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; 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,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY ARGUMENT SUMMARY

The First Circuit deprived "captive students" of their right "to express dissenting opinions civilly" at school. Life.Legal.Def. Found.Br.26. The court's novel substantial-disruption standard allows schools "to censor a great deal of First Amendment-protected speech," creates or deepens multiple circuit splits, and encourages schools to "relabel [ideological] discomfort as … 'material disruption,'" Parents.Def.Educ.Br.18–19, and censor views they oppose on "broad swaths of controversial matters," effectively demolishing *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), FIRE.Br.18.

Critically, the decision below "merges" *Tinker*'s two prongs, "waters them down," and allows schools "to restrict speech based on vague and generalized forecasts of adverse psychological reactions to speech." *Id.* at 2. That means students like L.M. may not disagree—even silently and passively—with government officials on hot-button topics. This Court should grant review, restore "*Tinker*'s carefully crafted standard," and bar schools from "squeezing young minds" to create a false conformity designed to prevent "discomfort in others." States.Br.7.

ARGUMENT

I. The First Circuit's novel substantial-disruption test contradicts this Court's precedent and that of multiple circuits.

The First Circuit applied a new substantial-disruption test that "insulate[s] some students from beliefs they do not share by suppressing messages that the government does not approve." States.Br.23. That crosses the constitutional line between government persuasion and government indoctrination. Immediate review is necessary to bust public schools' new monopoly on permissible ideas.

A. The First Circuit's new test flouts *Tinker* and its progeny.

The petition describes myriad ways in which the First Circuit's novel substantial-disruption test contradicts this Court's precedent. Pet.15–18. Middleborough fails to engage these flaws, including the lower court's reliance on a Ninth Circuit decision this Court vacated. It merely says the First Circuit's "standard [fits] comfortably within the bounds of *Tinker*," Opp.22—an egregiously wrong argument—and attempts to distinguish *Tinker* because the students' armbands there did not demean any "personal characteristics," Opp.19—an irrelevant content- and viewpoint-based distinction. "[T]his Court holds that speech on sociopolitical issues falls under *Tinker*—regardless of its content, viewpoint, or psychological effect." Pet.16. It has never "reduce[d] First Amendment protection" based on "the substance of students' political or religious message." Pet.18 (cleaned up).

Morse v. *Frederick*, 551 U.S. 393 (2007), Opp.2, is inapposite. There, this Court upheld a school's ban of a "BONG HiTS 4 JESUS" banner because the "speech [was] reasonably viewed as promoting illegal drug use." *Id.* at 397, 403. L.M.'s shirts did nothing like that.

Middleborough also tries to distinguish *Tinker* because it censored L.M. in middle school, not high school. But Mary Beth Tinker "was a 13-year-old student in junior high school" when she wore her armband, 393 U.S. at 504. This Court's substantial-disruption test applied in the same way to Mary Beth's Vietnam War protest as to the protests of 15-year-old John Tinker and 16-year-old Christopher Eckhardt, who "attended high schools." *Ibid*. L.M.'s age is irrelevant, especially as Middleborough *introduced* the subject of gender ideology to middle-school students, conceding they are prepared to discuss it. Pet.4.

The lower court's "subjective hate-speech exception to the First Amendment" violates this Court's precedent, Parents.Def.Educ.Br.18, and "defies" *Tinker*, which also implicated acute emotional harm. Indep.Women's.Law.Ctr.Br.10. On "certain *verboten* subjects," the First Circuit's test allows "students' discomfort [to] automatically trump[ ] everything." States.Br.19. And "the more [students'] speech involves an issue of public concern," like gender ideology, "the more punishable the speech." Parents.Def. Educ.Br.23. That upside-down standard is "anathema to the First Amendment." *Ibid*.

