No. 24-410

In the Supreme Court of the United States

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

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS, ET AL.

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

BRIEF OF RESPONDENTS TOWN OF MIDDLEBOROUGH; 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 IN OPPOSITION

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QUESTION PRESENTED

As this Court held in *Tinker* and has repeatedly confirmed, including recently in *Morse*, students' First Amendment rights must be applied "in light of the special characteristics of the school environment." The First Amendment affords schools considerable latitude to restrict speech that is inconsistent with their educational function, such as speech that could cause a material disruption to the educational environment, including other students' ability to learn.

John T. Nichols Middle School (NMS) is a public school attended by students between ten and fourteen years old. The school was aware of transgender and gender-nonconforming students who had experienced serious mental health struggles, including suicidal ideation, related to their treatment by other students based on their gender identities, and that such struggles could impact these students' ability to learn.

The court of appeals held that it was reasonable for NMS to conclude that "a message displayed throughout the school day denying the existence of the gender identities of transgender and gender nonconforming students would have a serious negative impact on those students' ability to concentrate on their classroom work." The court canvassed relevant cases from other circuits and explained that its ruling was consistent with them all. The question presented is:

Whether a school may impose reasonable restrictions on messages that students carry with them throughout the day, such as on banners or t-shirts, that the school reasonably concludes would materially interfere with the school's learning environment.

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INTRODUCTION

The First Amendment rights of public-school students must be "applied in light of the special characteristics of the school environment." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Time and again, this Court has explained that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675,

682 (1986). Indeed, in *Morse* v. *Frederick*, 551 U.S. 393, 409 (2007), this Court held that a high school did not violate the First Amendment when it restricted a student from displaying a banner with a message that the school "reasonably viewed as promoting illegal drug use," even though that message on a topic of public concern would otherwise be protected and the school permitted (indeed endorsed) the opposite message. Because states require students to attend school, and "because their parents are unable to [protect students] during those hours," "the school has a duty to protect students while in school." *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 201 (2021) (Alito, J., concurring).

Consistent with these principles, *Tinker* established that school administrators may restrict student speech where they reasonably "forecast substantial disruption of or material interference with school activities." 393 U.S. at 508, 513-514. The court of appeals utilized the same framework that courts of appeals have uniformly followed in applying *Tinker*'s material-disruption standard. Indeed, the court of appeals meticulously assessed each of the decisions applying *Tinker* to similar facts.

Petitioner attempts to rewrite the facts and decision below to create what he asserts are nine circuit splits. No circuit split exists, much less nine. For example, petitioner contends (incorrectly) that the court of appeals rested its holding on mere "ideological offense" (or "hurt feelings"), and failed to require NMS to produce "specific evidence" of anticipated disruption. To the contrary, the court of appeals expressly disavowed a "hurt feelings" exception under *Tinker* and described the standard for material disruption as "demanding," then—consistent with every circuit's approach—applied that standard to the wealth of "specific evidence" in the record.

Petitioner fails to meaningfully grapple with the evidence that served as the basis of the court of appeals' decision. Undisputed affidavits submitted by school administrators offer crucial context for understanding their actions, and why the court of appeals' decision upholding them is consistent with the decisions of other courts of appeals. School administrators attested to the young age of NMS students, the severe mental health struggles of transgender and gender-nonconforming students (including suicidal ideation), and the then-interim principal's experience working with gender-nonconforming students who had been bullied in other districts and had harmed themselves or were hospitalized due to contemplated, or attempted, suicide. The court of appeals held that, under these specific circumstances, it was reasonable for NMS to predict that L.M.'s wearing of this particular t-shirt throughout the day at this particular middle school would, at a minimum, materially interfere with certain students' ability to concentrate on their classwork.

Even if the Court were interested in reconsidering *Tinker* and *Morse*, numerous substantive and procedural obstacles make this case an inappropriate vehicle for doing so.

STATEMENT

I. FACTUAL BACKGROUND

A. John T. Nichols Middle School

NMS is a public middle school in Middleborough, Massachusetts. Pet. App. 5a. NMS students are in grades six through eight and between ten and fourteen years old. *Ibid.*

Several NMS students identify as members of the LGBTQ+ community. Pet. App. 5a-6a. NMS celebrates "Pride" month in June and has a Gay Straight Alliance Club, with ten to twenty members and allies at any given time. *Id.* at 6a; C.A. App. 204 (¶ 27). Heather Tucker, then-interim principal of NMS, attested in an affidavit that several students in NMS's LGBTQ+ community are transgender or gender nonconforming. Pet. App. 5a-6a; C.A. App. 199 (¶ 1), 204 (¶ 31).

Principal Tucker brought to NMS two decades of experience educating young students in Massachusetts. Pet. App. 6a. That experience included meetings with students who had been bullied based on their gender identity and working closely with students who had self-harmed or were hospitalized for attempted suicide or suicidal ideation "because of their gender identity." *Ibid.*; C.A. App. 199-200 (¶ 2). Tucker also had been part of teams that had recommended out-of-district placements for such students. *Ibid.*

Middleborough Public School System (MPSS) Superintendent Carolyn Lyons attested in affidavits that several NMS students "have attempted to commit suicide or have had suicidal ideations in the past few years, including members of the LGBTQ+ community." Pet. App. 6a; C.A. App. 69 (¶ 24), 103 (¶ 25). Some of these students' struggles have been "related to their treatment based on their gender identities by other students." Pet. App. 52a.

In June 2022, NMS conducted a survey of its student body to gauge student sentiments; Superintendent Lyons attested that the survey included comments from more than twenty students about "perceived bullying at school, feeling unwelcome at school, and expressing

specific concerns about how the LGBTQ+ population is treated at school." Pet. App. 6a.

