

24-1241

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE LEROY,
Plaintiff - Appellant,

v.

LIVINGSTON MANOR CENTRAL SCHOOL DISTRICT and
JOHN P. EVANS, in his capacity as Superintendent of Schools
of Livingston Manor Central School District,
Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of New York, No. 21-cv-6008

**BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS*
CURIAE IN SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

Pursuant to Fed. R. App. P. 29(a)(4)(a), Liberty Justice Center states that it is a nonprofit corporation registered in the State of Texas, and has no parent company and no stockholders

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INTEREST OF THE AMICUS CURIAE¹

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Austin, Texas that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

This case interests *Amicus* because the right to speak is fundamental, and the challenge to the right to speak on school campuses across the country is a threat to that fundamental American liberty.

¹ Fed. R. App. P. 29(a)(4)(E) statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission.

INTRODUCTION

“Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Yet this principle of neutrality is slipping: throughout the country, the institutions that we depend on to educate future generations increasingly seek to proscribe new orthodoxies, and to take sides where they should make space for debate. *Amicus* submits this brief to emphasize that Justice Jackson’s ideal came with a warning: that if public education “is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system.” *Id.* And ideological discipline is tragically the modus operandi of many educational institutions today. In this context, the Court should reject the metastasis of administrative control, and draw the most basic line: that when students speak off campus, on their own time, among themselves and in their communities, it’s not really any of the school’s business.

New incidents arise any time one sifts through the daily news: whether at K-12 schools, or at universities, there is a rising hostility to dissent, to debate, or even to the mildest personal expression—educators suspended for suggesting their charges care about a marketplace of ideas; students suspended for championing the protections of the Bill of Rights.

In this context, expanding the power of school administrators to off-campus activity will be disastrous for free inquiry.

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). And this evident truth implies a predicate: that students and teachers had those rights to shed before they entered campus. This Court should affirm the decision below, and find that school administrators have no power to censor students or teachers speaking outside the context of the school about matters in no way related to the school. To do otherwise would license the bad actors described herein to exercise panoptic control over their charges, wherever they may wander

Argument

Campus Authorities Increasingly Seek To Impose Ideological Conformity And Restrict Free Expression

It feels like the stories arrive daily: a student suspended, a teacher put on leave, a mandatory school program taking ideological and political sides. Yet each story invokes a common theme: school officials seeking to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. From T-Shirts to Facebook posts, to parties, no aspect of student life now escapes attempts to impose

some dominant view on dissenters—or even those who have simply failed to memorize the new shibboleths.

For instance, *Amicus* represents Barton Thorne, a career educator in Tennessee who saw that career threatened simply for explaining the value of the marketplace of ideas to his students. *See Thorne v. Shelby County Board of Education*, Western District of Tennessee No. 2:21-cv-02110. As part of his job as principal, Thorne delivered a weekly “principal’s minute” with messages to his students as part of the daily announcement’s video. These messages inspire, educate, inform, and challenge his high school students with broad themes and life advice from their principal.

After the tragic and disturbing events of January 6, 2021, our country experienced a teachable moment around the importance of free speech and the dangers of cancel culture and deplatforming as social media moderators reacted to the content of various accounts. Thorne used this teachable moment: if you seek speech being restricted, he explained “[y]ou may be in agreement with the people who are doing the filtering, but it’s just one moment away from somebody else being able to filter you. And so, if they can do that to a minority—or if they can do that to a powerful voice, it doesn’t have to be a minority—what will stop them one day from doing that to you?” This straightforward articulation of fundamental American values earned Principal Thorne a suspension and

investigation—even advocating *the First Amendment* is too much for some school administrations.

Other cases from around the country tell a similar story. A few years ago one school in Nevada disciplined a minor student for wearing a T-shirt that celebrated constitutional rights. *See Guardanapo v. Washoe County School District*, District of Nevada No. 3:18-cv-00172. The shirt in question referenced the Constitution in general and the Second Amendment in particular, but included no depictions of firearms, or any other weapon of any kind. The student was disciplined anyway, while the school district simultaneously supported students with the opposite view participating in the National School Walkout, a formal, organized protest calling for expansive new gun control measures.