B. The First Circuit's novel disruption test conflicts with other circuits' decisions.

Middleborough says lower courts "uniformly recognize" public schools can censor "passive and silent speech" they deem "*demeaning* of other students based on *core personal characteristics*." Opp.16 (emphasis added). First, that rewrites *Tinker*'s substantial-disruption standard. Second, no opinion's holding turns on a similar test. States.Br.11. Finally, far from "uniformly recognized," the First Circuit's standard relies on a few lines in *Nuxoll* v. *Indian Prairie School District No. 204*, 523 F.3d 668, 671 (7th Cir. 2008), and *Zamecnik* v. *Indian Prairie School District No. 204*, 636 F.3d 874, 876 (7th Cir. 2011), which both held censoring speech on a similar issue *violates* the First Amendment. The split is real and requires review.

To be sure, other circuits have approved censoring certain messages based on a local history of racial tension, altercations, or violence. Opp.16–18 (citing nine such cases). But there's nothing remotely comparable here. That no *actual* disruption occurred shows that none could be reasonably *forecast*.

"The Third, Sixth, Eleventh, and other circuits consistently require a far more robust standard than the First Circuit's anemic imitation." States.Br.9 (cleaned up). The decision below "waters down the 'substantial disruption' … prong[ ] of *Tinker*," creating a split. FIRE.Br.3–4.

C. L.M.'s messages aren't "demeaning."

Middleborough doesn't define what speech "demeans" or attempt to square the First Circuit's notion of that term with precedent. Pet.21 (quoting App.4a). Middleborough merely says that any "'message directly *den[ying] the self-conceptions* of [LGBTQ+] students'" counts as "*demeaning*"—even the untargeted, biologically based statement that "there are only two genders." Opp.14–15 (quoting App.51a) (emphasis added). This rule is shocking, allowing schools to censor any idea that some students don't want to hear, Pet.25–26; Ams.Prosperity. Found.Br.5–6, even though Middleborough encouraged students to say gender is limitless, Pet.4.

The First Circuit's new standard shouldn't even apply here. Pet.21–22. "L.M.'s message wasn't demeaning; it was his viewpoint the First Circuit found offensive." States.Br.17. "No individual actually or likely to be present could reasonably have regarded [L.M.'s] words as a direct personal insult." Indep.Women's.Law.Ctr.Br.11 (cleaned up). Absent intervention, schools will use this test to place "entire areas of discussion off-limits based on nebulous fears." FIRE.Br.18.

II. The First Circuit's analysis exacerbates the potential for censorship.

The First Circuit's analysis "justifies any speech restriction so long as" schools say they "reasonably interpreted a message as demeaning personal identity." States.Br.19. That analysis, which causes further circuit conflict, imperils free speech.

A. The First Circuit deferred to school officials.

The First Circuit abandoned "independent examination" for extreme deference, *Tinker*, 393 U.S. at 509, saying schools—not courts—should decide "whether [L.M.'s] t-shirts should have been barred," App.62a; accord Pet.23–24. That flouts the material-and-substantial disruption standard's demanding nature. Pet.19, 24; contra Opp.24.

Middleborough again cites *Morse* in support of near-limitless deference to educators. Opp.29–30. But there, this Court parsed all reasonable "interpretations of the words on the banner" and considered any "alternative meanings the banner might bear." *Morse*, 551 U.S. at 402. Only *then* did the Court agree with a principal that the "speech [was] reasonably viewed as promoting illegal drug use." *Id.* at 403. The First Circuit conducted no such nuanced inquiry here, as the Second, Fifth, Seventh, and Eleventh Circuits would have done. Pet.24–25.

"[R]ather than conducting a robust inquiry with a strong pro-speech default," as *Tinker* demands, the First Circuit "rubber stamp[ed]" schools' preferred censorship. States.Br.12. Its analysis "opens the door to arbitrary suppression of students' views on controversial topics" when school officials disagree. Life.Legal.Def.Found.Br.20. But "courts can't abdicate their duty to decide constitutional issues." Parents.Def.Educ.Br.22. "[T]he First Amendment protects against the Government; it does not leave [students] at the mercy of *noblesse oblige*," *United States* v. *Stevens*, 559 U.S. 460, 480 (2010).

