No. 24-1942

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN KLUGE

Plaintiff-Appellant,

v.

BROWNSBURG COMMUNITY SCHOOL CORP.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:19-cv-02462, The Honorable Jane Magnus-Stinson, Judge

BRIEF OF INDIANA, KANSAS, AND WEST VIRGINIA AND 14 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICI STATES

The States of Indiana, Kansas, West Virginia, Alabama, Florida, Georgia, Idaho, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota respectfully submit this brief as amici curiae in support of Plaintiff-Appellant John Kluge. Amici States are home to citizens with diverse religious beliefs, backgrounds, and practices, giving them an interest in "avoiding unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1970) (quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931)). As large public employers that operate networks of public schools and universities, amici States are also aware of the need for public institutions to function effectively and for schools to provide quality education. But those interests need not conflict. States and other employers can—and do—accommodate employees' sincere religious practices without compromising their ability to fulfill their core functions. In fact, providing reasonable religious accommodations can enhance employers' ability to attract and retain talent. Amici States submit this brief out of concern that the district court's decision denies an accommodation the law demands to the detriment of public institutions.

ARGUMENT

"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Public educational institutions train the next generation of citizens. They have the opportunity either to teach the principles that animate our Nation's governing documents, including respect for

religious exercise, or to portray them as parchment barriers. This case shows the harm that can follow when a school chooses the latter.

Brownsburg squandered an opportunity to showcase to students respect for people with different religious beliefs and practices. In this case, Kluge, a public-school teacher, could not refer to transgender students by their preferred (non-natal) first names consistent with his religious beliefs. Dkt. 113-2 at 2. He wished to call all students by their last names. *Id.* Brownsburg initially granted the accommodation, *id*. at 2–3, but ultimately revoked it for the following school year, *id*. at 4–5, citing litigation risks under Title IX and concern for the educational environment. *Id*. at 5–6.

On the record here, neither of these justifications suffices. Title VII requires employers to grant a religious accommodation absent an "undue hardship," or more specifically "substantial additional costs." *Groff v. DeJoy*, 600 U.S. 447, 468–69 (2023). But the district court never offered a cogent explanation of why Brownsburg faces substantial litigation risks under Title IX. Title IX does not mandate the use of a student's preferred name or pronoun—and if it did, such a requirement would lead to serious First Amendment concerns.

Nor is it necessary to mandate the use of preferred names or pronouns for schools to function as designed. Pushing out teachers who follow their consciences threatens to deprive schools of talented, dedicated, and experienced teachers at a time when teachers are in short supply. And far from helping students, schools send all

the wrong messages to students about our Nation's heritage of respect for religion. Granting religious accommodations is not only legally required but good policy.

For all these reasons, this Court should reverse the district court.

I. De Minimis Litigation Risks Do Not Justify Denying Kluge's Requested Religious Accommodation

Title VII places dual obligations on employers. It requires them both to refrain from discriminating against employees "because of . . . [their] religion," 42 U.S.C. § 2000e-2(a), and to accommodate employees' religious practices unless doing so would pose "undue hardship," § 2000e(j). In years past, this Court and others understood even "de minimis burdens" to constitute undue hardships. *See Groff,* 600 U.S. at 466 & n.12. In *Groff v. DeJoy*, 600 U.S. 447 (2023), however, the Supreme Court rejected that understanding. An undue hardship, the Supreme Court held, is "a hardship [that] would be *substantial* in the context of an employer's business." *Id.* at 471 (emphasis added). "The decision in *Groff* enables Americans of all faiths to earn a living without checking their religious beliefs and practices at the door." *Hebrew v. Texas Dep't of Crim. Just.*, 80 F.4th 717, 725 (5th Cir. 2023).

In the decision below, the district court paid only lip service to *Groff*. It cited Brownsburg's concern that permitting Kluge to refer to students by their last names could carry "potential for liability" under Title IX because "treating transgender students differently than other students invites litigation." RSA41–42. But the court ignored the fact that, under his accommodation, Kluge did not and could not treat transgender students differently. He would refer to "all students—not just transgender students—by their last names only." SA9. And the court's supposition

that Title IX requires transgender students to be addressed by their preferred names is palpably incorrect. The court effectively reimposed the de minimis standard that *Groff* rejected by allowing the mere possibility of a lawsuit or ill-defined and unsubstantiated concerns about the "learning environment" to justify denial of a religious accommodation.

