February 7, 2017).[19] This student-writer unilaterally declared that Yiannopoulos was no better than a Nazi intent on violence simply because he had opinions differing from her own. Since in her mind, his speech *was* violence, students were therefore justified in resorting to pre-emptive violence. Even the exercise of First Amendment rights by engaging with a person having a different opinion was violence, in her estimation. While the campus administration regretted the loss of the exercise of First Amendment rights on campus due to the canceling of the speaker (Berkeley News), in the end the violent protesters had their way, and the First Amendment and the student body were the losers.

The treatment Yiannopoulos received was also justified by some in the media. One article stated that, "Words can have a powerful effect on your nervous system. Certain types of adversity, even those involving no physical contact, can make you sick, alter your brain — even kill neurons — and shorten your life." Lisa Feldman

[19] https://www.dailycal.org/2017/02/07/check-privilege-speaking-protests (last visited September 19, 2023)

Barrett, "*When Is Speech Violence*," The New York Times, (July 14, 2017).[20] The author, a psychology professor, reasoned that, since speech can cause stress, it can be a form of violence if it is "abusive," and not merely "offensive." She concluded by deciding "But we must also halt speech that bullies and torments. From the perspective of our brain cells, the latter is literally a form of violence." *Id*. Nowhere in the article did she discuss how to differentiate between "abusive" speech and "offensive" speech, or who should make that determination.

The Berkeley Republicans welcomed Yiannopoulos' talk, so they obviously did not consider it abusive. The same is true with the YAF speakers and the pro-life students in New York. Presumably, students' opinions fell across the spectrum. It is obvious that the "speech equals violence" trope, whatever uses it may have in therapy, cannot have any place in First Amendment law as it invalidates the very purpose of freedom of speech. *Matal at 1764* ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'").

Philosophers too have entered the debate. Referencing Wittgenstein, one author stated that whether speech is violence depends on how it is defined. "If we

[20] https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html

define violence as a physical act, then speech is never violence. If we choose to define violence as causing harm to a person, then speech is often violence. If we choose to define violence as intentionally causing harm, then sometimes speech is violence." Kevin Litman-Navarro, *Wittgenstein on Whether Speech is Violence*, JSTOR Daily, (August 30, 2017).[21] Though the writer makes a passing reference to the judicial system, he does not consider how to translate this conclusion into a rule of law. Whatever the merits may be of his position philosophically, a rule of law based on the subjective reactions of innumerable individuals to various kinds of speech would be incoherent and unconstitutionally vague. Metaphors equating speech and violence, whatever truth they convey in the proper context, cannot become the basis of a rule of law.

Nadine Strossen, former President of the American Civil Liberties Union, rebutted the "speech is violence" assertion by aptly observing,

> Sticks and stones directly cause harm, through their own force, but words at most can potentially contribute to harm; *whether particular words actually do cause harm depends on how individual listeners perceive and respond to them, which in turn is influenced by the listeners' personalities and circumstances, including innumerable other factors that also potentially influence their psyches and behavior*. . . .When there is a sufficiently tight and direct causal nexus between speech and specific serious imminent harm, including violence, free speech principles permit such speech to be punished.

[21] https://daily.jstor.org/wittgenstein-whether-speech-violence/

Greg Lukianoff, *Free Speech Does Not Equal Violence: Part 1 of Answers to Bad Arguments Against Free Speech from Nadine Strossen and Greg Lukianoff*, Foundation for Individual Rights and Expression, (September 1, 2021) (emphasis added).[22]

CONCLUSION

The school's censorship of L.M.'s speech under the guise of protecting the rights of certain students over and against the rights of others is a thin veil for the constitutionally impermissible creation of a totalitarian climate in the public school system.

The District Court opinion should be reversed.

Respectfully submitted, October 2, 2023

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[22] https://www.thefire.org/news/blogs/eternally-radical-idea/free-speech-does-not-equal-violence-part-1-answers-bad-arguments

RULE 32 (g) CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE

I certify that this brief complies with the length limitation of Fed. R. App. P. 29(a)(5), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief was prepared using a proportionally spaced typeface (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5861 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 365) used to prepare this brief.

/s/ Catherine W. Short