B. The First Circuit approved offense-based censorship.

Middleborough admits the First Circuit approved censoring student speech that schools "reasonably interpret[ ] to demean … characteristics of personal identity," which might have "negative psychological impact on students." Opp.22. (cleaned up). Middleborough says this doesn't equate to "ideological offense." Opp.2, 24 (cleaned up). But any distinction between negative psychological impact, hurt feelings, and ideological offense, in this context, "is made up and meaningless." Parents.Def.Educ.Br.23; accord Pet.25–26. The Free Speech Clause *protects* ideas that may conflict with others' self-conception, especially on matters of public concern like "gender identity." *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 913 (2018).

Middleborough branded L.M. and like-minded students as purveyors of vile ideas and hate speech with no worry about "demeaning" *them*. Pet.7, 12. Its concern for students' psychological injury is one-sided, with Middleborough declaring ideological winners and losers. Yet "[t]he First Amendment withdraws from the State any power to 'shield' others from *mere ideas* that can potentially cause distress in sensitive listeners." J.R.Br.6. *Tinker*'s "protection does not wane because someone deems expression 'controversial' or 'offensive.'" FIRE.Br.7; accord *Morse*, 551 U.S. at 409 (rejecting schools' offense-based censorship of drug-related speech). Otherwise, schools could "render entire areas of discussion off-limits based on nebulous fears that some students may suffer some negative consequence," FIRE.Br.18—precisely what Middleborough did.

Only stray lines from *Nuxoll* and *Zamecnik* support that view, Pet.26, now that the Sixth Circuit granted en banc review and vacated *Olentangy*. *Parents Def. Educ.* v. *Olentangy Local Sch. Dist. Bd. of Educ.*, 120 F.4th 536, 537 (6th Cir. 2024). In contrast, the Third and Fifth Circuits hold that personal-characteristic-based offense doesn't justify censorship. Pet.27. This Court should resolve that split and clarify that *Tinker* forbids "prohibit[ing] the expression of an idea simply because [others may] find[ ] *the idea itself* offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989) (emphasis added).

C. The First Circuit eviscerated *Tinker*'s demanding evidentiary standard.

The First Circuit accepted "Middleborough's assessment that there was the requisite basis for the forecast of material disruption." App.50a. That reduces *Tinker*'s "demanding standard" to the floor. *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 193 (2021); accord Pet.27–29. Middleborough says there's a "wealth of 'specific evidence' in the record" that supports censoring L.M.'s speech. Opp.2. That's wrong five ways.

First, Middleborough fails to justify the First Circuit's erroneous depiction of expressive t-shirts as *inherently* disruptive, undermining its entire substantial-disruption analysis. Pet.27–28.

Second, Middleborough cites "mental health struggles of transgender and gender-nonconforming students" generally. Opp.3. L.M. shares that concern. But the argument's upshot is that *any* school may censor *any* student speech that students who identify

as transgender may dislike, regardless of the nature of their struggles or the situation in their school. That can't be right, as *Tinker* requires schools to make "a specific showing" of substantial disruption, using particularized "facts." 393 U.S. at 511, 514.

Third, Middleborough relies on the principal's "experience" with bullying "*in other districts*." Opp.3 (emphasis added). There's zero evidence of anything similar in Middleborough. If schools may censor based on what happened elsewhere, no speech on "controversial subjects" is safe. *Tinker*, 393 U.S. at 513.

Fourth, Middleborough says a teacher was "concern[ed]" that L.M.'s shirt could impact other students and "could potentially disrupt classes." Opp.7–8. That's just "an urgent wish to avoid the controversy which might result from [L.M.'s] expression." *Tinker*, 393 U.S. at 510. Such an "undifferentiated fear or apprehension of disturbance is not enough to" censure L.M.'s speech. *Id*. at 508.

Last, the First Circuit deemed irrelevant events that *postdated* L.M. wearing his t-shirt. Opp.33 n.5. Rightly so, as they played no role in Middleborough's censorship. Nor are lawful off-campus protests and complaints from the public grounds for censorship. School official's jobs include taking criticism. Opp.9–10. And while both sides protested, Opp.9–10, Middleborough censored only one side—the view it opposed.

