STATEMENT OF

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"Confronting Pervasive Antisemitism in K-12 Schools"

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Chairwoman Foxx, Ranking Member Scott, Subcommittee Chair Bean, Subcommittee Ranking Member Bonamici, and Members of the Subcommittee on Early Childhood, Elementary, and Secondary Education, on behalf of the American Civil Liberties Union (ACLU),[1] I want to thank you for the privilege of testifying before your Subcommittee today.

I want to start by acknowledging that today's topic, confronting antisemitism, is a gravely important one. By many accounts, antisemitic incidents have become more common in recent years. Jewish friends and colleagues have been struggling. Of particular note, I'm close with a law school dean and a New York City public high school principal, both Jewish, who understand full well the impact of antisemitism. But these Jewish school leaders are themselves being accused of antisemitism, or at least failing to do enough to stop antisemitism in their school communities. It is truly an unenviable position. These are deeply complicated and confusing times.

I have been invited here, not to opine on the Middle East, nor to defend or condemn my fellow witnesses, but rather I have been asked to provide some context for this subcommittee's important work. Specifically, I have been tasked with clarifying for the Members and the public how the First Amendment operates in K-12 schools and how it interplays with other rights. To accomplish this ambitious task in 5 short minutes, I'd like to make three key points: First, I will briefly describe the First Amendment and its key principles. Second, I will describe how my colleagues and I are working to protect First Amendment rights in schools. Third and finally, I will suggest ways this Subcommittee can help safeguard peoples' rights.

I. The First Amendment

The text of the First Amendment is short, so I will just read it:

> **Congress** shall make no law respecting an establishment of **religion**, or prohibiting the free exercise thereof, or abridging the freedom of **speech**, or of the **press**, or of the right of the people peaceably to **assemble** and to **petition** the government for a redress of grievances.

As you no doubt noticed, the very first word of the First Amendment is "Congress." You all are the stars of the show. The First Amendment is primarily about what you (and by extension other government entities) cannot do – "Congress shall make no law" restricting five related freedoms. Fundamentally, the First Amendment is about restricting the government's authority. Without government action, the First Amendment does not apply. This is why the First Amendment applies in public schools, but generally not private ones.

[1] For over 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. With more than eight million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico and Washington, D.C., to preserve American democracy and an open government.

Turning to the five freedoms, Burt Neuborne, a legendary First Amendment lawyer at the ACLU, has described the poetry behind the ordering of these freedoms. He has argued that the structure provides some insight into the meaning of the First Amendment. First, the government cannot regulate your **religion**, e.g. what you believe, your thoughts, your ideas, your faith, what's going on in your head. Second, the government cannot abridge the freedom of **speech**. Now you have gone from having an idea, a belief, a faith system, to communicating that idea or belief to others around you. Third, the government cannot abridge the freedom of the **press**. Now we have gone from an idea, to speaking that idea to those who are within earshot, to the press, which really means publishing or otherwise disseminating ideas to a wider audience. Fourth is "the right of the people peaceably to **assemble**." Now, we are not just thinking something, or saying something, or writing and publishing something, now we are gathering and mobilizing people around this idea. People are feeling solidarity and they're physically sharing space. Fifth is the right "to **petition** the government for a redress of grievances." This means that you have the right to not only have an idea, not only speak that idea, not only to publish that idea, and not only galvanize people around this idea, but you have the right to bring that idea to the seat of power—to the government— to redress your grievances. Taken together, we can understand the First Amendment, looking closely at its text, as facilitating the journey from an idea to a movement.[2]

Notwithstanding the strong protections of the First Amendment, not all speech is protected. Harassment, true threats, fighting words, incitement, and obscenity are categories of "unprotected" speech that we allow the government more leeway in regulating.[3] And civil rights statutes require school officials to respond to harassment and discrimination in certain circumstances.

So, what does all this mean in the K-12 context?

The Supreme Court has famously said that students and teachers do not lose their first amendment rights "at the schoolhouse gate."[4] But the Court has also recognized that public schools necessarily have more authority to regulate speech at school than the government would normally have in other contexts. That is, the government sets the curriculum in public schools, teachers and staff are government employees, and in order for learning to happen, students are not allowed to speak whenever they want about whatever they want. How we strike the balance between respecting individuals' rights and deferring to the state to determine how to run its schools is hotly contested. I will now discuss a few cases that illustrate how we analyze public school issues under the First Amendment.

