UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

PARENTS DEFENDING EDUCATION
Plaintiff,

v.

CROTON-HARMON UNION FREE SCHOOL DISTRICT, *et al.*,
Defendants.

No. 7:24-cv-04485-CS

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Public-school students do not "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). Nor do schools get to follow students home, policing their speech at all hours of the day on their own personal devices. *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187-94 (2021). Because "America's public schools are the nurseries of democracy," students must be free to express their opinions, even if those views are "unpopular." *Id.* at 190. Protecting speech in public schools "ensur[es] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.* School officials thus can neither "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" nor force students "to confess by word or act their faith therein." *W.V. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Despite these well-established rules, the Croton-Harmon Union Free School District has enacted a series of speech codes that punish students for their protected speech. These rules and regulations restrain, deter, suppress, and punish speech about the political and social issues of the day. They disregard decades of precedent and violate the First and Fourteenth Amendments.

Parents Defending Education, a membership organization whose members include parents with children in District schools, seeks a preliminary injunction against these policies. The children of PDE's members want to engage in speech that is arguably prohibited by the District's policies, but they refrain because they fear the repercussions. Because these policies are so clearly unlawful and are chilling speech now, they should be quickly enjoined—lest whole classes of students graduate without ever getting to fully exercise their constitutional rights.

But binding yet erroneous Second Circuit precedent requires this Court to deny PDE's motion and dismiss its case. Under *Do No Harm v. Pfizer*, this Court must dismiss this case for lack of Article

III standing because PDE moved for a preliminary injunction while identifying its standing members with pseudonyms, rather than using their legal names. 96 F.4th 106 (2d Cir. 2024), *pet. for reh'g en banc pending*. Independently, under *Aguayo v. Richardson*, this Court must dismiss PDE's complaint for lack of statutory standing because the Second Circuit bans associational standing under 42 U.S.C. §1983. 473 F.2d 1090 (2d Cir. 1973).

If not for this binding precedent, a preliminary injunction would be warranted. PDE would likely succeed on the merits of its claims because the challenged policies violate the First and Fourteenth Amendments. As a result, PDE would necessarily satisfy the remaining preliminary-injunction criteria. Still, under *Pfizer* and *Aguayo*, this Court must deny the preliminary-injunction motion and dismiss the case. PDE asks the Court to do so promptly, so PDE can challenge these precedents on appeal.

BACKGROUND

I. The First Amendment and Public Schools

The framers designed the Free Speech Clause to "protect the 'freedom to think as you will and to speak as you think.'" *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023). The First Amendment thus "protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief." *Id.* at 586 (cleaned up). The government also "may not compel a person to speak its own preferred messages." *Id.*

Students have First Amendment rights too, and they do not "shed" those rights "at the schoolhouse gate." *Tinker*, 393 U.S. at 506. America's "public schools are the nurseries of democracy," and "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190.

Given these bedrock principles, the Supreme Court has recognized only four "specific categories of student speech that schools may regulate in certain circumstances," *id.* at 187:

> (1) "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds," *id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986));
>
> (2) "speech, uttered during a class trip, that promotes 'illegal drug use,'" *id.* at 187-88 (quoting *Morse v. Frederick*, 551 U.S. 393, 408 (2007));
>
> (3) "speech that others may reasonably perceive as 'bearing the imprimatur of the school,' such as that appearing in a school-sponsored newspaper," *id.* at 188 (alteration omitted) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)); and
>
> (4) on-campus and some off-campus speech that "'materially disrupts classwork or involves substantial disorder or invasion of the rights of others,'" *id.* (quoting *Tinker*, 393 U.S. at 513).

Importantly, the fourth category requires schools to meet a "demanding standard." *Id.* at 193. *Tinker* "places the burden of justifying student-speech restrictions squarely on school officials." *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022); *accord Trachtman v. Anker*, 563 F.2d 512, 516-17 (2d Cir. 1977). To justify barring speech, the school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. There's "no generalized hurt feelings defense to a high school's violation of the First Amendment rights of its students." *Jacob*, 37 F.4th at 426 (cleaned up). Instead, the school must "reasonably forecast" that the speech at issue will "cause material and substantial disruption to schoolwork and school discipline." *Barr v. Lafon*, 538 F.3d 554, 565 (6th Cir. 2008).