A. Unsubstantiated concern over the mere possibility of litigation does not rise above de minimis risk

To determine what constitutes a substantial hardship, courts must undertake a "context-specific" analysis. *Groff*, 600 U.S. at 468, 473. That analysis requires asking whether an accommodation would present "a hardship [that] would be substantial in the context of an employer's business." *Id.* at 471. Since employers must follow all applicable laws—not merely Title VII—an accommodation's legal feasibility is a valid consideration. *See Minkus v. Metro. Sanitary Dist. of Greater Chicago*, 600 F.2d 80, 83 (7th Cir. 1979). An employer need not provide a religious accommodation that would require violating other applicable laws or create a "substantial" risk of liability. *Id.*

At the same time, employers cannot use "litigation risk" as a get-out-of-jail-free card. *Groff* makes one principle abundantly clear: "undue hardships" are "*substantial hardships*." 600 U.S. at 468 (emphasis added). "[M]ere burden[s]" or "de minimis" costs do not suffice. *Id.* at 469. So employers cannot deny religious accommodations merely because a possibility exists that someone might sue on an incorrect reading of the law. *See Minkus*, 600 F.2d at 83. And that is especially true where the lawsuit stems from someone's disagreement with a religious practice. "If bias or

hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Groff*, 600 U.S. at 472; *see id.* at 466 n.13, 472–73 (disapproving of cases citing negative reactions).

Under *Groff*, it was thus incumbent on Brownsburg to demonstrate that the granting requested accommodation would put it at "substantial" risk of liability. Brownsburg did not. The district court cited Brownsburg's concern that permitting Kluge to refer to students by their last names could carry "potential for liability" because "treating transgender students *differently* than other students invites litigation under a variety of theories." RSA43 (emphasis added). But the court ignored that Kluge would refer to "all students—not just transgender students—by their last names only." RSA9. In other words, the critical difference in treatment was absent here.

To make matters worse, the district court did not explain why either Title IX or the other, unspecified "theories" it referenced would place Brownsburg on the "'razor's edge' of liability." RSA42. Instead, the court referenced the existence of litigation over matters as diverse as whether school staff could refer to a transgender student "'with his *previous* [first] name and using feminine pronouns'" and whether "gender dysphoria is a disability covered by the ADA," throwing in references to voluntary settlements for good measure. RSA43–44 (emphasis added). Yet the court never explained why the accommodation Kluge sought would run afoul of the legal requirements placed on schools. It treated the existence of litigation on transgender issues

writ large as an excuse to deny any accommodation touching on those issues. *Groff* demands more.

B. The supposed litigation risks are predicated on an incorrect—and likely unconstitutional—reading of Title IX

Close inspection of Title IX reveals that Brownsburg's concerns lack textual grounding. Title IX does not compel teachers to use students' preferred pronouns, much less prohibit schools from granting religious accommodations. In fact, construing Title IX to compel staff to call students whatever the students prefer would raise First Amendment concerns.

1. Title IX does not require teachers to use a student's preferred first name and pronouns

The syllogism that Title IX requires teachers to call transgender students by their preferred first names and pronouns rather than their last name proceeds as follows: Title IX's prohibition on sex discrimination equates to a prohibition on gender-identity discrimination, and a prohibition on gender-identity discrimination requires teachers to call transgender students by their first names rather than their last names. Each of the syllogism's two premises are wrong.

a. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). When Title IX was enacted in 1972, "sex" carried a "narrow, traditional interpretation." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984). "[V]irtually every dictionary definition of 'sex' referred

to the *physiological* distinctions between males and females—particularly with respect to their reproductive functions." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J., dissenting).

"Sex" cannot be stretched to include "gender identity"—meaning an "individual's self-identification as being male, female, neither gender, or a blend of both genders." *Gender Identity*, The American Heritage Dictionary of the English Language (5th ed. 2022). Congress chose to use the word "sex," and included carveouts for "separate living facilities for the different sexes," authorizing separate showers, bathrooms, and bunks. 20 U.S.C. § 1686. If "'sex' [was] ambiguous enough to include gender identity, then the carve-outs would be meaningless." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 813 (11th Cir. 2022) (en banc).