In sum, *Tinker* does not allow schools to "suppress unpopular or offensive student speech [based on] vague speculation that unwanted speech will sometime in the future cause" substantial disruption. FIRE.Br.8. Only the Sixth Circuit might agree with the lower court's evidentiary standard here. *Lowery* v.

Euverard, 497 F.3d 584, 594 (6th Cir. 2007) ("not requir[ing] substantial evidentiary support"). Nine circuits reject it. Pet.29. Review is needed to bring uniformity and prevent lower courts from downgrading the substantial-disruption inquiry to "just checking boxes." States.Br.12.

D. The First Circuit allowed viewpoint discrimination.

Middleborough admits the First Circuit approved viewpoint discrimination under *Tinker* and doesn't meaningfully contest the circuit conflict. Opp.25–26. Instead, it says the First Circuit got it right because "viewpoint discrimination doctrines from other contexts" don't apply here. Opp.25. That defies *Tinker* and other precedent. 393 U.S. at 509; *Matal* v. *Tam*, 582 U.S. 218, 244 (2017) (plurality opinion); *id*. at 250 (Kennedy, J., concurring); *Morse*, 551 U.S. at 423 (Alito, J., concurring); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986).

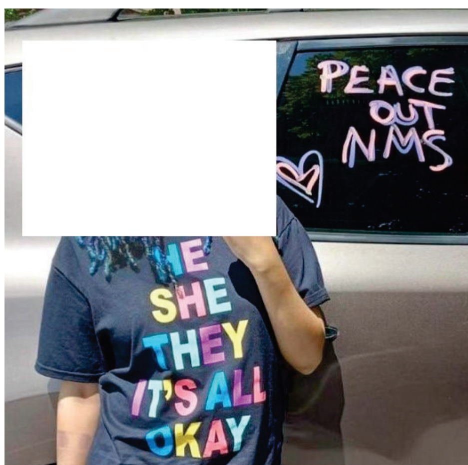
Middleborough again relies on *Morse*. Opp.2, 26. That decision created a narrow *exception* to *Tinker*'s rule for speech promoting illegal-drug use. 551 U.S. at 405–10. It said nothing about whether *Tinker* allows viewpoint discrimination. And here, the parties agreed that *Tinker*—not *Morse*—controls. App.19a.

On the circuit split, Middleborough perplexingly argues the Sixth Circuit said *Tinker* forbids viewpoint discrimination but allowed viewpoint discrimination in practice. Opp.26. Such confusion pre-*Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), is understandable; it is not today. And at best, this renders the split 2-1-3, reinforcing the need for review.

Middleborough says it didn't limit discussion of transgenderism to only one viewpoint. Opp.26–27. That's sophistry. Consider L.M.'s t-shirt:

App.91a. Middleborough banned it as "*hate speech*," Opp.6, denigrated L.M.'s views as "vile," Pet.12, admittedly targeted "his views [on] gender identity," and forced him to express those views only "outside of NMS" (Nichols Middle School), Appellees.Br.31 (1st Cir. Nov. 22, 2023); accord App.120a; Opp.12. Reasonable students would understand this as a schoolwide ban—not a time-place-manner regulation—and chill their speech.

Yet Middleborough encouraged NMS students to agree there are unlimited genders, Pet.4, as in this since-deleted Facebook post:



That's textbook viewpoint discrimination. Six other circuits would not allow Middleborough "to excise certain ideas or viewpoints from the public dialogue." States.Br.13 (cleaned up); accord Pet.31–32. Neither would this Court. Even when regulating unprotected speech, officials have "no … authority to license one side of a debate to fight freestyle, while [muzzling] the other." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992). Schools may not "indoctrinat[e]" students "by either coercion or suppression of dissent." Nat'l.Religious.Broads.Br.8.

E. The First Circuit greenlighted a heckler's veto.

Middleborough champions a heckler's veto in which schools "consider[ ] the [potentially improper] reaction of other students" to speech on matters of public concern. Opp.27. *Tinker* forbids that. Pet.33; Life.Legal.Def.Found.Br.22–23. So do decisions by the Fifth, Seventh, and Eleventh Circuits. Pet.33 (collecting cases).