II. Challenging Curriculum Censorship and Restrictions on Access to Books

Public school curricula are created by state and local education officials, and school libraries are populated by districts and librarians, and courts are loath to intervene in educators' pedagogical choices. However, the government's discretion is not unlimited.

For example, in Oklahoma, the legislature passed a law called H.B.1775, that restricts discussions on "race and sex" in Oklahoma's public schools without any legitimate pedagogical

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[2] See Burt Neuborne, Madison's Music (The New Press 2015).
[3] See *United States v. Alvarez*, 567 U.S. 709, 717 (2012).
[4] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

justification,[5] using language that is simultaneously sweeping and unclear. This law is part of a nationwide trend of laws and policies aiming to ban inclusive education, modeled off of Executive Order 13950 which set forward a list of so-called "divisive concepts" that was officially deemed politically incorrect. Thankfully, that executive order was blocked by a federal court, and withdrawn by President Biden on his first day in office, but according to PEN America, 18 million Americans live in a state where a ban on inclusive education is in place.

Some of the so-called "divisive concepts" are seemingly innocuous. The first banned concept is that no one is allowed to teach that one race or sex is inherently morally superior to another. Of course, no one was really teaching that to begin with, so banning it does not seem to really stifle anyone's speech in particular. Some other banned concepts are nonsensical. One says that no one is allowed to teach, that anyone "cannot or should not attempt to treat others without respect to race, sex, gender and national origin." A judge in Florida ruled that the same language in Florida's Stop W.O.K.E. Act, "achieved the rare triple negative," as he blocked implementation of that law.

But if some of the concepts on their face are innocuous or ungrammatical others directly target important ideas. For example, under H.B. 1775 no one is allowed to teach that unconscious bias exists, despite decades of research that document this phenomenon. Nor can anyone teach that systemic racism and sexism are pervasive despite ample evidence to support this idea. Of particular note, one banned concept says that no one can teach that anyone "should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex." This provision was quite clearly designed to protect white children from feeling guilty while learning about racism. But what does it mean for the understandable anguish Black students feel when learning about slavery or Jewish students feel learning about the Holocaust, for example? Are they not supposed to feel some sort of discomfort on account of their identity while learning about something so horrific? The clear implication is that Oklahoma teachers are not supposed to address these hard histories at all.

Oklahoma's Academic Standards recognize, it is essential that the "classroom is a place that is inclusive of the identities that reflect the richness and diversity of the human experience."1In order to meet the State's educational goals, "[a]ll learners must hear the voices of their own heritage in the literature they encounter." But the clear message of H.B. 1775 and similar laws is that teachers should avoid challenging topics related to race and sex altogether, to the detriment of students and their educations. H.B. 1775 and similar laws are inflicting these harms now, irreversibly robbing students of the free and open exchange of ideas in academic settings that the Constitution and Supreme Court precedent have long protected. School districts have struck books like *To Kill a Mockingbird* from reading lists and instructed teachers to avoid the term "diversity" altogether.

In a state where over three quarters of Oklahomans never learned about the rise and fall of Tulsa's "Black Wall Street" and the Tulsa Race Massacre in their elementary and secondary education,[6] it is ironic that the legislature would seek to further limit how history is taught,

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[5] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

[6] Nuria Martinez-Keel, "'A Conspiracy of Silence': Tulsa Race Massacre Was Absent from Schools for Generations," *The Oklahoman* (May 26, 2021), https://bit.ly/3jtNybd.

rolling back efforts to tell a more complete story of Oklahoma's past. Because of the Act, educators now fear sanctions for doing so.

For this reason, the ACLU, along with the Lawyers Committee for Civil Rights Under the Law and our *pro bono* counsel, have sued to block the implementation of H.B. 1775. This lawsuit was filed on behalf of students in Oklahoma public schools who's right to receive an education is being infringed upon and teachers whose livelihoods are at stake if they violate a law that they cannot possibly be expected to understand in some places and that directly contradicts their training and expertise in others. The case is pending in federal court as are similar challenges to curricular restrictions elsewhere.[7]

The First Amendment also protects the right to access information—including students' right to access information through school library shelves. Indeed, as the Supreme Court held forty years ago, the school library is "the principal locus" of students' freedom "to inquire, to study and to evaluate, to gain new maturity and understanding."[8] Nevertheless, school-board officials, lawmakers, and others across the country have recently accelerated efforts to ban books—especially those that engage with themes at the intersection of gender, sexuality, and race—from circulation in school and public libraries.[9]