And even if one nonetheless thinks that the meaning of "sex" in Title IX is "inconclusive," *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 770 (7th Cir. 2023), any ambiguity cuts in favor of a viewing "sex" to refer to a binary, biological concept. Congress enacted Title IX pursuant to its Spending Clause authority. *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). This means that Congress must speak "unambiguously" to bind recipients of federal monies. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). So long as two competing interpretations of "sex" are possible, recipients cannot be held liable for adhering to the understanding that Title IX prohibits only sex discrimination.

In the context of litigation over school bathroom and locker room policies, this Court has construed Title IX to reach more broadly. In *A.C.*, this Court reiterated

that, in *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), it held "discrimination against transgender students is a form of sex discrimination." 75 F.4th at 769. In reaching that conclusion, however, this Court never grappled with Title IX's status as Spending Clause legislation. This Court instead imported Title VII precedents wholesale, *see id.*; *Whitaker*, 858 F.3d at 1047–48—a logical leap that other courts have recognized is a mistake, *see, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("Title VII differs from Title IX in important respects."); *Tennessee v. Becerra*, 2024 WL 3283887 at *8 (S.D. Miss. July 3, 2024); *Tennessee v. Cardona*, 2024 WL 3019146, at *12 (E.D. Ky. June 17, 2024). Yet perhaps more importantly, this Court's decisions in *Whitaker* and *A.C.* do not resolve whether teachers must address transgender students by their preferred names. As this Court cautioned, neither *A.C.* nor *Whitaker* should be read to preordain answers to questions about "how Title IX and the Equal Protection Clause regulates" matters other than the bathroom and locker room policies challenged in those cases. *A.C.*, 75 F.4th at 773.

b. This brings us to the second step of the syllogism—that allowing Kluge to address students by their last names constitutes gender-identity discrimination. To discriminate against a person "mean[s] treating that individual worse than others who are similarly situated." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657 (2020). In *Whitaker* and *A.C.*, this Court invalidated bathroom and locker room policies under Title IX because they afforded transgender students "less favorable treatment." *A.C.*, 75 F.4th at 769. For example, in *Whitaker*, a student was allegedly "denied . . . access

to the boys' restroom because he [wa]s transgender," which forced the student to choose between being late to class or using a bathroom on the other side of the building. 858 F.3d at 1049. The situation was similar in *A.C.,* 75 F.4th at 767.

One can debate whether assigning students to bathrooms based on sex rather than gender identity is "discrimination" or recognition that sex is a relevant difference. *See Cardona*, 2024 WL 3019146 at *9. Setting aside that debate, the important point is that Kluge sought permission to call "all students—not just transgender students—by their last names only." RSA9. Under the requested accommodation, Kluge would not treat some students "worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. He would treat all students the same. By any measure, referring to all students in the same manner is not discrimination. And though the district court leaned heavily on a handful of statements that students "fe[lt] targeted and uncomfortable," Dkt. 113-5 at 7, "facts," not "perceptions and feelings, are required to support a discrimination claim," *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1137 (7th Cir. 1997).

Granted, Brownsburg cited evidence that Kluge "occasionally" used "gendered honorifics or gendered pronouns with non-transgender students." RSA13. But whether Kluge occasionally misspoke is disputed. Dkt. 113-2 at 3–4. Three students and a private music instructor submitted declarations that they *never* heard Kluge use gendered language, observed him using last names only to refer to all students, and *never* witnessed him treating transgender students differently than other students. *See* Dkt. 52-3 (Bohrer Decl.); Dkt 52-4 (Roberts Decl.); Dkt. 52-5 (Jacobson

Decl.); Dkt. 52-2 (Gain Decl.). On summary judgment, any dispute over whether Kluge consistently adhered to the accommodation must be resolved in his favor. *See Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nor is it likely that the occasional verbal misstep by a teacher would place a school at risk under Title IX. Title IX prohibits only "intentional" sex discrimination by the funding recipient. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