Indeed, one could fill a brief with student T-shirts alone. A student in Oregon was suspended for a shirt that advocated building physical barriers on the southern border. Eli Rosenberg, *A student was suspended for wearing a border wall shirt. It cost the district \$25,000 and an apology*, *Wash. Post* (July 25, 2018).² A sophomore in Pennsylvania was suspended for wearing a shirt that said “Keep America Great” and a mask that said “Women for Trump.” Chacour Koop, *‘Make Liberals Cry Again.’ Pro-Trump student suspended over apparel, PA lawsuit says*,

² <https://www.washingtonpost.com/news/local/wp/2018/07/25/a-student-was-suspended-for-wearing-a-border-wall-shirt-it-cost-the-district-25000-and-an-apology/>.

Center Daily Times (Oct. 23, 2020).³ Students in Arizona were disciplined for wearing “Make America Great Again” apparel to the school’s official “Party in the USA” theme day. Ellie Nakamoto-White, *Parents say students at Perry High School told to remove MAGA gear, student suspended*, AZCentral (Mar. 2, 2019).⁴ In California, students may be disciplined simply for wearing the stars and stripes on their shirt at school. *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014). And these clothes were *worn to school*. A ruling for the school district in this case would allow schools to check up on what clothing students wear on their weekends and over the summer.

Even when the schools approve of student activism, school administrators have made students do so on the administrators’ terms. At Utica Academy for International Studies in Michigan, students were encouraged to participate in the National School Walkout, mentioned *supra*. However,

The rules required the students to stick to “pre-identified chants” as they marched outside the school, and any posters they wished to carry during their walkout would need to be submitted to administrators for advance approval. Incredibly, the rules also

³ <https://www.centredaily.com/news/nation-world/national/article246663238.html>.

⁴ <https://www.azcentral.com/story/news/local/chandler-education/2019/03/02/parents-say-students-perry-high-school-told-remove-maga-gear-donald-trump/3035751002/>.

provided that no “political messages” would be permitted. Several students who refused to be silenced by school administrators were suspended for peacefully participating in the walkout and holding up signs with political messages.

ACLU of Michigan, *Students Suspended For ‘Unapproved’ Political Speech*.⁵ Even those students who choose to support the administrators’ proposed messages must jump through their hoops.

Nor does the climate students face in high school improve when they are ready to move on to higher education. Such was the discovery of a high school senior in Wisconsin, who simply chose to express her personal political views—along with her “Trump 2020” flag— on social media. See Jackson Walker, *Marquette University threatened to rescind student’s admission over pro-Trump TikTok video*, *The College Fix* (July 7, 2020).⁶ Simply for expressing entirely mainstream political views, she was subject not just to criticism from other students, but “bias complaints” that lead to her being dragged before university administrators to explain herself, and warned darkly that her status at the university was uncertain—all for the modern equivalent of “I Like Ike.”

⁵ <https://www.aclumich.org/en/cases/students-suspended-unapproved-political-speech>.

⁶ <https://www.thecollegefix.com/marquette-university-threatened-to-rescind-students-admission-over-pro-trump-tiktok-video/>.

Just a few years earlier, the same university had suspended a professor for having the temerity to suggest, on his personal blog, that universities should allow honest debate in the classroom. *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 712 (2018). Dr. McAdams, a professor of political science, criticized another professor who had announced, categorically, that her ethics class would permit no discussion on the merits of such topics as gay rights, civil rights, or any other topic on which one side is inconsistent with progressive orthodoxy—these topics were apparently beyond ethical debate. *Id.* at 713. McAdams argued instead that a university classroom should be a battleground for the open conflict of ideas. For his efforts, he received a formal complaint, based on which the University moved to revoke his tenure and terminate his employment. *Id.*