B. NMS Promotes a Safe and Supportive Learning Environment for Its Transgender and Gender-Nonconforming Students

To promote "a safe and supportive school environment for all students," the Massachusetts Department of Elementary and Secondary Education (DESE) instructs schools to "incorporate education and training about transgender and gender nonconforming students into their anti-bullying curriculum, student leadership trainings, and staff professional development." C.A. App. 83. DESE guidance notes that transgender and gender-nonconforming students "are at a higher risk for peer ostracism, victimization, and bullying," and that, according to a 2011 study, "75.4% of transgender students had been verbally harassed in the previous year, 32.1% had been physically harassed, and 16.8% had been physically assaulted." *Id.* at 78.[1]

Consistent with DESE's guidance, NMS's Student & Family Handbook (Handbook) recognizes that "[a]ll children must be able to learn in an environment that is free from discrimination based on race, color, sex, national origin, disability, religion, gender identity, or sexual orientation." C.A. App. 120. These rules are consistent with NMS's core mission to foster "excellence within every student" and to ensure the "social-

[1] DESE's guidance implements a 2011 amendment to Mass. G. L. c. 76, Section 5, which prohibits discrimination based on gender identity against students who enroll in, or attend, public school. C.A. App. 77.

emotional growth and well-being of all members of the school community." *Id.* at 113-114.

The Handbook also includes a dress code (Dress Code). Pet. App. 7a-8a. The Dress Code provides:

> Clothing must be neat and clean.
>
> Clothing that is excessively revealing * * * will not be allowed.
>
> Tank tops or basketball shirts must have a t-shirt underneath.
>
> Chains, chain belts, spikes, studs, and gang-related attire is not allowed.
>
> Clothing with alcohol, tobacco, vulgar writing, sexual references or controlled substance reference[s] will not be allowed.
>
> Outer coats, hats, caps, bandanas, sweatshirt hoods, and sunglasses will not be worn in the building without permission of an administrator.
>
> Wheeled shoes and platform shoes are dangerous on our floors and are not allowed.
>
> Blankets or other clothing that drapes down or is considered a tripping hazard will not be allowed.
>
> *Clothing must not state, imply, or depict hate speech or imagery that target[s] groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation, or any other classification.*[2]

---

[2] The Dress Code further provides that "[a]ny other apparel that the administration determines to be unacceptable to our community standards will not be allowed." Pet. App. 8a. Petitioner asserted a facial challenge to this provision, which the court of appeals

C.A. App. 151-152 (emphasis added). The Dress Code adds that "[i]f students wear something inappropriate to school, they will be asked to call their parent/guardian to request that more appropriate attire be brought to school." *Id.* at 152.

C. L.M. Violates NMS's Dress Code

On March 21, 2023, L.M., then twelve years old and in the seventh grade, wore a black t-shirt to NMS that stated in large, black capitalized letters, "THERE ARE ONLY TWO GENDERS." Pet. App. 8a, 97a (¶ 55). Below is a picture of L.M. wearing the t-shirt:

Pet. App. 91a. A teacher emailed Assistant Principal Jason Carroll about the t-shirt, noting that multiple

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rejected on standing grounds. *Id.* at 57a-58a. Petitioner does not ask this Court to review that issue. See Pet. (i).

members of the LGBTQ+ student population were present at school and would be impacted by the t-shirt, and expressing concern that the t-shirt could potentially disrupt classes. *Id.* at 8a-9a. The teacher also expressed concern for the safety of both L.M. and other students. *Ibid.* Carroll relayed the report to Principal Tucker. C.A. App. 210 (¶ 2).

Principal Tucker met L.M. at the start of his physical education class. Pet. App. 9a. She introduced herself and asked to speak with L.M., reassuring him that he was not in trouble. *Ibid.*; C.A. App. 200 (¶ 6). L.M. asked Tucker "if it was about his t-shirt," to which Tucker responded, "yes." C.A. App. 200 (¶ 6). Tucker asked L.M. whether, instead of meeting with her, he would be willing to change his shirt and return to class; L.M. refused. Pet. App. 9a. They then left the gymnasium to continue their discussion. *Ibid.* Joined by a school counselor, Tucker met with L.M. and again asked him to change shirts before returning to class, but L.M. refused to change. *Ibid.*; C.A. App. 201 (¶ 7).

Principal Tucker then called L.M.'s father, Chris Morrison. Pet. App. 9a. Tucker asked Morrison to have L.M. change shirts, adding that L.M. "[wa]s welcome to wear what he wants outside of school." *Id.* at 120a; C.A. App. 201 (¶ 8). Morrison refused Tucker's request and instead indicated that he preferred to pick L.M. up from school over having L.M. remove the t-shirt. Pet. App. 9a, 120a. Morrison picked L.M. up from school, and L.M. was not disciplined. *Id.* at 9a.

Eleven days later, on Saturday, April 1, Morrison emailed Superintendent Lyons to complain about L.M. being removed from class and Principal Tucker's response to L.M.'s Dress Code violation. Pet. App. 10a,

120a-121a. Morrison wrote that he "reviewed the student handbook and cannot find anything that indicates a school policy or rule that [L.M.] broke." *Id.* at 121a. Morrison also questioned whether any staff had complained. *Ibid.*

Superintendent Lyons responded on Tuesday, after speaking with Principal Tucker about the situation. Pet. App. 122a. Lyons told Morrison that L.M. had not been, and would not be, disciplined and that Morrison had been under no obligation to pick L.M. up from school on March 21. *Ibid.* Lyons expressed support for Tucker's handling of the situation, noting the school's responsibility for the well-being of students, and informing Morrison that both students and staff had complained about the t-shirt. *Ibid.* Lyons then shared the Dress Code for Morrison's reference. *Id.* at 123a-124a.

D. NMS Experiences Disruption in the Form of Protests and Threats

On April 13, 2023, protestors appeared outside the entrance of NMS holding signs displaying the messages, "there are only two genders" and "keep woke politics out [of] our schools." Pet. App. 11a. The protestors were stationed just off of school property, at the entrance to the bus drop-off area, in plain view of students as they entered school grounds. *Ibid.*; C.A. App. 201 (¶ 14). Superintendent Lyons received complaints from the school's LGBTQ+ community members about the protestors' signs. C.A. App. 100 (¶ 6).

The same day, L.M. appeared before the Middleborough School Committee to complain about NMS's Dress Code enforcement. C.A. App. 100 (¶ 7). L.M. described how other students had told him that they, too, wanted

"THERE ARE ONLY TWO GENDERS" shirts. Pet. App. 105a (¶ 97).