But even if a school policy satisfies *Tinker*, it can still violate the First Amendment. A school cannot engage in "viewpoint discrimination." *Id.* at 571; *accord Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005). It cannot compel speech. *Barnette*, 319 U.S. at 642. And it cannot draft overbroad policies that violate the First Amendment in a "substantial" number of

applications, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-16 (3d Cir. 2001) (Alito, J.), or that are unconstitutionally vague, *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668-69 (8th Cir. 2023).

Despite these well-established principles, schools often seek to silence controversial student expression. Speech codes punish students for unpopular speech under rules against "harassment," "bullying," "hate speech," or "incivility"—categories so broad that officials can use them to ban speech based on one's firmly held views, including religious views, or to compel speech contrary to such views. When speech codes impose vague, overbroad, or viewpoint-based restrictions on speech, they are unconstitutional.

Despite the Constitution, schools are increasingly adopting speech codes regarding controversial topics, such as gender identity, race, religion, and morality. For example, a student was forced to change because he was wearing a shirt that said, "There are only two genders." Ex. I. Other students have been reprimanded for wearing clothes that said, "Let's Go Brandon," Ex. J, for promoting the view "All Lives Matter," Ex. K, or for other conservative messages, *e.g.*, Ex. L ("Don't Tread on Me" patch); Ex. M (Trump MAGA apparel); Ex. N (Trump 2020 flag); Ex. O (pro-life sign); Ex. P (MAGA sign).

II. The District's Speech Codes

Despite students' fundamental rights, the District has adopted some of the most aggressive speech codes in the country. The policies are designed to punish disfavored speech on controversial subjects, such as gender identity and race. Together, Policies 0110, 0110-R, 0115, 115-R, 0115-E, 5300, 4526, and 4526-R, *see* Exs. A-H, discriminate against disfavored speech without sufficient justification. They are also overbroad, applying on and off campus.

Policies 0110 and 0110-R: These policies prohibit "sexual" and "gender-based" harassment. Prohibited "harassment" includes "unwelcome" "conduct or communication" that:

> "is directed at an individual because of that individual's sex, gender, or sexual orientation"; and

> "has the purpose *or* effect of substantially or unreasonably interfering with an employee's work performance or a student's academic performance or participation in school-sponsored activities, or creating an intimidating, hostile or offensive working or educational environment, even if the complaining individual is not the intended target of the conduct or communication."

Ex. B at 1 (emphasis added); *accord* Ex. A at 1-2. Activity is "'unwelcome' if the student did not request or invite it and regarded the conduct as undesirable or offensive." Ex. B at 2.

"Gender-based harassment," in particular, "means verbal, non-verbal or physical aggression, intimidation or hostility that is based on actual or perceived gender identity." Ex. B at 1.

The policy further prohibits other "[u]nacceptable [c]onduct," which includes:

> "unwelcome and offensive name calling or profanity that is … based on sexual stereotypes or sexual orientation, gender identity or expression";
>
> "hostile actions taken against an individual because of that person's sex, sexual orientation, gender identity or transgender status, such as … bullying, yelling, or name calling; or otherwise interfering with that person's ability to work or participate in school functions and activities"; or
>
> "any unwelcome behavior based on sexual stereotypes and attitudes that is offensive, degrading, derogatory, intimidating, or demeaning," including "disparaging remarks, slurs, jokes about or aggression toward an individual."

Ex. B at 1-2. To determine whether these prohibitions are met, the District "evaluat[es] the totality of the circumstances." Ex. B at 3.

Policies 0115, 0115-R, and 0115-E: These policies prohibit "'[h]arassment,'" which is defined as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that

> (a) "has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits within the school setting, or mental, emotional or physical well-being";
>
> (b) "reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student"; or
>
> (c) "reasonably causes or would reasonably be expected to cause a student to fear for their physical safety."