And such complaints are no longer unusual. On university campuses across the country, these sorts of “bias complaints” alleging “offensive” behavior have proliferated, with schools instituting “bias response teams” to punish disfavored speech. At the University of Wisconsin—La Crosse, “bias incidents” have run the gamut from vulgar bathroom graffiti, to common political slogans such as “Trump 2016,” to a Christian group’s use of a cross on their poster—this most common symbol of the Christian faith ostensibly created an “unsafe” environment for gay and lesbian students. Nathan Hansen, *Students*

use UW-L bias/hate system to report everything from Christian posters to offensive images, La Cross Tribune (Sep. 26, 2016).⁷

At Emory University, chalk declaring “Trump 2016” was likewise investigated as a “bias” incident, with the President of the University affirming that the culprits would be sought out and “If they’re students,’ he said, ‘they will go through the conduct violation process.” Jeffrey Aaron Snyder and Amna Khalid, *The Rise of “Bias Response Teams” on Campus*, *The New Republic* (Mar. 30, 2016).⁸ At Appalachian State University on the other hand, one student filed a bias report because he was “offended by the politically biased slander that is chalked up everywhere reading “TRUMP IS A RACIST.” Foundation for Individual Rights in Education, *Bias Response Team Report 2017*.⁹

By 2022, as many as 454 colleges had implemented Bias Reporting Systems. Speech First, *Free Speech in the Crosshairs: Bias Reporting on College Campuses* (2022).¹⁰ How schools define “bias” varies across

⁷ https://lacrossetribune.com/news/local/students-use-uw-l-bias-hate-system-to-report-everything/article_759c0e01-e64e-5aa4-bb29-4e7236d4f5f8.html.

⁸ <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>.

⁹ <https://www.thefire.org/research/publications/bias-response-team-report-2017/>.

¹⁰ https://speechfirst.org/wp-content/uploads/2022/04/Free-Speech-in-the-Crosshairs_BRS-Report.pdf.

institutions, as caprice is inherent in the endeavor, but many explicitly curtail expression of political disagreement: “14% of institutions include ‘political affiliation’ among their categories of bias. Still others include bias against similar categories such as ‘intellectual perspective’ (University of Central Arkansas), ‘political expression’ (Dartmouth), or ‘political belief’ (University of Kentucky).” FIRE, *Bias Response Team Report, supra*. Going further,

[m]any policies include catch-all categories of bias—e.g., “other” biases. In such cases, the definition of a bias incident encompasses not only protected speech, but also any speech that offends anyone for any reason. The net effect is that broad definitions of “bias” invite reports of any offensive speech, whether or not it is tethered to a discernable form of bias, thereby inviting scrutiny of student activists, organizations, and faculty engaged in political advocacy, debate, or academic inquiry.

Id.

Speech need not even be about a real political candidate to run afoul of a bias reporting scheme. At Wake Forest, a satirical Instagram post in the style of a student government campaign ad was deemed “deeply offensive and unacceptable” for promising to “build a wall” between the school and nearby Winston-Salem State University. Adam Goldstein,

Wake Forest's investigation of 'build a wall' Instagram post chills free speech, FIRE, Mar. 28, 2019.¹¹

One professor was reported for simply bringing up the topic of pop singer Janet Jackson's famous "wardrobe malfunction." Payne, *There's No Safe Space for Ideas on Campus 'Animal Farms'*, *supra*. A Michigan State student had a bias report filed against him simply for watching a video of conservative pundit Ben Shapiro. *Id.* At the University of Wisconsin–Madison, an event featuring Shapiro's Daily Wire colleague Matt Walsh was reported as a bias incident before it had even taken place. Audrey Thibert, *LGBTQ+, GNC community sees bias incident ahead of conservative talk*, *Badger Herald*, Oct. 13, 2022.¹² A student at Stanford was reported for simply reading a copy of *Mein Kampf*, one of the most historically important books of the twentieth century. Haley Gluhanich, *Stanford University: Student Reported for Reading Adolf Hitler's Autobiography, 'Mein Kampf'*, FIRE, Apr. 18, 2023.¹³ At SUNY-Cortland, a professor received a bias complaint for suggesting "we should be proud of how far we've come as a society relating to race and

¹¹ <https://www.thefire.org/news/wake-forests-investigation-build-wall-instagram-post-chills-free-speech>.