The following day, April 14, 2023, counterprotests were held outside of NMS with signs supporting transgender students. Pet. App. 11a. Lyons also received complaints from community members about these messages. *Ibid.*

L.M.'s t-shirt became the subject of significant discussion on social media among students, parents, and others and was featured on several news programs. Pet. App. 11a; C.A. App. 202 (¶ 16).

Meanwhile, Superintendent Lyons and other MPSS and NMS administrators received "an ongoing stream of messages, tweets, and emails as well as phone calls," some of which were threatening in nature. C.A. App. 66-67 (¶ 10); Pet. App. 11a-12a. One post on the social media platform "X," formerly known as Twitter, listed NMS's staff directory with the ominous message, "if you see these people in public, you know what to do." Pet. App. 12a. Lyons reported the post to the Middleborough Police Department, C.A. App. 66-67 (¶ 10), which led the department to assign a police detail to NMS from April 24 to April 28, 2023. Pet. App. 12a. On May 1, 2023, after increased news coverage, NMS received over fifty telephone messages that Principal Tucker described as "hateful and lewd"; the school continued receiving similar calls over the following weeks. *Id.* at 11a-12a.

E. L.M. Violates NMS's Dress Code Again

On April 27, 2023, L.M.'s counsel sent Superintendent Lyons a letter asserting that L.M. had a First Amendment right to wear the t-shirt at NMS and that he intended to wear it to school again on May 5, 2023. Pet. App. 10a, 135a-142a. MPSS's counsel responded

that Massachusetts law "provides protection against discrimination, harassment and bullying on the basis of . . . gender identity," and that such protections are appropriate to prevent conduct that is "reasonably likely to lead to a disruption of [school] operations." *Id.* at 10a-11a (quoting Pet. App. 144a) (brackets in original). Around this time, on May 4, 2023, the parent of a transgender student also appeared before the School Committee to express fears for her child's safety. C.A. App. 101 (¶ 14).

L.M. wore the t-shirt to school on May 5, covering the words "ONLY TWO" with a piece of tape on which "CENSORED" was written. Pet. App. 12a. Below is a picture of L.M. wearing the taped shirt:

Id. at 107a. Principal Tucker brought L.M. to NMS's Administrative Office after he arrived at school. C.A. App. 102 (¶ 17). L.M. removed the taped shirt, was allowed to proceed with his school day, and was not disciplined. Pet. App. 12a.

F. Additional Events at NMS

On May 9, 2023, two other NMS students wore shirts stating "THERE ARE ONLY TWO GENDERS." Pet. App. 12a. Principal Tucker enforced NMS's Dress Code again as to these students by asking them to change their shirts; neither student faced discipline. *Ibid.*

On June 1, 2023, NMS began celebrating "Pride Month." C.A. App. 204 (¶ 27). The same day, L.M. wore a t-shirt stating "freedom over fear," which NMS did not ask him to remove. *Id.* at 204 (¶ 28).

On other occasions, L.M. had worn shirts to school displaying messages including "Don't Tread on Me," "First Amendment Rights," and "Let's Go Brandon"—none of which he was asked to remove. Pet. App. 9a; C.A. App. 201 (¶ 11). L.M. was also not disciplined for any of his off-campus statements or asked to refrain from speaking about the t-shirt or posting on social media while off-campus. See C.A. App. 201 (¶¶ 10, 12).

II. Procedural Background

A. Preliminary Injunction Ruling

On May 19, 2023, L.M. sued the Town of Middleborough, the Middleborough School Committee, Superintendent Lyons in her official capacity, and Principal Tucker in her official capacity as acting principal (collectively, respondents) pursuant to 42 U.S.C. 1983, alleging violations of the First and Fourteenth Amendments. C.A. App. 3-4, 16, 33-37. The same day, petitioner filed an emergency motion for temporary restraining order and preliminary injunction. *Id.* at 4.

On June 16, 2023, the district court denied petitioner's motion for preliminary injunction. C.A. App. 12.

The court held that petitioner had failed to show a likelihood of success as to his First Amendment claim. Pet. App. 76a-80a. The court reasoned that, under *Tinker*, NMS could restrict the original t-shirt as an "invasion of the rights of others," namely the rights of transgender and gender-nonconforming students. *Id.* at 76a-79a. The court similarly held that, because the taped shirt effectively conveyed the same message as the original, given the considerable attention the original shirt had received in the intervening period, it could be restricted for the same reasons. *Id.* at 79a-80a.

Petitioner filed a notice of interlocutory appeal of the denial of the preliminary injunction motion. C.A. App. 13. The parties then filed a joint motion to stay proceedings pending appeal, which the court denied. *Id.* at 14. In light of that denial, the parties filed a motion to enter final judgment based on the factual record established during preliminary injunction proceedings. *Ibid.* The district court allowed the motion and entered final judgment on July 19, 2023, incorporating the reasoning from its June 16 decision, see Pet. App. 85a-86a, and petitioner appealed on August 4, 2023, C.A. App. 14-15.

B. The Court of Appeals Affirms, but on Different Grounds

The court of appeals consolidated the appeals, Pet. App. 18a, and affirmed the district court, holding that NMS did not violate L.M.'s First Amendment rights. The court of appeals reached that conclusion on different grounds, relying on *Tinker*'s "material disruption" test rather than the "rights of others" test applied by the district court. Pet. App. 26a, 36a-37a, 55a. Specifically, the court explained that, given "what the record here shows about what Middleborough reasonably understood the

message to convey and what it knew about the NMS student population," the court did "not understand *Tinker*, our own precedents, or any other circuits' decisions to support our second-guessing Middleborough's assessment that there was the requisite basis for the forecast of material disruption here." *Id.* at 50a.

In assessing the school's forecast as to the shirt L.M. wore on March 21, the court explained that the school could reasonably understand the "demeaning nature of the message," given that "L.M. himself agrees that the message directly denies the self-conceptions of certain middle-school students" and that "those denied self-conceptions are no less deeply rooted than those based on religion, race, sex, or sexual orientation." Pet. App. 51a. The court further explained that "[t]his is also a middle-school setting, with some kids as young as ten," and that the school's restriction had to be assessed specifically in light of "the disruptive impact of a particular means of expression and not of, say, a stray remark on a playground, a point made during discussion or debate, or a classroom inquiry." *Id.* at 51a-52a (citing *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring); *Morse* v. *Frederick*, 551 U.S. 393, 404 (2007)).