Ex. C at 1; *accord* Ex. D at 1-2. Prohibited harassment covers conduct "on school property" and even conduct "off school property" if the conduct "create[s] or foreseeably" "would create a risk of substantial disruption within the school environment" or "would adversely affect the educational

performance, opportunities or benefits within the school setting, or mental, emotional or physical well-being of any individual or group of individuals." Ex. C at 1-2; Ex. D at 2. Harassment includes "verbal … actions" and "may be based on any characteristic," including "race," "national origin," "ethnic group," "religion," "sex," "sexual orientation," or "gender identity." Ex. D at 2-3; *accord* Ex. C at 2.

Policy 5300 (Student Code of Conduct): The Code contains many overbroad speech restrictions. Examples of prohibited conduct include "Defamation," "Harassment," "Intimidation," "Bullying," and "Using … abusive language or gestures." Ex. F at 15-16.

- "Defamation" includes "making false or unprivileged statements or representations about an individual or identifiable group of individuals that harm the reputation of the person or the identifiable group by demeaning them." Ex. F at 15.
- "Harassment" and "Bullying" include "a sufficiently severe action or a persistent, pervasive pattern of actions or statements directed at an identifiable individual or group which are intended to be or which a reasonable person would perceive as hostile, ridiculing or demeaning." The conduct includes "harassment based on" characteristics, such as sex, gender identity, race, national origin, and "any other status protected by law." Ex. F at 16.
- "Intimidation" includes "engaging in actions or statements that put an individual in fear of bodily harm." Ex. F at 16.

Policies 4526, 4526-R, and 5300 (Acceptable Use Policies): Policy 5300 prohibits "Computer/electronic communications misuse." Ex. F at 14-15. Such misuses include violating "the District's acceptable use policy" in Policies 4526 and 4526-R. Ex. F at 14. The prohibition extends to "misuse off-campus," and includes "using such means of communication to threaten, harass, or annoy school personnel and/or other students, sending 'hate mail,' or creating messages or documents of … [an] inflammatory nature." Ex. F at 14-15.

Policy 4526 also prohibits using a school or personal electronic device on the District's network in "[s]upport or opposition for ballot measures, candidates and any other political activity." Ex. G at 2. And it prohibits using such devices for "[c]yberbullying, hate mail, defamation, harassment of

any kind, discriminatory jokes and remarks, or any communication that could reasonably be construed as racist, sexist, abusive or harassing to others." *Id.*

Policy 4526-R provides a non-exhaustive list of "prohibited behaviors" on the District's devices, Internet, or a school account, including "[s]ending hate mail," "making discriminatory remarks," "[u]sing the Internet to harass" others, "[e]ngaging in use with the purpose to cause others personal humiliation or embarrassment," and using "abusive" language in private or public messages." Ex. H at 1-2.

III. Parents Defending Education and This Litigation

PDE is a nationwide, grassroots membership organization whose members include parents, students, and other concerned citizens. Neily Decl. ¶3. PDE's mission is to prevent—through advocacy, disclosure, and, if necessary, litigation—the politicization of K-12 education, including schools' attempts to coopt parental rights or silence students. *Id.* PDE has members in the District who are harmed by the policies, including Parents A-C. *See id.* ¶¶10-12.

The children of Parents A-C (Students) attend District schools. Parent A Decl. ¶2; Parent B Decl. ¶2; Parent C Decl. ¶¶2, 4. The Students each have "views that are unpopular, controversial, and in the minority at their schools, in the District," and in their community. Parent A Decl. ¶10; Parent B Decl. ¶9; Parent C Decl. ¶7. For example, Parent B's children believe that "sex is immutable," "the government should enforce our immigration laws against people who are here illegally," and "support for Palestine is often animated by hatred against Jews." Parent B Decl. ¶¶10, 12. And the Students want "to use pronouns that are consistent with a teacher's or classmate's biological sex, rather than their 'preferred pronouns.'" Parent B Decl. ¶11; *e.g.*, Parent A Decl. ¶¶4, 11-12; Parent C Decl. ¶¶8-9.