¹² <https://badgerherald.com/news/2022/10/13/lgbtq-gnc-community-sees-bias-incident-ahead-of-conservative-talk/>.

¹³ <https://www.thefire.org/cases/stanford-university-student-reported-reading-adolf-hilters-autobiography-mein-kampf>.

gender relations” since the 1930s—which one might have thought a banal point given the legal and social changes of the past 90 years. Christian Schneider, *Professor reported to bias team for saying race relations have improved since the 1930s*, College Fix, Mar. 18, 2022.¹⁴

Nor are “bias” incidents treated as simply opportunities for dialogue; they often result in swift and severe punishment. When some students at Bowdoin College threw a juvenile “fiesta,” featuring tequila and sombreros, the punishment for their wrongthink was swift and severe: the students were forced to move out of their dorm, banned from various college social events, and forced to attend mandatory reeducation sessions. Editorial, *Out of Focus*, The Bowdoin Orient (Mar. 4, 2016).¹⁵ Emerson College suspended a conservative student group for distributing stickers with the text “China kinda sus”—apparently deeming criticism of a genocidal authoritarian foreign government a form of bias against Asian Americans. FIRE, *STICKER SHOCK: Emerson College doubles down on censorship, denies TPUSA chapter’s appeal of ‘bias’ charge for distributing stickers criticizing China’s government*, Nov. 16, 2021. And the offenders made aware of their offense are the lucky ones: a professor at Ohio Northern University was

¹⁴ <https://www.thecollegefix.com/professor-reported-to-bias-team-for-saying-race-relations-have-improved-since-the-1930s/>.

¹⁵ <https://bowdoinorient.com/bonus/article/11035>.

sanctioned and investigated without even being informed of the charge against him. Christopher J. Ferguson, *Bias-Response Teams Are a Bad Idea*, Chronicle of Higher Education, June 5, 2023.

The Vice Chancellor of the University of California, Santa Barbara, as part of her announcement of the creation of a Bias Response Team, encouraged students to report “bias incidents” to campus police. Jason Garshfield, *UCSB Bias Response Team Speaks Volumes About Free Speech*, The Bottom Line (Dec. 12, 2015).¹⁶ And lest one think such “bias incidents” are limited to white supremacist vandalism, the University of California publishes an official list of examples of what it deems biased “microaggressions,” including asking things like “Where are you from or where were you born?” and saying that “America is a melting pot” or “the land of opportunity.” *Id.*

Santa Clara University’s now-revised Bias Incident Reporting policy, which defined a “Bias Incident” as “a speech, act, or harassing action that targets, threatens, or attacks an individual or group because of their actual or perceived race, color, national origin, ethnicity, religious affiliation, sex, gender identity, disability, or sexual orientation,” instructed students that “If the bias incident is in progress or just occurred: **ALWAYS CALL 911 IMMEDIATELY.**” *Bias Incident*

¹⁶ <https://thebottomline.as.ucsb.edu/2015/12/ucsb-bias-response-team-speaks-volumes-about-free-speech>.

Reporting, Santa Clara University, Archived as of June 11, 2015 (emphasis in original).¹⁷ The University has since had the minimal good sense to rewrite this policy and remove the reference to 911, instead giving students multiple options to report their “bias” incident, from calling campus security to using an online reporting form. *Bias Incident Reporting*, Santa Clara University.¹⁸

If one doubts the extent to which these anti-“bias” efforts target speech, one need only consult the ways in which they have reacted to events *about freedom of speech*. For instance, a poster at the University of Minnesota advertised a panel discussion about speech and censorship in the wake of the *Charlie Hebdo* massacre. Given the subject of the event, the poster included an image of one of *Charlie Hebdo*’s magazine covers depicting the Prophet Mohammed. In response to an event about free expression inspired by then-recent events of serious public concern, “the university’s Equal Opportunity and Affirmative Action office held a formal investigation and concluded that ‘university members should condemn insults made to a religious community in the name of free speech.’” Snyder and Khalid, *The Rise of ‘Bias Response Teams’, supra*.