The court discussed how the school had to assess the disruptive impact of the shirt in light of its knowledge of "the serious nature of the struggles, including suicidal ideation, that some of those students had experienced related to their treatment based on their gender identities by other students, and the effect those struggles could have on those students' ability to learn." Pet. App. 52a. The court also noted Principal Tucker's prior experience "recommending out-of-district placements for such students prior to her coming to NMS." *Id.* at 52a-

53a. Under these circumstances, the court held that "it was reasonable for Middleborough to forecast that a message displayed throughout the school day denying the existence of the gender identities of transgender and gender non-conforming students would have a serious negative impact on those students' ability to concentrate on their classroom work." *Id.* at 53a.

The court of appeals also noted that "precisely because the message was reasonably understood to be so demeaning of some other students' gender identities, there was the potential for the back-and-forth of negative comments and slogans between factions of students," Pet. App. 53a, that could lead to what the Seventh Circuit described in *Nuxoll* as "a deterioration in the school's ability to educate its students," *ibid.* (quoting *Nuxoll* v. *Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 672 (7th Cir. 2008)). In support of that conclusion, the court noted that a teacher had expressed concerns to Assistant Principal Carroll that LGBTQ+ students would be "impacted by the t-shirt['s] message" and that it would "potentially disrupt classes." *Ibid.* (brackets in original). The court also relied on the mental health struggles of transgender and gender-nonconforming students and the school's 2022 survey indicating that "a number of students had 'specific concerns about how the LGBTQ+ population [was] treated' at NMS." *Ibid.* (brackets in original).

As to the taped shirt, the court of appeals explained that "our analysis is largely the same" because it was "the same shirt" and "aside from the taping, looked the same." Pet. App. 56a. The court also noted that, in the time between when L.M. wore the initial t-shirt and the taped one, "L.M. spoke at the School Committee meeting about the precise contents of the Shirt on April 13, had

significant local and national press coverage between March 21 and May 5, and had photos of himself wearing the Shirt go viral online in that period." *Ibid.* Accordingly, the court held that NMS "reasonably concluded that, given the attention L.M.'s wearing of the Shirt on March 21 garnered, other students would know the words written on the Taped Shirt, even if two words were covered up." *Ibid.*

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS THAT REQUIRES THIS COURT'S RESOLUTION

The outcome of this case would have been the same in any circuit, and there is no conflict for this Court to resolve. The court of appeals exhaustively canvassed the relevant law in other circuits and explained that those courts uniformly hold that *Tinker* permits school administrators to limit a student's silent, passive expression where they reasonably forecast that the speech will materially disrupt the school's learning environment. On the other hand, no court, including the First Circuit, permits a school to restrict speech merely because it is offensive.

The courts of appeals that have considered the issue uniformly recognize that, in applying *Tinker*'s material-disruption standard, passive and silent speech that a school can reasonably interpret to be demeaning of other students based on core personal characteristics may be restricted where the record supports the reasonableness of the school's forecast of disruption. See *Dariano* v. *Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778-779 (9th Cir. 2014) (high school could restrict certain displays of American flag on Cinco de Mayo, where school had

history of racially motivated altercations and students warned officials of imminent fighting); *Hardwick* v. *Heyward*, 711 F.3d 426, 439 (4th Cir. 2013) (middle school's history of racial tension supported ban on student shirts displaying Confederate flag with phrases "Southern Chicks," "Dixie Angels," and "Daddy's Little Redneck"); *A.M.* v. *Cash*, 585 F.3d 214, 222 (5th Cir. 2009) (high school could ban students' display of Confederate flag, where school experienced racially hostile graffiti and disciplinary referrals involving racial epithets); *B.W.A.* v. *Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009) (high school could ban students' display of Confederate flag, where school had history of racially motivated altercations); *Barr* v. *Lafon*, 538 F.3d 554, 568 (6th Cir. 2008) (high school could ban students' display of Confederate flag, where school had history of racially hostile graffiti and racially motivated altercations); *Nuxoll* v. *Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 674-676 (7th Cir. 2008) (high school could ban shirts with serious and disruptive psychological effects, such as "blacks have lower IQs than whites" or "a woman's place is in the home"; remanding for further factual development to assess whether stating "Be Happy, Not Gay," which was arguably merely a "play on words," was similar to those other statements); *Scott* v. *School Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (high school could ban students' display of Confederate flag, where school had history of racial tensions and racially motivated altercations); *Sypniewski* v. *Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254-257 (3d Cir. 2002) ("[S]ubstantial evidence of prior disruption related to the Confederate flag * * * would likely support a ban of displays of the Confederate flag under *Tinker*," but the record did not support a ban on all clothing displaying the term "rednecks."); *West* v. *Derby Unified Sch. Dist. No. 260*,

206 F.3d 1358, 1362-1363, 1366 (10th Cir. 2000) (school could restrict student's drawing of Confederate flag where school had history of racial tension and verbal confrontations between students wearing Confederate flag and Malcom-X clothing and no history of violence in middle school itself).

The decision below did not disturb this consensus. Indeed, the court of appeals expressly disclaimed any conflict and rested its holding on the "material-disruption" limitation, in keeping with the consensus of the other courts of appeals. Pet. App. 36a. Petitioner cannot deny this, so he instead endeavors to rewrite the court of appeals' decision and manufacture purported "circuit splits" by comparing the opinions of other circuits with a caricature of the court of appeals' decision here.

A. The Court of Appeals Expressly Disclaimed Any Conflict, and Explained the Principles Common to the Other Circuit Court Cases

Contrary to petitioner's allegation that the court of appeals "sidelined" *Tinker*, Pet. 2, its decision reflects the court's meticulous assessment of the rules announced in *Tinker* and their application to the particular facts of this case. Pet. App. 4a-5a, 19a-45a.