When issues involving these controversial topics arise, the Students want to state their opposing beliefs, "point out the flaws in their [peers'] arguments[,] and convince them to change their minds." *E.g.*, Parent A Decl. ¶14; Parent B Decl. ¶14; Parent C Decl. ¶12. The Students want to "talk

directly" and "speak frequently and repeatedly on these issues," including through electronic communications. *E.g.*, Parent A Decl. ¶14; Parent B Decl. ¶14.

But under the policies, the Students can be punished merely for expressing their controversial opinions. Because of the policies, the Students are "reluctant to openly express [their] opinions or have these conversations." Parent B Decl. ¶15; *e.g.*, Parent A Decl. ¶¶15-17; Parent C Decl. ¶¶13-14. They "do not fully express themselves or talk about certain issues" in class, during school activities, and even off campus "because they fear that sharing their beliefs will be considered 'harassment'" or otherwise a violation of school policies. Parent B Decl. ¶16; *e.g.*, Parent A Decl. ¶¶15-17.

The Students are in school now or soon returning from their summer break. These policies chill their constitutionally protected expression every day they're in force, and some may graduate without ever getting to attend school without them. PDE thus moves for a preliminary injunction, as it has done in similar cases. *E.g.*, *Linn Mar*, 83 F.4th 658; *PDE v. Olentangy Loc. Sch. Dist.*, 684 F. Supp. 3d 684 (S.D. Ohio 2023); *PDE v. Wellesley Pub. Schs.*, No. 1:21-cv-11709 (D. Mass.). But unlike every other circuit in the country, the Second Circuit makes that relief impossible.

ARGUMENT

A plaintiff is entitled to a preliminary injunction if it can satisfy four factors: it's "likely to succeed on the merits," it's "likely to suffer irreparable harm in the absence of preliminary relief," the "balance of equities tips in [its] favor," and "an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *accord A.H. ex rel. Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021). In free-speech cases, the first factor is decisive. When a policy likely violates the First and Fourteenth Amendments, the remaining factors necessarily favor a preliminary injunction. *E.g.*, *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); *Hester*, 985 F.3d at 184; *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020). Here, if not for the Second Circuit's binding but erroneous precedent, PDE would satisfy all the preliminary-injunction criteria.

I. PDE would be likely to succeed on the merits, but for binding and erroneous Second Circuit precedent.

Though PDE would be entitled to a preliminary injunction under a correct reading of the law, this Court must deny its motion and dismiss its case. Two binding but wrong Second Circuit opinions dictate that result: *Do No Harm v. Pfizer* and *Aguayo v. Richardson*. This Court must deny this motion and dismiss this case under those precedents, which will then allow PDE to challenge them on appeal. If those precedents are overruled, then PDE will satisfy the remaining criteria for a preliminary injunction.

A. Binding circuit precedent forecloses PDE's success on the merits.

Because of two Second Circuit precedents, PDE cannot satisfy the likelihood-of-success factor for a preliminary injunction.

First, under *Pfizer*, this Court must rule that PDE lacks Article III standing and dismiss its entire case without prejudice. *Pfizer* holds that an association loses Article III standing if it moves for a preliminary injunction without disclosing its members' real names. 96 F.4th at 118-19. Here, PDE moves for a preliminary injunction, and it refers to its members only with pseudonyms (Parent A, Parent B, and Parent C). So this Court "*cannot* consider the merits of the preliminary injunction motion and should dismiss the action in its entirety." *Id.* at 120.

To be sure, this case is not entirely like *Pfizer*. Standing there turned on whether the members were "able and ready" to apply to the challenged program, *id.* at 113, while standing here turns on whether the Students' speech is chilled by the challenged policies. The *Pfizer* court thought that, unless those members disclosed their real names, they were not "sincer[e]" about their willingness to apply. *Id.* at 116. But anonymity is entirely sincere when the injury is chilled speech; revealing the Students' identities here would essentially make them *speak* by publicly connecting them to their controversial views, risking the very punishment they're trying to avoid under these policies. Unlike the adults in *Pfizer*, moreover, the Students here are minors. The Federal Rules *require* that minors' real names not