2. Compelling the use of preferred names or pronouns would invite conflict with other sources of federal law

There is yet another difficulty with the district court's uncritical assumption that an accommodation would violate Title IX—other federal laws protect speech and religious freedom. Schools are not "enclaves of totalitarianism," where "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 511 (1969). Generally, that principle does not prevent States from directing what public-school teachers may and may not say to students while at school. Public-school teachers "hire out their own speech and must provide the service for which employers are willing to pay." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007); *cf. Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861, 892 (7th Cir. 2023), *vacated on denial of reh'g*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023). The federal government does not employ local teachers, and to construe federal law as requiring citizens to speak in a particular manner would raise "serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Under the theory of Title IX that the district court floated, teachers would be required to refer to students by their preferred names and pronouns—even if they had a sincere religious conviction against doing so. That runs up against the First Amendment. What names, "titles," and "pronouns" that a speaker chooses to use "carr[ies] a message." *Meriwether,* 992 F.3d at 505. Under the First Amendment, however, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to . . . rigorous scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *see Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 180 (2024). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 582 U.S. 218, 234 (2017) (cleaned up). To construe Title IX as a mandate that "forces the Nation's schools and educators" to use a particular naming convention would offend that bedrock principle. *Cardona*, 2024 WL 3019146 at *23; *cf. Bostock*, 590 U.S. at 682 (conceding protections for religion may "supersede" Title VII).

Despite the substantial statutory and constitutional arguments against the theory that Title IX requires Kluge to use students' preferred names and pronouns, the district court never tarried with them. It treated the mere possibility that someone might sue Brownsburg as a sufficient reason to deny a religious accommodation, without asking whether a hypothetical lawsuit would have any merit. That is precisely the uncritical analysis of putative burdens that no longer passes muster.

II. Providing Reasonable Religious Accommodations Benefits Public Employers, Teachers, and Students Alike

Providing religious accommodations to employees like Kluge not only accords with the law, it also helps employers, educational institutions, and students thrive. Employers that accommodate diverse religions foster respect for those of different faiths, support civil liberties, and measurably grow the economy. *Socioeconomic Impact of Religious Freedom*, RELIGIOUS FREEDOM & BUS. FOUND., https://tinyurl.com/yk3dz63n (last visited July 17, 2024). Employers that discriminate *against* religious groups, on the other hand, cost both the employer and "society . . . by forfeiting the productive potential of" society's population and creating market inefficiencies. THOMAS SOWELL, DISCRIMINATION AND DISPARITIES 41 (2019); *see* GEORGE BORJAS, LABOR AND ECONOMICS 318–59 (9th ed. 2024) (explaining discrimination's distortionary effects). Religious discrimination makes businesses and the "economy suffer[]" because it "interferes with the optimal allocation of talent." Kilian Huber, *How Discrimination Harms the Economy and Business*, CHICAGO BOOTH REV. (July 15, 2020), https://tinyurl.com/5b3bux27. In contrast, "religious freedom contributes to better economic and business outcomes." Brian J. Grim *et al.*, *Is Religious Freedom Good for Business?: A Conceptual and Empirical Analysis*, 10 INTERDISC. J. OF RSCH. ON RELIGION, Art. 4, at 15 (2014).

A. Accommodating religious freedom benefits both employers and those they serve

Public employers who engage in religious discrimination, like Brownsburg, hurt themselves for two principal reasons: most Americans are religious, and the job market is competitive.

First, as Nobel Laureate Gary Becker explained: "[W]hen minority members are a sizable fraction of the total" population, "discrimination by the majority injures [the majority] as well." Gary S. Becker, *The Economic Way of Looking at Life*, *in* NOBEL LECTURES: ECONOMIC SCIENCES 1991-1995, 38, 40 (Torsten Persson ed., 1997). And that's exactly the case with religious discrimination, since religious observers are a huge portion of the American population. *See How Religious Are Americans?*, GALLUP (Mar. 29, 2024), http://bit.ly/3EpPwnC (45% of Americans say religion is "very important" to them). What's more, 65% of Americans fundamentally disagree with transgender ideology, *Cultural Issues and the 2024 Election*, PEW RESEARCH CENTER (June 6, 2024), https://tinyurl.com/4wd7cdn7, and 43% are "somewhat" or "very uncomfortable" using pronouns of people that don't match their sex, PRRI Staff, *The Politics of Gender, Pronouns, and Public Education*, PUBLIC RELIGION RESEARCH INSTITUTE (2023), https://tinyurl.com/54yt48ry. And about half of those people's opinions are based at least in part on religious views. *See* Michael Lipka & Patricia Tevington, *Attitudes about transgender issues vary widely among Christians, religious 'nones' in U.S.*, PEW RSCH. CTR. (July 7, 2022), https://tinyurl.com/5c5h63c. So losing even a small part of those segments could seriously squeeze public employers.