The court of appeals began its analysis by reviewing *Tinker* itself, which recognized the First Amendment right of public-school students to wear black armbands to school in protest of the nation's involvement in the Vietnam War. Pet. App. 4a. As the court of appeals explained, however, the Court was also sensitive to the "special characteristics of the school environment," *ibid.* (quoting *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)), and so held that school administrators may restrict silent, passive expression where

they reasonably "forecast *substantial disruption of or material interference with school activities*" or "the rights of other students." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508, 513-514 (1969) (emphasis added). The armband ban in *Tinker* failed to clear either the material-disruption standard or the rights-of-others standard because the school provided "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Id.* at 508.

The court of appeals correctly observed that, although *Tinker* established the framework for analyzing restrictions of student speech under the First Amendment, "the armbands at issue there were not asserted to espouse any message other than opposition to the Vietnam War and did not -- unlike the t-shirts here -- refer to any such personal characteristics." Pet. App. 21a. Accordingly, the court considered "an extensive body of federal court caselaw," *id.* at 23a, applying the *Tinker* framework to "speech that (though expressed passively, silently, and without mentioning any specific students) assertedly demeans characteristics of personal identity, such as race, sex, religion, or sexual orientation," *id.* at 4a.

After questioning the scope of cases that considered similar facts under *Tinker*'s "rights of others" limitation, see Pet. App. 20a-21a, 24a-26a, the court of appeals turned to, and ultimately relied upon, circuit court rulings "invoking the material-disruption limitation to approve of a school's authority to regulate seemingly similar expression," *id.* at 26a-33a.

First, the court of appeals analyzed the Seventh Circuit's decision in *Nuxoll*, 523 F.3d at 668, which involved a high school's restriction of a shirt stating, "Be Happy, Not Gay." The Seventh Circuit held that the school had failed to justify its ban given the "the scanty record" that failed to support a reasonable forecast of material disruption but suggested that a "fuller record * * * may cast the issue in a different light." *Id.* at 675-676. The Seventh Circuit also noted that the shirt had been worn in the context of high school and that high school students in particular should not be "raised in an intellectual bubble." *Id.* at 671 (quoting *American Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)). But in finding a First Amendment violation, the court squarely rejected any suggestion that *Tinker* barred school administrators from restricting passive, silent expression where that expression demeans other students on the basis of "unalterable or otherwise deeply rooted personal characteristics," such as race, sex, or sexual orientation, and could therefore disrupt the school. *Ibid.* The Seventh Circuit explained that, on a "fuller record," the student's shirt could go beyond merely offensive speech and offer a basis for school administrators to forecast that the expression would "lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption." *Id.* at 674, 676.

As explained by the court of appeals, the Seventh Circuit reviewed the same expression at the same school in a "sequel" decision in *Zamecnik* v. *Indian Prairie School District No. 204*, 636 F.3d 874, 875 (7th Cir. 2011). Pet. App. 29a. There, the Seventh Circuit noted that "[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line

between hurt feelings and substantial disruption of the educational mission, because they have the relevant knowledge of and responsibility for the consequences." *Zamecnik*, 636 F.3d at 877-878. Nonetheless, the Seventh Circuit concluded that the high school had still failed to meet an evidentiary burden to support the school's forecast of material disruption. *Ibid.*

The court of appeals also discussed cases from the Third, Eleventh, and Sixth Circuits, explaining that those courts, like the Seventh Circuit, also allow school administrators to restrict the display of silent, passive expression that demeans other students if there is a record to support a reasonable forecast of material disruption.

The court of appeals discussed how in *Scott*, 324 F.3d at 1249, the Eleventh Circuit held that a school could discipline students for displaying Confederate flags on school grounds because "[s]chool officials presented evidence of racial tensions existing at the school."[3] Similarly, in *Barr*, 538 F.3d at 565, 568, the Sixth Circuit upheld a school district's ban on displays of the Confederate flag given a history of racial tensions and explained that "*Tinker* * * * does not require that the banned

[3] The court of appeals also described a district court case that applied the material-disruption standard to speech demeaning other students on the basis of religion. Pet. App. 33a; see *Sapp* v. *School Bd. of Alachua Cnty.*, No. 09-cv-242, 2011 WL 5084647, at *4-5 & n.3 (N.D. Fla. Sept. 30, 2011) (upholding school district's ban on t-shirt stating "Islam is of the Devil" because Muslim student had been deeply upset by shirt and elementary school "received disturbing and threatening emails," such that shirt "could cause an unsafe environment due to the polarizing effect of the anti-Islamic message" and "foster a hostile and intimidating atmosphere for students").

form of expression itself actually have been the source of past disruptions."

The court also looked to *Sypniewski*, 307 F.3d at 252, 254-257, where the Third Circuit held that, on a preliminary injunction, prior incidents of racial tension could not support restricting white students from wearing shirts with the term "rednecks," given the conflicting evidence regarding the term's likely impact, in contrast to displays of the Confederate flag, which would likely satisfy *Tinker* given the flag's association with a group involved in past racial tension. Pet. App. 31a.

Consistent with these decisions, the court of appeals explained the two "showings" that NMS was required to meet "to ensure 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." Pet. App. 35a. First, NMS had to show that L.M.'s t-shirt could be "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.'" *Id.* at 34a (quoting *Nuxoll*, 523 F.3d at 671). Second, NMS had to establish that "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 35a (quoting *Nuxoll*, 523 F.3d at 674, 676). Thus, by anchoring the concept of "demeaning" speech to concrete evidence supporting school administrators' reasonable forecast, the court of appeals constrained its application of the material-disruption standard comfortably within the bounds of *Tinker* and

the uniform consensus of circuit court rulings in similar cases.

B. Petitioner's Attempt to Manufacture Nine Purported Circuit Splits Mischaracterizes the Facts and the Standard Applied by the Court of Appeals

Petitioner insists that the court of appeals implicated nine different alleged circuit splits, but all of these alleged splits rest on mischaracterizations of the court of appeals' decision and the facts of this case. Petitioner's disagreement with the court of appeals' decision does not create any circuit split, much less nine.