be disclosed. *See* Fed. R. Civ. P. 5.2(a). Because exposing parents' identities also exposes their children's identities, Parents A-C would have a right to use pseudonyms even if they had brought this case themselves. *See, e.g.*, *P.M. v. Evans-Brant Cent. Sch. Dist.*, 2008 WL 4379490, at *3 (W.D.N.Y. Sept. 22). *Pfizer* also leaves open whether an association can use pseudonyms, even if it doesn't disclose the members' true identities to the other side, if it discloses their real names to the court *in camera*. *See* 96 F.4th at 115-19. PDE would consider that option—so long as this Court ordered it, PDE's members consented, and this Court ruled (before disclosure) that neither the District nor the public would get the names.

But these distinctions do not seem controlling under *Pfizer*. While this case involves different standing theories and members, the rule from *Pfizer* is unyielding: The Court "h[e]ld that an association must identify by name at least one injured member for purposes of establishing Article III standing." *Id.* at 118. That "requirement," "rule," and "necessity" has no room for exceptions based on the nature of the standing member or that member's injuries. *Id.* at 114-16; *accord id.* at 117-18 ("an association must name its injured members to establish Article III standing"); *id.* at 115 ("an association … must identify at least one [specific member] by name"). As for *in camera* review, the logic of *Pfizer* appears to foreclose this option too. Disclosing the names of PDE's members *in camera* would give this Court no information about their standing. From their names alone, this Court couldn't tell whether the parents' children's speech is chilled by the challenged policies, or even whether their children *attend* school in the District. Nor is it clear how a top-secret disclosure to the Court would prove anything about Parents A-C's "sincerity." *Id.* at 116.

Respectfully, *Pfizer* is wrong. Its ban on pseudonyms splits, at least, with the Tenth, Eleventh, and D.C. Circuits. *Speech First v. Shrum*, 92 F.4th 947, 949-50 (10th Cir. 2024); *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, --- F.4th ----, 2024 WL 2812981, at *4-5 (11th Cir. June 3); *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 592-94 (D.C. Cir. 2022). It misreads Supreme Court cases that

didn't involve pseudonyms and contradicts high-profile cases that allowed pseudonyms. *E.g.*, *SFFA v. Harvard*, 600 U.S. 181 (2023).

But until *Pfizer* is overruled by the Second Circuit en banc or the Supreme Court, this Court must follow it. And that decision requires dismissing PDE's complaint "'in its entirety'" without prejudice, even sua sponte. *Pfizer*, 96 F.4th at 120.

Second, even if this Court could proceed under *Pfizer*, it would still have to dismiss PDE's complaint under *Aguayo*. PDE is suing under §1983 as a representative of its members, not on its own behalf. But a line of Second Circuit precedent starting with *Aguayo* bars associational standing under §1983. *Aguayo* stated that neither the "language" nor the "history" of §1983 suggested that "an organization may sue under the Civil Rights Act for the violation of rights of members." 473 F.2d at 1099; *accord Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011) ("It is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. §1983."); *League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Sup'rs*, 737 F.2d 155, 160-61 (2d Cir. 1984) (similar). Despite "'a raft of Supreme Court precedent'" letting associations sue under §1983, this Court has felt "bound" to continue following *Aguayo* under the prior-panel-precedent rule. *Nnebe*, 644 F.3d at 156 & n.5; *accord Knife Rts., Inc. v. Vance*, 802 F.3d 377, 387-88 & n.9 (2d Cir. 2015) (same); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 123 (2d Cir. 2017) (Jacobs, J., dissenting) ("This Circuit has adhered to *Aguayo* without ever expressly considering the impact of" later Supreme Court precedents.).