Second, discrimination is especially damaging for employers—like public employers—engaged in competitive labor markets, where tolerant employers quickly snatch up discriminated-against employees. Sowell, *supra*, at 43, 46 (noting discrimination "often br[eaks] down under such economic pressures"). Right now, "State governments . . . fac[e] unprecedented workplace shortages." Elise Gurney, *Colorado Shifts to Skills-Based Hiring to Fill State Government Workforce Needs and Hire More Individuals with Disabilities*, COUNCIL OF STATE GOV'TS (Jan. 10, 2023), https://bit.ly/3xrBQVi. In this last school year, "[n]early 9 in 10 public school districts struggled to hire teachers," according to the National Center for Education Statistics. Zachary Schermele, *Teacher shortages continue to plague US: 86% of public schools struggle to hire educators*, USA TODAY (Oct. 17, 2023, 12:01 a.m. ET), https://tinyurl.com/3u6j4kb6. And the national teacher shortage increased by 19,000 vacant positions to 55,000. *See* Madeline Will, *What Will Teacher Shortages Look Like in 2024 and Beyond? A Researcher Weighs In*, EDUC. WK. (Dec. 21, 2023), https://tinyurl.com/mvjmffzd.

Discrimination does more than just cause dollars-and-cents harm. When religious employees see their employer disrespect their faith, they suffer poorer job satisfaction, lower morale, and worse retention rates. *See* Daine Taylor, *Accommodating Religious Diversity in the Workplace: Fostering Inclusion & Cultural Understanding*, INCLUSIONHUB (Oct. 19, 2023), https://tinyurl.com/5n7cw4z2. Conversely, "more employee-friendly accommodations would likely boost employee morale, leading to greater productivity, creativity, loyalty, and profitability." Dallan F. Flake, *Restoring*

Reasonableness to Workplace Religious Accommodations, 95 WASH. L. REV. 1673, 1722 (2020). So "accommodating religious diversity" can't just be "a checkbox for compliance purposes"—employers must respect religion in a genuine and real way. Taylor, *supra*; *accord Building Freedom of Religion or Belief Through Faith-and-Belief Friendly Workplaces*, ALL-PARTY PARLIAMENTARY GRP. FOR INT'L FREEDOM OF RELIGION OR BELIEF, https://tinyurl.com/yc3rck7r (last visited July 17, 2024).

States have long understood that respecting religious freedom "directly benefit[s]" their "bottom line" as employers in many ways. *Religious Freedom Linked to Economic Growth, Finds Global Study*, RELIGIOUS FREEDOM & BUS. FOUND., https://tinyurl.com/3btre92y (last visited July 17, 2024).

Public schools will not thrive if they start employing Brownsburg-style religious discrimination, given that they already face crippling teacher shortages. Discriminating against religious employees will not only leave schools short-staffed by forcing them out—it will also demoralize the employees who are left. And administering public school systems is already challenging enough. The States can't afford to add religious discrimination to the mix, yet the lower court's opinion approves just that.

B. Compelling the use of preferred pronouns in violation of sincere religious beliefs sends all the wrong messages to students

Discriminating against teachers with religious convictions raises serious concerns as to the values taught to students and whether students are truly free to discover, learn, and grow in their own thought processes and beliefs. Schools should strive to teach respect for all religions instead of uniformity of thought. And affirming

someone's gender identity is not necessary for a healthy learning environment. Rather, it risks serious harm to vulnerable and impressionable minors.