Conversely, the First, Ninth, and (in some circumstances) Tenth Circuits allow heckler's vetoes under *Tinker*. Pet.33. This Court's review is needed to resolve that split and establish that schools may not "suppress[ ] … ideas because some group of students [might possibly] respond in a disruptive, even violent way to speech … they do not like." J.R.Br.10.

Middleborough cites "back-and-forth" between students that *might* occur. Opp.15; contra *Tinker*, 393 U.S. at 512. But nothing *did* occur. And Middleborough continued to allow one side to speak, while silencing the other, an impermissible way to avoid "potential[ ] disrupt[ion]." Opp.15 (cleaned up).

F. The First Circuit erred in approving censorship of L.M.'s protest t-shirt.

Middleborough doesn't dispute the 3–1 circuit conflict over L.M.'s protest t-shirt. Pet.34. Middleborough again says its forecast of substantial disruption was reasonable. Opp.28–29. But no evidence supports that. Ams.Prosperity.Found.Br.18, 21–23. Officials must tolerate criticisms and even off-campus protests. Contra Opp.9–10, 33. And there was nothing disruptive about temporarily bolstering the police presence that *already existed* at school. Middleborough Police, *School Safety*, https://perma.cc/GC4V-4TCN. That made disorderly reactions *less likely*.

Review is warranted to resolve the split, protect students' "criticism of [school] rules," *Mahanoy*, 594 U.S. at 190, and establish that schools cannot censor by substituting their "own interpretation of a speaker's message." Ams.Prosperity.Found.Br.23.

III. The First Circuit's distortion of *Tinker*'s rights-of-others prong is an existential threat to free speech.

Middleborough accepts that the First Circuit construed *Tinker*'s rights-of-others prong to include "freedom from psychological attacks," Pet.35 (cleaned up), which conflicts with rulings by six circuits, Pet.36–37. Middleborough only says the lower court nominally "declined to base its decision on the 'rights-of-others' doctrine." Opp.25. But the district court grounded its ruling on the rights-of-others prong. App.77a–78a. And the First Circuit agreed—eliding *Tinker*'s two prongs and asserting that *both* supported censorship here, Pet.35.

Requiring a seriatim appeal after the First Circuit inevitably doubles down on remand makes no sense, especially as the lower court's logic *currently* poses an existential free-speech threat. Ams.Prosperity.Found.Br.3–4. "[S]chool administrators nationwide will wield it to censor unpopular or dissenting viewpoints" on sociopolitical topics. FIRE.Br.5. This Court should grant review and demystify *Tinker*'s rights-of-others prong.

IV. This case is an ideal vehicle.

Middleborough's vehicle objections are specious. Opp.34–35. First, Middleborough argues that L.M.'s "there are only two genders" t-shirt told "students with different beliefs about the nature of their existence" that they "are wrong." Opp.34 (cleaned up). But Middleborough told L.M. his ideas were hateful. Characterizing ideological messages as "demeaning" to one side but not the other is unconstitutional.

Second, L.M. only admitted that officials may censor the school equivalent of "fighting words," App.39a, as *Mahanoy* requires, 594 U.S. at 191. There's nothing like that here.

Third, middle and high schools are both secondary schools, so there's no valid distinction between the two; indeed, the same dress code provision applies to both here. Plus, *Tinker* protects even elementary students' speech. *E.g.*, *K.A.* v. *Pocono Mountain Sch. Dist.*, 710 F.3d 99, 107–111 (3d Cir. 2013).

Fourth, the parties stipulated that no material factual dispute exists. App.85a–86a. And this Court "independent[ly] examin[es] … the record" with no deference to lower courts, *Tinker*, 393 U.S. at 509.

Last, Middleborough must "justify [the] prohibition of" L.M.'s speech. *Ibid*. So evidentiary shortcomings show that Middleborough failed to carry its burden and L.M prevails.

Because *Tinker* "bears strong similarities to this case," it is "close to a perfect vehicle" for answering the question presented, Ams.Prosperity.Found.Br.15; accord States.Br.5–8, which is of vital importance to some 50 million students nationwide, States.Br.1–3. Those students cannot wait for their free-speech rights to be clarified.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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