For example, the ACLU filed a case on behalf of two students in Wentzville, Missouri schools, alleging that the Wentzville district violated students' First Amendment right to access information by engaging in viewpoint-based removal of books. In addition, the lawsuit challenged the district's policies, including those that require the automatic removal of any book once it is challenged by a parent, student, or guardian. The books that the School District banned pursuant to its policies included:

- *The Bluest Eye*, by Toni Morrison;
- *Fun Home: A Family Tragicomic Paperback*, by Alison Bechdel;
- *Heavy: An American Memoir*, by Kiese Laymon;
- *Lawn Boy*, by Jonathan Evison;
- *All Boys Aren't Blue*, by George M. Johnson;
- *Gabi, a Girl in Pieces*, by Isabel Quintero;
- *Modern Romance*, by Aziz Ansari and Eric Klinenberg; and
- *Invisible Girl*, by Lisa Jewell.

All these books, which have received critical acclaim, engage with themes at the intersection of gender, sexuality, and race.

After the ACLU sued, all but one of the books were returned to school library shelves. The

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[7] For more information on *BERT v. Drummond*, see: https://www.aclu.org/cases/bert-v-oconnor.
[8] *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982) (plurality).
[9] Elizabeth A. Harris and Alexandra Alter, "Book Bans Efforts Spread across the U.S.," *The New York Times*, (June 22, 2023) https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html.

court denied Plaintiffs' request for preliminary relief on August 5, 2022 and in February 2023, Plaintiffs voluntarily dismissed the case.[10]

III. Protecting Student Speech Rights

It is a bedrock constitutional principle that outside of school, government may not penalize speech because listeners find it offensive or disagreeable. That principle, and the related prohibitions on content and viewpoint discrimination apply equally where young people are involved. Inside school, however, under the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), authorities may punish any student speech that leads to or might lead to "substantial disruption" – even if the disruption is caused by others who find the idea expressed offensive or disagreeable. *Tinker* is thus a stark exception to the First Amendment's most fundamental rule, and one that that Court confined to "the school environment" – in school, at school-sponsored or supervised events, and when students are traveling between school and home.

To give a sense of the broad scope of school's authority to regulate disruptive speech, under *Tinker*, courts have sustained discipline of students within school for the following:

- Wearing a shirt stating "homosexuality is shameful. Romans 1:27;"
- Quoting scripture and distributing small rubber dolls along with cards stating that they "represented the actual size and weight of a 12-week-old baby;"
- Wearing shirts that read "We Are Not Criminals" to protest an immigration bill;"
- Wearing a shirt that displayed the American flag and stated "Old Glory flew over legalized slavery for 90 years;"
- Displaying a Confederate flag, drawing a Confederate flag, wearing clothing depicting the Confederate flag, and wearing clothing that stated "Our School Supports Freedom of Speech for All (Except Southerners);"
- Signing a petition stating that football players did not want to play for their coach after he was accused of abusing players; and
- Wearing a University of San Diego sweatshirt and Los Angeles Lakers and Dodgers jerseys.

Thankfully for young people, they are not subject to *Tinker* all the time. Outside of school-supervised settings, young people have the right to speak without being punished for their ideas, and other young people and adults have the right to hear what they have to say. As the Supreme Court recently made clear in *Mahanoy Area School District v. B. L. by & through Levy*—the Court's first case considering, and holding unconstitutional, a school's discipline of a student for off-campus, online speech— school officials cannot reflexively extend the authority they have inside the school environment to student speech outside of school, even where features of the speech risk[] transmission to the school itself."[11]

Holding otherwise, the Supreme Court explained, would unduly inhibit and silence young people. It could "mean that . . . student[s] cannot engage in [certain] kind[s] of speech at all,"

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[10] For more information on *C.K.-W. v. Wentzville V-IR School District*, see: https://www.aclu.org/cases/ck-w-v-wentzville-r-iv-school-district-0.

[11] *Mahanoy Area School District v. B. L. by & through Levy,* 594 U.S. 180, 191 (2021).

including, anything that might be controversial or critical of the status quo.[12] It would risk interfering with parents' authority to direct their children's upbringing outside school.[13] And it would fail to serve schools' interests in educating our youth about, and preparing them for, a polity that values the free exchange of ideas.