1. Schools should endeavor to teach students respect for religion and free speech—not demand uniformity of thought

In pushing out a teacher just because it disagreed with his religious views, Brownsburg failed its educational mission. American public education has never been about learning information for the sake of information. Rather, schools are meant "to teach what it is to be a true human being, living within a moral order." Russell Kirk, *The Conservative Purpose of a Liberal Education*, *in* REDEEMING THE TIME 43 (Jeffrey O. Nelson ed. 1998). Beyond just dispensing facts, public education is meant to "conserve and preserve" the "permanent things," "such as duty to one's parents, courtesy toward guests, honor, courage, character, magnanimity, courtesy, chastity, mercy, order, humility, and prudence." Panelists, *The Roots of Modern Education*, 35 REGENT U. L. REV. 471, 474 (2023). Courts and scholars alike agree that a public school achieves its end—serving the "common good of all," *Bush v. Oscoda Area Schs.*, 275 N.W.2d 268, 276 (Mich. 1979) (Ryan, J., dissenting)—when it acts as an "arena for molding visons of what constitutes the good life to which we should aspire as an American society." Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 5 (2020).

Public education "prepare[s] pupils for citizenship in the Republic" by "inculcat[ing] the habits and manners of civility," which is 'indispensable to the practice of self-government in the community and the nation." *Bethel Sch. Dist. No. 403 v.*

Fraser, 478 U.S. 675, 681 (1986) (quoting Charles A. Beard & Mary R. Beard, *New Basic History of the United States* 228 (1968)). And States don't assume civic virtues will just passively accrue; they have "'designed'" their educational institutions and policies to "'inculcate [this] virtue.'" Thomas Marvan Skousen, *The Lemon in* Smith v. Mobile County*: Protecting Pluralism and General Education*, 1997 B.Y.U. EDUC. & L.J. 69, 101 (1997); *see also* Coupet, *supra*, at 6 (same). Indeed, state constitutions say a proper public education is *crucial* to States' "prosperity and happiness," N.D. Const. art. VIII, § 1; their "free and good government," Ark. Const. art. XIV, § 1; Ind. Const. art VIII, § 1; "the rights and liberties of the people," Cal. Const. art. IX, § 1; Mo. Const. art. IX, § 1(a); Tex. Const. art. VII, § 1; and the "stability of a republican form of government," Idaho Const. art. IX, § 1; Minn. Const. art. XIII, § 1. Forming whole persons equipped with both information *and* the moral and civic-virtue frameworks to understand and apply that information is crucial for American democracy. Abandoning that aim risks producing students who have information without depth of true understanding and who don't understand why or how they should respect those with whom they disagree. That's why public schools have long prioritized instruction in "fundamental values." *Ambach v. Norwick*, 441 U.S. 68, 76 n.6 (1979). To effectively join the permanent national debates about what constitutes America's good life, students must start learning the fundamentals of that dialogue in school.

Public schools build civic virtue and a civic society in part by acting "as an 'assimilative force'" that brings "diverse and conflicting elements in our society . . . together on a broad but common ground." *Ambach*, 441 U.S. at 77. Exposing students

to diverse ideas helps them "awaken[] . . . to cultural values" and "adjust normally to [their civic] environment." *Brown*, 347 U.S. at 493; *see also* Coupet, *supra*, at 6 (saying public schools' instruction in civic virtue helps "weave together the social fabric of our nation"). Of course, schools must be aware of "the sensibilities of others" and "teach[] students the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. But they must also model ideals "essential to a democratic society," like "tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Id.* Public education won't instill civic virtues unless it teaches both the ability to "work together to advance . . . society," Coupet, *supra*, at 6, and "'the ability to deliberate,'" Josh Chafetz, *Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the* Yoder *Problem*, 15 Wm. & Mary Bill Rts. J. 263, 285 (2006). Both these skills are necessary to "'participate in conscious social reproduction.'" *Id.*

Our major faith traditions, like Christianity, include many diverse elements crucial to our national fabric and civic society. States have been particularly anxious to assimilate those of our major faith traditions by extending "conscience protection in the workplace." James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 267 (2007) (saying "states have been the chief trailblazers"). But civic virtues like tolerance and respect will only take hold in the public schools if they are "actively inculcated in students" through "engagement with, and active respect for, differences." Coupet, *supra*, at 36 (cleaned up). Mere "expos[ure]" to concepts won't adequately "prepar[e] children to exercise full citizenship

and enrich our liberal democracy." *Id.* This active respect applies to both belief *and* action. *See Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972); Alex Deagon, *Liberal Secularism and Religious Freedom in the Public Space: Reforming Political Discourse*, 41 HARV. J.L. & PUB. POL'Y 901, 926 (2018) (noting that the vision of religious freedom that won out in *Yoder* says "religion is not merely private" or "simply a matter for the individual" (cleaned up)); *accord* Shelley K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1207 (1989).