Aguayo is plainly incorrect. It admits that associational standing is okay under other statutes but insists that §1983 is different without explaining why. *See* 473 F.2d at 1099-100. No textual or historical reason exists. Many landmark Supreme Court decisions involved associations bringing constitutional claims under §1983. *See, e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 669 & n.6 (1993); *Minn. Voters Alliance v. Mansky*, 585 U.S. 1 (2018); *NIFLA v. Becerra*,

585 U.S. 755 (2018); *Warth v. Seldin*, 422 U.S. 490 (1975); *SFFA*, 600 U.S. 181 (§1983 for University of North Carolina); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). And every other circuit allows associations to sue under §1983 on behalf of their members. *See Centro de la Comunidad*, 868 F.3d at 123 (Jacobs, J., dissenting) (collecting cases).*

Though *Aguayo* contains no clear reasoning, the Second Circuit has read it to rest on the assumption that §1983 is unique because "the rights it secures" are "personal," *League of Women Voters*, 737 F.2d at 160; but that reasoning is no better. Section 1983 does not secure "any substantive rights at all"; it is a "cause of action" for violations of other constitutional and statutory rights. *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 617-18 (1979); *accord id.* at 617 ("one cannot go into court and claim a 'violation of §1983'—for §1983 by itself does not protect anyone against anything"). While those underlying rights are personal, the whole point of associational standing is that the association is suing as a representative to assert the rights "of its members." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977); *accord SFFA*, 600 U.S. at 200 ("the three-part test for organizational standing … asks whether an organization's *members* have standing"). The association can sue if one of its members could have sued, *Hunt*, 432 U.S. at 343, and no one doubts that individuals can sue under §1983. Put differently, under the associational-standing doctrine, courts do not ask whether the *association* has statutory standing; they ask whether the association's *members* do. *See, e.g.*, *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (trade association could sue because its "members" fell within the

* *See also, e.g.*, *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos.*, 89 F.4th 46 (1st Cir. 2023); *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 274-75 (D.N.J. 2003), 390 F.3d 219, 228 n.7 (3d Cir. 2004) (independently finding standing), 547 U.S. 47, 52 n.2 (2006) (agreeing that "FAIR ha[d] standing"); *Speech First v. Sands*, 69 F.4th 184, 190 n.3 (4th Cir. 2023), *gvr'd*, 144 S.Ct. 675 (2024); *Speech First v. Fenves*, 979 F.3d 319 (5th Cir. 2020); *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004); *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023); *ACLU of Nev. v. Heller*, 378 F.3d 979, 983 (9th Cir. 2004); *Speech First v. Shrum*, 92 F.4th 947 (10th Cir. 2024); *Speech First v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022); *Metro. Wash. Chapter, Associated Builders & Contractors, Inc. v. D.C.*, 62 F.4th 567 (D.C. Cir. 2023).

statute's zone of interests); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 557 (6th Cir. 2021) (NAACP could sue under §1983 to vindicate a member's rights because "[t]here is no prudential standing bar when member-based organizations advocate for the rights of their members"). So the notion that associations cannot sue under §1983 because the rights it protects are "personal" is a non sequitur.

Thus, even without *Pfizer*, this line of cases would require denying PDE's motion and dismissing its complaint. (Dismissal would be warranted because this legal error also appears in PDE's complaint, and no amendment to the pleadings could cure it. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 910, 912-13 (D.C. Cir. 2015); *Cortec Indus. v. Sum Holding L.P.*, 949 F.2d 42, 50 (2d Cir. 1991).) Because *Pfizer* involves Article III jurisdiction, this Court must dismiss on that rationale first. *See Pfizer*, 96 F.4th at 121 n.9; *All. for Env't Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 87 (2d Cir. 2006). But it can alternatively explain that, even without *Pfizer*, it would dismiss PDE's complaint under *Aguayo*. *See, e.g.*, *Animal Welfare Inst. v. Vilsack*, 2022 WL 16553395, at *9 (W.D.N.Y. Oct. 31) ("Even assuming, *arguendo*, that Plaintiffs had satisfied their burden of demonstrating Article III standing, their claims would fail on the merits."); *Palmieri v. Town of Babylon*, 2006 WL 1155162, at *6 (E.D.N.Y. Jan. 6) ("the Court does not believe Plaintiff has standing to bring his due process claim. However, for completeness, the Court shall address the merits"), *aff'd*, 277 F. App'x 72 (2d Cir. 2008). That ruling will allow PDE to challenge *Aguayo* on appeal as well—without a pointless trip back down to this Court, should the Second Circuit vacate, overrule, or narrow *Pfizer*.