At the outset, petitioner alleges that the court of appeals' application of *Tinker*'s material-disruption standard created a 1-9 circuit split, highlighting the Seventh Circuit's decisions in *Nuxoll* and *Zamecnik*, and the outcomes in those cases, as exemplary of how other circuits purportedly apply *Tinker* differently. Pet. 18-20. But petitioner's insistence that the First Circuit applies a different material-disruption standard than the Seventh Circuit is belied by the fact that the First Circuit expressly adopted *Nuxoll*'s holdings concerning the material-disruption standard.[4] Far from being "irreconcilable," Pet. 19, the court below and the Seventh Circuit in *Nuxoll* and *Zamecnik* simply reached different

[4] Although petitioner characterizes the language in *Nuxoll* relied upon by the court below as "dicta," Pet. 20, the Seventh Circuit's discussion of speech that demeans based on personal characteristics was central to its distillation of the material-disruption standard. The Seventh Circuit itself disclaimed that its holding would extend to situations such as that here, involving young schoolchildren. See *Nuxoll* v. *Indian Prairie Sch. Dist. 204*, 523 F.3d 668, 673 (7th Cir. 2008). That is hardly indicative of a circuit split.

outcomes because they were applying the same law to different facts.

Petitioner overlooks entirely that this case involved a middle school, with students as young as ten. Pet. App. 5a. *Nuxoll* and *Zamecnik* considered speech in *high school*, and the Seventh Circuit expressly noted that distinction as essential. The court in *Nuxoll* reasoned that "high-school students should not be 'raised in an intellectual bubble,' " but observed, by contrast, that "the school has a pretty free hand" where "the schoolchildren are very young." 523 F.3d at 671, 673 (citation omitted). In *Zamecnik*, the Seventh Circuit reiterated that "the younger the children, the more latitude the school authorities have in limiting expression." 636 F.3d at 876.

Petitioner's other alleged splits fare no better, because they attack a caricature of the decision below. For instance, petitioner asserts that the court of appeals afforded "near-total deference" to the school, creating a "split with six other circuits." Pet. 23-25. But the court expressly disavowed the position petitioner ascribes to it—emphasizing that "the standard for showing a material disruption is 'demanding.'" Pet. App. 35a (quoting *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 193 (2021)). Petitioner asserts that the court of appeals approved "censorship grounded on personal-characteristic based offense" or "ideological offense," creating an alleged split. Pet. 25-27. But, again, petitioner attributes to the court of appeals a rule that it expressly disavowed. See Pet. App. 38a (emphasizing that *Tinker* "does not permit a 'hurt feelings' exception that any opinion that could cause 'offense' may trigger").

Petitioner argues that another purported split exists on the grounds that the court refused to require

"particular evidence supporting a forecast of substantial disruption." Pet. 27-29. But, to the contrary, the court required and considered particular evidence, including detailed affidavits by school officials, which petitioner does not address beyond a single sentence mischaracterizing the students' struggles as "generic." See Pet. 27. Petitioner omits that Principal Tucker's experience in other schools was with similarly situated transgender students, who had experienced suicidal ideation, and petitioner fails to acknowledge the young age of NMS students. See *ibid.*; see also C.A. App. 199-200 (¶¶ 1-2); Part II, *infra*.

Finally, petitioner further claims that the court of appeals created a new circuit split on *Tinker*'s rights-of-others prong, Pet. 35-37, but it is hard to imagine how that could be, when the court explicitly declined to base its decision on the "rights-of-others" doctrine that some other courts have embraced, Pet. App. 36a. If the Court wishes to consider the viability of a "rights-of-others" doctrine under *Tinker*, it should await a case in which that doctrine is dispositive.

Building upon these strawman arguments, petitioner tries to manufacture alleged circuit splits by grafting viewpoint discrimination doctrines from other contexts onto *Tinker*'s material-disruption standard. Specifically, petitioner asserts that the court of appeals' decision stands in contrast to other circuit rulings in *Kristofferson* v. *Port Jefferson Union Free School District*, No. 23-7232, 2024 WL 3385137, at *3 (2d Cir. July 12, 2024), *Barr*, 538 F.3d at 571, and *Speech First, Inc.* v. *Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022), which petitioner characterizes as holding that viewpoint discrimination is categorically barred under *Tinker*. See Pet. 30.

But of these three decisions, only *Barr* applied *Tinker*'s material-disruption standard. And in *Barr*, the Sixth Circuit rejected the very argument petitioner now advances. *Barr* denied high school students' argument "that the school engages in viewpoint discrimination by banning racially divisive symbols but not racially inclusive symbols"—describing their characterization of the policy as viewpoint discrimination as "a red herring." 538 F.3d at 571-572.

Barr's analysis, like that of the court of appeals, is entirely consistent with this Court's recent precedent in *Morse*. In *Morse*, the Court rejected a version of petitioner's argument—that if a school educates the student body about the harmful effects of drugs then it cannot restrict student speech advocating drug use. *Morse* v. *Frederick*, 551 U.S. 393, 409-410 (2007).

Consistent with *Morse*, as well as *Tinker*, the court of appeals noted that it did not read any student-speech decisions by this Court (or any federal court) "to require 'positive messages' be prohibited if a 'negative' message is regulable" under one of *Tinker*'s exceptions. Pet. App. 61a n.11. As the court of appeals cogently explained, "*Tinker* does not require a school to tolerate t-shirts that denigrate a race or ethnicity, for instance, just because the school celebrates Black History Month, Asian and Pacific American Heritage Month, and Hispanic Heritage Month." *Id.* at 55a. There is also no indication that the court endorsed a rule that schools may permit "one side of an issue to be discussed." Pet. 31. NMS did not ask L.M. to remove his other shirts displaying messages such as "Freedom Over Fear," "Don't Tread on Me," "First Amendment Rights," and "Let's Go Brandon," C.A. App. 201 (¶ 11); Pet. App. 9a, and the court specifically limited its holding to expressions that students

would, in effect, carry with them and subject other students to continuously throughout the school day, as distinguished from other contexts in which such messages could be expressed, Pet. App. 51a-52a. As the court of appeals found, nothing in the record indicated that NMS "barred L.M.'s oral expression of disagreement with pro-LGBTQ+ views in school, or prohibited the mere utterance of the particular message in question." *Id.* at 54a.