With this context in mind, it's easy to see how Brownsburg erred. Consider how the school and the court below described the school's mission as a public educator: It aims to "foster a supportive environment for all," RSA45 (emphasis omitted); "a safe, inclusive learning environment," RSA44; and "a safe and supportive environment for all students," RSA37. Teaching students to emotionally support and include others is undoubtedly necessary and good. And Brownsburg's vision of inclusivity may sound nice on paper. But, ironically, its vision of inclusion and support manifests itself in exclusion, suppression, and a take-no-prisoners demand for ideological purity. Brownsburg's message of support and inclusion rings hollow when held up next to its crackdown of Kluge. But this distortion is unsurprising: support and inclusion are crucial civic virtues, yes, but they are a few among many. A public school must also attend to other civic virtues like courage, tolerance, justice, wisdom, civility, strength, patience, prudence, and, above all, sacrifice. *See* R. George Wright, *The Law of Education: Educational Rights and the Roles of Virtues, Perfectionism, and Cultural*

Progress, 31 N. ILL. U. L. REV. 385, 397–410 (2011). Yet these concepts—so key to a healthy child, school, community, and polity—appear nowhere in Brownsburg's briefing or the court's opinion. Instead, Brownsburg taught its students that religious and philosophical disagreements are best resolved by banishing those with whom we disagree from society.

Ultimately, Brownsburg subordinated all other civic virtues to emotional support and inclusion. That choice teaches its students *not* to compromise or find common ground, nor to discuss and respectfully disagree. And it communicates to its students that nearly half the country is too dangerous *even to be heard* on this point. This approach sets up those students for failure and imperils our States' democratic republican forms of government. After all, the people who disagree with Brownsburg's gender ideology and pronoun rules undoubtedly include Brownsburg students' family members, neighbors, and future coworkers and fellow voters. Brownsburg had a chance to model true tolerance of religious belief and action and freedom of speech by sticking to its reasonable compromise with Kluge. Its Last-Name-Only compromise was the sort of active, assimilating respect for the socially unpopular views of a significant and diverse element of society that the Supreme Court says is crucial to teaching children how to tolerate "divergent political and religious views." *Fraser*, 478 U.S. at 681. But, applying a twisted view of public education's mission and purpose, Brownsburg caved. Brownsburg exiled and silenced unpopular speakers, teaching public school children *not* to work together or deliberate with those with whom they disagree. So long as States' public schools model such anti-democratic, anti-liberal

behavior, they can't effectively inculcate crucial civic virtues in their students. And without those civic virtues, it's doubtful our politics will stay healthy.

2. Reflexively affirming declared gender identities is not necessary but risks harms to vulnerable minors

The faulty assumption underlying most of Brownsburg's argument and the lower court's decision is that children are harmed when schools don't affirm their gender identities. The organization behind most policies like Brownsburg's is the World Professional Association of Transgender Health (WPATH), which "enjoys the reputation of being the leading scientific and medical organization devoted to transgender healthcare." *WPATH Files*, CLINICAL ADVISORY NETWORK ON SEX AND GENDER (Mar. 8, 2024), https://tinyurl.com/5xhsn5fw. For years, WPATH's standards of care have said that children should be supported in their "social transition"—including the use of their preferred pronouns. E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, 23 INT'L J. OF TRANSGENDER HEALTH S1, S75 (2022), https://tinyurl.com/5bbc4brd; s*ee id.* at S75–S80. But as discussed more below, recent disclosures reveal that WPATH pushed activist policies unsupported by scientific studies. Because these inclusivity policies appear to be products of *political* preferences seeking to influence students, it is not at all clear that the policies even help the students who vigorously claim they must trump every other interest, religious ones included.