B. If not for these erroneous precedents, PDE would likely succeed on the merits.

PDE likely has associational standing to challenge the policies because at least one member has standing in the member's own right, this suit is germane to PDE's mission, and no member participation is necessary. PDE's claims are also likely to succeed because the policies are overbroad, viewpoint-based, and vague.

1. PDE likely has Article III standing to challenge the policies.

An association has standing when (1) "its members would otherwise have standing to sue in their own right," (2) "the interests it seeks to protect are germane to the organization's purpose," and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Because standing "'must be supported … with the manner and degree of evidence required at the successive stages of the litigation,'" a plaintiff must show "[a]t the preliminary injunction stage … only that each element of standing is likely." *Fenves*, 979 F.3d at 329-30; *but see Pfizer*, 96 F.4th at 119-21. PDE meets all three requirements from *Hunt*.

PDE easily meets the second and third requirements. *See Olentangy*, 684 F. Supp. 3d at 695 n.1. The claims here are in the heartland of PDE's mission, *e.g.*, Neily Decl. ¶3, and the suit does not require the participation of its members because PDE seeks injunctive relief, *see, e.g.*, *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004); *Red River Freethinkers v. Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012); *Fenves*, 979 F.3d at 330 n.5.

PDE also satisfies the first *Hunt* requirement: At least one of its standing members would have standing to sue in the member's own right. *Linn Mar*, 83 F.4th at 666. To establish standing, a member must show injury, causation, and redressability. *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 136 (2d Cir. 2023). To show injury, a member must show (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," (2) that the intended conduct is "arguably … proscribed by" the challenged policies, and (3) that "there exists a credible threat of" enforcement of the challenged policies. *SBA List v. Driehaus*, 573 U.S. 149, 159 (2014); *accord Vitagliano*, 71 F.4th at 136. Standing is "not hard to sustain" in this context. *Fenves*, 979 F.3d at 331. It is sustained here.

Injury: The Students' desired speech is arguably affected with a constitutional interest. Their speech reflects core moral, political, and philosophical beliefs. *See, e.g.*, *Linn Mar*, 83 F.4th at 666-67 (speech on gender identity "'concerns political speech' and is 'arguably affected with a constitutional

interest'"); *Fenves*, 979 F.3d at 332 (speech on race, religion, abortion, gun rights, immigration, etc. was "political speech" that "is certainly affected with a constitutional interest" (cleaned up)); *Olentangy*, 684 F. Supp. 3d at 695 (speech on gender identity "arguably" constitutionally protected).

The speech is "arguably proscribed" by the policies. *Vitagliano*, 71 F.4th at 138; *Picard v. Magliano*, 42 F.4th 89, 98 (2d Cir. 2022). The "categories of speech arguably covered" by the policies are incredibly "broad." *Fenves*, 979 F.3d at 332. The members' speech is controversial, touching on gender identity, illegal immigration, DEI, and other topics of public concern. Their speech would be "directed at" an individual or group because of their protected status (*e.g.*, "race," "sexual orientation," "gender identity"). *See* Ex. B at 1-2; Ex. D at 2; Ex. F at 16; *see also, e.g.*, Parent A Decl. ¶¶10-12. Their speech arguably would, among other things, "unreasonably interfer[e]" with a student's education, "adversely affect" a student, or "cause … emotional harm." *E.g.*, Ex. B at 1-2; Ex. D at 2; Ex. F at 16; *see Cartwright*, 32 F.4th at 1121; *Linn Mar*, 83 F.4th at 667. Their speech is also one that a reasonable person arguably would find "unwelcome," "intimidating," "offensive," "hostile," "inflammatory," "hate[ful]," "ridiculing," or "demeaning." *E.g.*, Ex. B at 1-2; Ex. D at 2; Ex. F at 15-16.