Petitioner also claims the court of appeals "embrace[d] * * * a heckler's veto" and implicated a purported circuit split because it referenced in its analysis that a teacher had expressed concern that LGBTQ+ students would potentially disrupt classes in response to L.M.'s t-shirt. Pet. 32-33. Petitioner mischaracterizes the decisions in *Shanley* v. *Northeast Independent School District*, 462 F.2d 960, 966 (5th Cir. 1972), *Zamecnik*, 636 F.3d at 879, and *Holloman* v. *Harland*, 370 F.3d 1252, 1274-1276 (11th Cir. 2004). None of them articulated a bright-line rule barring a school from considering the reaction of other students when assessing the school's forecast of disruption. Pet. 33. *Shanley*, for example, expressly disavowed such a rule, explaining that "[i]f the content of a student's expression could give rise to a disturbance from those who hold opposing views, then it is certainly within the power of the school administration to regulate the time, place, and manner of distribution with even greater latitude of discretion." 462 F.2d at 973-974. *Zamecnik* similarly emphasized that the heckler's veto doctrine does not supersede *Tinker*'s material-disruption test, because a school has "legitimate responsibilities, albeit paternalistic in character, toward the immature captive audience that consists of its students, including the responsibility of protecting

them from being seriously distracted from their studies by offensive speech during school hours." 636 F.3d at 879-880. *Holloman*, for its part, held only that a school's forecast of disruption was unsupported, because its supposed evidence consisted exclusively of students' concerns that another student's fist-raising during the Pledge of Allegiance "wasn't 'right.'" 370 F.3d at 1273-1274.

Here, the court of appeals' reference to one teacher's concern about LGBTQ+ students' reactions was part of an analysis that considered far more evidence of disruption to students' education, including, *inter alia*, a recent survey of the NMS student body indicating specific concerns with how LGBTQ+ students are treated, the serious mental health struggles of transgender and gender-nonconforming students at NMS, the effect those struggles could have on these students' ability to learn, and Principal Tucker's recognition of the potential need for students to be transferred because of such issues related to their gender identity. Pet. App. 52a-54a. Thus, the court did not hold that the teacher's concern, in isolation, supported the ban, but instead considered it as one piece of evidence in assessing whether school administrators reasonably could anticipate "the potential for the back-and-forth of negative comments and slogans between factions of students that * * * could 'foresee[ably lead to] a deterioration in the school's ability to educate its students.'" *Id.* at 53a (quoting *Nuxoll*, 523 F.3d at 672). That calculus is consistent with *Tinker* and did not implicate or create any purported circuit split.

Finally, petitioner claims that the court of appeals created a split with three other circuits as to whether *Tinker* protects "students' peaceful and non-disruptive

protest of their schools' actions or rules." Pet. 34. But this imagined split rests on petitioner's assertion that the taped shirt was "non-disruptive." The record plainly established the opposite, see Part II, *infra*, and—consistent with the court's findings—school administrators reasonably forecasted that L.M.'s taped shirt would prompt the same disruptions as the initial t-shirt. See Pet. App. 56a.

II. The Court Of Appeals' Decision Is Correct And Applied The Law Properly Based On The Record

With no circuit split to stand on, the petition constitutes a bare request for asserted error correction. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Tolan* v. *Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (quoting U.S. Sup. Ct. R. 10)). And regardless, the court of appeals did not err.

This Court has long recognized that "[t]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986). Indeed, in *Morse*, this Court reaffirmed the notion that a public school must be able to restrict some student speech to protect its students and ensure a learning environment in which all students can flourish. The Court also emphasized that the First Amendment analysis in school-speech cases turns not on what federal courts on subsequent review interpret a message to mean, but on what school officials "reasonably" understand the speech to mean in the moment. *Morse*, 551 U.S. at 403, 408-409. For example, while the Court in

Morse acknowledged the potential for various interpretations of the student banner which read "BONG HiTS 4 JESUS," the Court deferred to the school, noting: "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one." *Id.* at 401.

Consistent with these principles, *Tinker*'s material-disruption standard allows school administrators to restrict speech where they can reasonably forecast material disruption to the school's learning environment based on their reasonable understanding of how the message will be interpreted. *Tinker* thus permits schools to prevent "nascent" disruption. 393 U.S. at 508. Indeed, "due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence." *Morse*, 551 U.S. at 425 (Alito, J., concurring). Courts of appeals have confirmed the same. See, *e.g.*, *Lowery* v. *Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (emphasizing that *Tinker* does not "require[] actual disruption to occur before school officials may act" because such a rule would be "disastrous public policy" and "would cripple the officials' ability to maintain order"); *Nuxoll*, 523 F.3d at 674 (noting that violence was not at issue in *Morse* or *Fraser*); *West*, 206 F.3d at 1366 (upholding middle school's ban on student's drawing of Confederate flag despite no history of violence in school).

The court of appeals correctly applied *Tinker*'s material-disruption standard. Applying a "searching" review of the factual record and holding the school to a "demanding" standard for showing material disruption, Pet. App. 18a-19a (first quoting *Mullin* v. *Town of Fairhaven*, 284 F.3d 31, 37 (1st Cir. 2002); then quoting

Mahanoy Area Sch. Dist. v. *B.L.*, 594 U.S. 180, 193 (2021)), the court of appeals held that the school's forecast was reasonable. *Id.* at 53a-54a. The court reached that conclusion based on specific facts in the record. *Id.* at 51a-54a. For instance, the court noted petitioner's concession "that the message directly denies the self-conceptions of certain middle-school students," *id.* at 51a, which necessarily means that the school could reasonably have construed the message that way. The court of appeals explained that school officials could therefore reasonably understand the message to be demeaning of personal characteristics "no less deeply rooted than those based on religion, race, sex, or sexual orientation." *Ibid.*

The court of appeals further emphasized that some NMS students are "as young as ten," Pet. App. 51a, consistent with other courts of appeals, which recognize that "[t]he application of *Tinker* must account for such factors as the age and grade level of the students to whom the speech is directed," *N.J.* v. *Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022); see *C.R.* v. *Eugene School District 4J*, 835 F.3d 1142, 1153 (9th Cir. 2016) ("The targeted students' age is also relevant to the analysis."); *Walker-Serrano* v. *Leonard*, 325 F.3d 412, 416 (3d Cir. 2003) (noting that *Tinker* analysis must take into account "the age and maturity of the student"). Indeed, this Court expressly noted in *Fraser* that many students at a high school assembly "were 14-year-olds" when it held that the school could restrict the student speaker's otherwise protected "lewd speech." *Fraser*, 478 U.S. at 677.