The ACLU has represented the students in all five of the Supreme Court's cases regarding student free speech, including *Mahanoy* and *Tinker*. As an organization committed to protecting the rights to freedom of speech and religious liberty, as well as students' rights to receive an education free from harassment, the ACLU has no particular interest in supporting or endorsing the ideas expressed by our student clients. In fact, the ACLU and its membership often strongly disapprove of the speech at issue—as we have done in cases involving antisemitic speech.[14]

IV. The First Amendment Rights of Educators and Parents

The First Amendment rights of educators and parents are both limited in public schools.

Public school teachers generally do not have a First Amendment interest in school curricula. Under a string of precedent, government employees at work are not engaging in private speech protected by the First Amendment, but rather they are speaking on behalf of the government and can be disciplined for failing to follow directives. Teachers do maintain their First Amendment rights when they are outside of work, just like students when they are off-campus, and the Supreme Court's ruling in *Kennedy v. Bremerton,* 42 S. Ct. 2407 (2022) indicates that the First Amendment protects teachers and coaches' speech even while on school grounds.

In *Bremerton*, the Supreme Court found that a football coach's prayer on the fifty-yard line during a school-sponsored football game was private speech not "ordinarily within the scope of his duties as a coach."[15] The Court reasoned that the coach was not "instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach."[16] The Court further recognized that teachers frequently engage in personal speech and activities when they are on and off school grounds; they wear certain clothing in the classroom, pray during lunch, check text messages, or socialize.[17]

Parents also have an important role to play in K-12 schools. Research has shown that parental involvement is critical for student success in school. The ACLU has long supported transparency in education because families can and should understand what their children are being taught in school. But some parental rights bills are not about transparency. They allow any family or private individual to object to an entire curriculum, overburdening educators and undermining efforts at inclusive education. Families may have the right to opt their child out of select

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[12] *Id.* at 190.
[13] *Id.* at 192.
[14] See, e.g. the *amicus* brief filed by the ACLU and ACLU of Colorado in *C1.G. v. Scott Siegried*, No. 20-1320 (10th Cir. 2021).
[15] *Kennedy v. Bremerton,* 42 S. Ct. 2407, 2423 (2022).
[16] *Id.*
[17] See *id.* at 2424–25 (noting it is not "dispositive" whether the public employee's speech "took place 'within the office' environment").

teachings, but no family has the right to control what all children are allowed to learn, including content about race and racism, sexuality and gender expression.

V. Conclusion

Finally, I think we all should remember that when exposed to more speech and more information we can and do change our minds. In a deeply polarized world, it can be hard for us to imagine someone "switching sides" on a significant issue, but all of us have the capacity to change our minds. I am not suggesting that we should all be like Daryl Davis trying to talk people out of the Ku Klux Klan,[18] but if we believe Bryan Stevenson when he says "each of us is more than the worst thing we've ever done,"[19] including people on death row, then surely people are also more than the worst thing they've ever said or thought.

I believe that sending people into prison is not the only or best way to heal victims and engender real accountability that leads to growth; and I believe that when my two little kids do something hurtful that it's important for them to acknowledge the pain that they've caused, to understand the impact of their actions, and to figure out a way to make it better instead of just sending them to their room; and if I believe in these principles of free thought and restorative justice, then I also have to believe that we can forgive people for things that they have said or thought.

This call for forgiveness does not mean that we should not call out injustice when we see it—that is the epitome of free speech. Restorative justice doesn't mean you let things go or that any harm done is not important, it means that we prioritize making all victims whole and we prioritize consistent, real accountability. I submit that between throwing up our hands and saying there is nothing we can do to address controversial speech because of the First Amendment, and excommunicating people from our communities because of what they have said or thought, are all the good ideas for how schools and communities can heal and grow and prosper together.

I really appreciate the opportunity to speak with you today.

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[18] Dwane Brown, "How One Man Convinced 200 Ku Klux Klan Members To Give Up Their Robes," *National Public Radio* (Aug. 20, 2017), https://www.npr.org/2017/08/20/544861933/how-oneman-convinced-200-ku-klux-klan-members-to-give-up-their-robes.

[19] Bryan Stevenson, Just Mercy: A story of justice and redemption (New York, Spiegel & Grau 2015).