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http://web.archive.org/web/20150611154725/http://www.scu.edu/provost/diversity/education_training/biasincidentreporting.cfm.

18 <https://www.scu.edu/diversity/bias-incident-reporting/>.

At the University of Colorado, a professor was investigated for daring to encourage a classroom discussion regarding contemporary transgender issues. Adam Steinbaugh and Alex Morey, *Professor Investigated for Discussing Conflicting Viewpoints, 'The Coddling of The American Mind,'* FIRE (June 20, 2016).¹⁹ According to the report, the professor was advised to avoid discussing transgender issues in his classroom. *Id.* Another professor was investigated for encouraging his students to think critically and debate rhetoric and ideas related to gay rights. *Id.* In that case, a student complained that students should not be required to listen to arguments from opponents of gay marriage. *Id.* That critical thinking and debate are now treated as a danger to the college community, rather than its *raison d'être*, should give this Court pause.

The scope of what constitutes 'controversial' speech on campus now envelopes everyday life, elevating even the most minor events to matters of official concern. At the University of Michigan, a snowman-style amateur sculpture was reported as a bias incident because the offended student deemed that the work reminded her of a phallus. Erin Dunne, *Snow Penis Reported as Bias-Incident, The Michigan Review* (Feb. 25, 2016).²⁰ At Colby College, a student was reported for bias after using the

¹⁹ <https://www.thefire.org/professor-investigated-for-discussing-conflicting-viewpoints-the-coddling-of-the-american-mind/>.

²⁰ <http://www.michiganreview.com/snow-penis-reported-as-bias-incident/>.

phrase “on the other hand,” which apparently is now deemed “ableist.” FIRE, Bias Response Team Report, *supra*. At the University of Wisconsin-Platteville, students were reported for dressing as the “Three Blind Mice” of nursery rhyme fame on Halloween, because someone somewhere might think the purpose of such a costume was not nostalgia for Mother Goose but rather to mock people with disabilities. *Id.*

The COVID-19 pandemic provided its own new avenues for the stifling of student speech. One school threatened to suspend a student for including the sitting President of the United States in his background for virtual learning. FIRE, *Student faces possible suspension, fine for Zoom background of President Trump*, (Aug. 7, 2020).²¹ A high school student in Washington likewise faced similar sanction for a flag in the frame of his webcam. Bradford Betz, *Washington high school student kicked out of Zoom class over pro-Trump flag, parents say*,” Fox News (Sep. 23, 2020).²² The same happened to a student in Maine as well. Jackie Mundry, *Student says she was removed from Zoom class for having*

²¹ <https://www.thefire.org/student-faces-possible-suspension-fine-for-zoom-background-of-president-trump/>.

²² <https://www.foxnews.com/us/washington-high-school-student-kicked-out-of-zoom-class-over-pro-trump-flag-parents-say>.

Trump flag,” News Center Maine (Oct. 4, 2020).²³ Another student was punished for using social media to criticize classmates who ignored the masking requirements intended to ensure student safety. Fernando Alfonso III, *Free speech experts call on public schools to not penalize students for sharing images of maskless classmates*, (Aug. 8, 2020).

And while the pandemic may have receded, its blurring of the line between the campus and the home should give this Court even greater pause in expanding the speech-regulating rights of school administrators: can schools punish students for the posters on the walls of their private bedrooms? For the T-shirts they happen to have hanging in the closet behind them? Is a student to be punished because their parent keeps an antique rifle on the mantel behind the couch which is their one quiet place to try to learn? As schools intrude virtually more and more into the private areas of students—and teachers—should this expand the scope of their censorial power to our most intimate spaces? *Amici* submit the answer is no, and that this Court should emphasize that whatever limited power schools have to direct children’s education stops at the schoolhouse door.

²³ <https://www.newscentermaine.com/article/news/politics/student-says-she-was-removed-from-zoom-class-for-having-trump-flag/97-fd7f79f5-81aa-41be-a1fe-b65793b16104>.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE AS TO LENGTH

Pursuant to Fed. R. App. P. 32(g)(1), counsel of record certifies that the body of this brief, including footnotes, contains 3,362 words.