The court of appeals also correctly noted that the school's assessment had to be considered as it pertains to "the disruptive impact of *a particular means of*

expression and not of, say, a stray remark on a playground, a point made during discussion or debate, or a classroom inquiry." Pet. App. 52a (emphasis added). That logic is consistent with this Court's recognition in *Morse* that schools "have the authority to determine 'what *manner of speech* in the classroom or in school assembly is inappropriate.'" 551 U.S. at 404 (quoting *Fraser*, 478 U.S. at 683) (emphasis added).

Turning to other evidence in the record, the court of appeals discussed how the school "knew the serious nature of the struggles, including suicidal ideation, that some [transgender and gender-nonconforming] students had experienced related to their treatment based on their gender identities by other students, and the effect those struggles could have on those students' ability to learn." Pet. App. 52a. The court further noted that Principal Tucker had directly tied this experience of such treatment to disruption of those students' education, noting that she had needed to "recommend[] out-of-district placements for such students prior to her coming to NMS." *Id.* at 52a-53a. Under these circumstances, the court held that "it was reasonable for Middleborough to forecast that a message displayed throughout the school day denying the existence of the gender identities of transgender and gender nonconforming students would have a serious negative impact on those students' ability to concentrate on their classroom work." *Id.* at 53a. Moreover, the court noted that, in addition to the mental health struggles of these students, the concerns raised by one teacher and the 2022 survey indicated a "potential for the back-and-forth of negative comments and slogans between factions of students that *Nuxoll* could 'foresee [leading to] a deterioration in the school's ability

to educate its students.'" *Ibid.* (quoting *Nuxoll*, 523 F.3d at 672).

Similarly, as to the taped shirt, the court of appeals observed that the events that had transpired in the weeks between March 21 and May 5, including the protests, threats, and assignment of a police detail (and the fact that it was the same shirt), supported the school administrators' assessment that the taped shirt would cause further disruptions. See Pet. App. 56a-57a (citing *Hardwick* v. *Heyward*, 711 F.3d 426, 430-433 (4th Cir. 2013)).[5]

In short, the robust record in this case indicates that the court of appeals correctly held that the school's forecast of disruption was reasonable, an outcome which reflects the longstanding responsibility of schools to "protect[] [students] from being seriously distracted from their studies by offensive speech during school hours." *Zamecnik*, 636 F.3d at 880.

III. Even If The Court Were Interested In Reconsidering *Tinker* And *Morse*, This Case Is A Poor Vehicle For Doing So

Beyond the issues noted above, additional substantive and procedural obstacles make this case a poor vehicle for the Court's review.

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[5] Although the court of appeals did not rely upon the events that transpired in the weeks after March 21 when analyzing the school's forecast as to the initial t-shirt, those events also further support the reasonableness of the school administrators' forecast. See, *e.g.*, *Hardwick* v. *Heyward*, 711 F.3d 426, 438 & n.14 (4th Cir. 2013) (citing racially charged incident involving 2009 display of Confederate flag to assess reasonableness of school officials' forecasts from 2002 and 2006).

First, petitioner made key concessions below concerning the nature of the message on the initial t-shirt and a school's authority to restrict demeaning speech, even speech that is "silent" and "passive." For instance, despite the petition's statement that the t-shirt merely stated L.M.'s "ideological position without criticizing other views or attacking those who hold them," Pet. 21, as the court of appeals noted, "L.M. [did] not dispute * * * that the message expresses the view that students with different 'beliefs about the nature of [their] existence' are wrong," Pet. App. 48a (quoting Pet. C.A. Br. at 28, 23-1535 Docket Entry (1st Cir. Sept. 25, 2023)) (brackets in original). And to the extent petitioner now suggests that "passive" and "silent" expression cannot be restricted, see, *e.g.*, Pet. 2, 15, L.M. "acknowledged at oral argument that schools could bar silent, passive expression that described persons who identify as transgender in obviously highly demeaning terms," Pet. App. 39a. This Court would need to accept those concessions as the basis of its analysis, notwithstanding petitioner's efforts to run away from them in his petition. Because petitioner's arguments are inconsistent with his own concessions below, this case does not provide an appropriate vehicle for deciding those issues.

Second, as noted above, the First Amendment questions raised here arise in the highly fact-bound context of a t-shirt worn in middle school, with children as young as ten. Pet. App. 5a. Numerous courts of appeals have observed that the First Amendment concerns raised in *Tinker* are far less weighty, and the need for school administrators to have more margin to protect their most vulnerable students is far greater, when the restrictions concern younger students, rather than high schoolers. See *N.J.*, 37 F.4th at 426; *C.R.*, 835 F.3d at 1153; *Walker-*

Serrano, 325 F.3d at 416; see also *Fraser*, 478 U.S. at 677 (upholding restriction of lewd speech at assembly attended by "14-year-olds"). If the Court wishes to consider some of the issues raised by the cases cited by petitioner, it should await a case involving speech restrictions at a high school, as many of those cases do. See, *e.g.*, *Dariano*, 767 F.3d at 774; *A.M.*, 585 F.3d at 217; *B.W.A.*, 554 F.3d at 735; *Barr*, 538 F.3d at 556; *Nuxoll*, 523 F.3d at 669-672.

Third, petitioner's refusal to engage with the record as understood by the court of appeals, see pp. 31-33, *supra*, would require the Court to undertake first a review of the lower court's factual findings to determine whether petitioner's version of events is accurate, before it could address the legal questions petitioner purports to raise. This is "rarely" a proper basis for granting a petition for certiorari, and this case is no exception. See U.S. Sup. Ct. R. 10.

Finally, petitioner waived his right to a more developed record, stipulating to final judgment "based on the factual record established through the preliminary injunction proceedings" and preserving only his right to "appeal * * * legal issues." Pet. App. 85a-86a. Remand for further factual development is thus unavailable; any shortcoming in the evidentiary record is a product of petitioner's own litigation strategy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 2025