Many examples of WPATH's slant can be found. In one instance, WPATH removed age guidelines from its standards of care—not because the science supported it, but at the ideological insistence of Admiral Rachel Levine, the U.S. Assistant

Secretary for Health and Human Services. In one email, a member of the WPATH guideline development group described an exchange with "Admiral Levine's chief of staff: 'She is confident, based on the rhetoric she is hearing in D.C., and from what we have already seen, that these specific listing of ages, under 18, will result is devastating legislation for trans care. She wonders if the specific ages can be taken out.'" Azeen Ghorayshi, *Biden Officials Pushed to Remove Age Limits for Trans Surgery, Documents Show*, N.Y. TIMES (June 25, 2024, 9:54 p.m.), https://tinyurl.com/4c6mft9t. In response to that inquiry, and with no scientific backing, WPATH removed its guidelines' age restrictions. *Id.* Further, the Cass Review—an independent study commissioned by the United Kingdom's National Health Service—recently found that although WPATH "has been highly influential in directing international" standards for transgender medical care, "its guidelines . . . lack developmental rigor." *Independent Review of Gender Identity Services for Children and Young People*, CASS REV., Apr. 2024, at 28, available at https://tinyurl.com/4r96n284. "This is an area of remarkably weak evidence." *Id.* at 13. Yet WPATH routinely "overstates the strength of the evidence in making [its] recommendations." *Id.* at 132. So any policy based on that group's recommendations should be suspect at best, especially when children are involved.

On the other hand, various medical institutions and thousands of individual doctors and other health care professionals have recognized that "[m]ost children and adolescents whose thoughts and feelings do not align with their biological sex will resolve those mental incongruencies after experiencing the normal developmental

process of puberty." *Doctors Protecting Children Declaration*, DOCTORS PROTECTING CHILDREN, https://tinyurl.com/33pfx4ew (last visited July 15, 2024). Even though this is a normal part of childhood, advocacy groups urge parents and teachers to intervene and "affirm" the child's "gender identity." E. Coleman et al., *supra* at 76. This can include "social transition" or "social affirmation," which includes calling a student by his or her preferred name—different than his or her legal name. *Id.* But, as discussed, studies have "found no definitive proof that gender dysphoria in children or teenagers was resolved or alleviated by what advocates call gender-affirming care" including "social transition." Pamela Paul, *Why Is the U.S. Still Pretending We Know Gender-Affirming Care Works?*, N.Y. TIMES (July 12, 2024), https://tinyurl.com/y3jhpf2y. "[T]here [is no] clear evidence that transitioning kids decreases the likelihood that gender dysphoric youths will turn to suicide, as adherents of gender-affirming care claim." *Id.* And not only is there no evidence that calling a student by his or her preferred name helps the child: doctors have also warned that there are "serious long-term risks." Doctors Protecting Children, *supra* (citing Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology & Metabolism 3869 (2017); Kenneth J. Zucker, *Debate: Different Strokes for Different Folks*, 25 Assoc. for Child & Mental Health 36–37 (2020), https://doi.org/10.1111/camh.12330; Prescribing Information, Lupron Depot, https://www.lupron.com/pi.html (last visited July 17, 2024); Letter from Nancy Stade to the U.S. Food and Drug Admin. (Apr. 15, 2024), https://www.regulations.gov/document/FDA-2023-P-3767-0654.

Though it may seem harmless to call a child by a different name, calling a student by a different name sets the student on a road with permanent consequences. Doctors have warned that "[s]ocial transition is associated with the persistence of gender dysphoria as a child progresses into adolescence." Doctors Protecting Children, *supra* (quoting Hembree, *supra* at 3879) (alteration in original). And if gender dysphoria persists, children may eventually begin using puberty blockers and cross-sex hormones, which have been known to "permanently disrupt physical, cognitive, emotional and social development." *Id.* (citing Stade, *supra*, at 3–4; Lupron Depot, *supra*). Requiring teachers to refer to a child by his or her declared "gender identity" can lead to serious, permanent negative consequences.

In the end, even if it were right to weigh the interests of student affirmation against the interests of free religious exercise, evidence like the above suggests that the "affirmation" interests are not substantial enough to carry the day. The district court should not have reflexively assumed that "refusing to affirm transgender status" in one specific way will cause "emotional harm." RSA38.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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July 17, 2024

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I hereby certify that on July 17, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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