Because the policies arguably cover its members' speech, PDE has standing if the policies are "not moribund." *Vitagliano*, 71 F.4th at 138. The credible-threat standard "is a 'quite forgiving' requirement that sets up only a 'low threshold' for a plaintiff to surmount." *Antonyuk v. Chiumento*, 89 F.4th 271, 334 (2d Cir. 2023). It's a "well-established proposition that where a [policy] specifically proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Vitagliano*, 71 F.4th at 138 (cleaned up). Here, there is no "compelling contrary evidence" negating the strong presumption of a credible threat of enforcement. *Ostrewich v. Tatum*, 72 F.4th 94, 102 (5th Cir. 2023).

Causation and Redressability: PDE also shows causation and redressability. *See Linn Mar*, 83 F.4th at 667; *Olentangy*, 684 F. Supp. 3d at 696-98. "[P]otential enforcement of the challenged

policies caused [PDE's] members' self-censorship, and the injury could be redressed by enjoining enforcement of those policies." *Fenves*, 979 F.3d at 338 (cleaned up); *accord Vitagliano*, 71 F.4th at 140 (traceability and redressability satisfied by requested relief of injunction against enforcement of a law that violates free-speech rights).

Courts have concluded that PDE has shown standing to facially challenge materially similar policies for materially indistinguishable speech. *Linn Mar*, 83 F.4th at 666-67; *Olentangy*, 684 F. Supp. 3d at 696-98. If not for the erroneous Second Circuit precedent, the same would be true here.

2. The policies are likely facially unconstitutional.

To pass constitutional muster, the District's speech regulations must, at a minimum, overcome four obstacles: they must be viewpoint neutral; they must not compel speech; they must not be overbroad; and they must not be void for vagueness. The policies do none of the four.

a. The policies are viewpoint-discriminatory.

The Supreme Court has made clear that restrictions "based on viewpoint are prohibited." *Mansky*, 585 U.S. at 11; *see, e.g.*, *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019); *Cartwright*, 32 F.4th at 1126 ("Restrictions … based on viewpoint are prohibited, seemingly as a per se matter." (cleaned up)). This per se prohibition on viewpoint discrimination applies no differently in the public-school setting. *Barr*, 538 F.3d at 571; *see Peck*, 426 F.3d at 633 ("viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical interests"); *Collins v. Putt*, 979 F.3d 128, 135 (2d Cir. 2020) (same). So even if a school's regulation is "consistent with … the *Tinker* standard," it will still be unconstitutional if it fails the Supreme Court's "prohibition on viewpoint discrimination." *Barr*, 538 F.3d at 571; *e.g.*, *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004); *Cartwright*, 32 F.4th at 1127 n.6; *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001).

The challenged policies discriminate based on viewpoint for at least two reasons.

First, the policies do not bar "harassment" alone; they bar "harassment" based on various classifications (*e.g.*, race, sex, and gender identity). *E.g.*, Ex. B at 1-2; Ex. D at 2; Ex. F at 16. By barring speech based on some classes and not others, the District "'disapprov[es] of a subset of messages it finds offensive.'" *Iancu*, 588 U.S. at 393. It "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). The government can't license one side to speak freely while muzzling the other. *See Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) ("[A] school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality.").

Second, the policies bar speech that is "unwelcome," "intimidating," "offensive," "hostile," "inflammatory," "hate[ful]," "ridiculing," or "demeaning." But "[g]iving offense is a viewpoint." *Matal v. Tam*, 582 U.S. 218, 243 (2017) (plurality op.); *see Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (Alito, J.) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint."). Policies that regulate offensive speech, like the policies challenged here, impose "'viewpoint-discriminatory restrictions.'" *Saxe*, 240 F.3d at 206. Courts have long recognized that, when harassment policies reach speech, they necessarily impose "viewpoint-discriminatory restrictions." *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995); *accord, e.g.*, *Wollschlaeger v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) (same); *DeJohn v. Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008) (same).

In short, "a [policy] disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Iancu*, 488 U.S. at 396. The challenged policies do that very thing. They are thus facially unconstitutional, full stop. *See id.* at 399 (concluding that it is unnecessary to do overbreadth analysis because a "finding of viewpoint bias end[s] the matter").

b. The policies unconstitutionally compel speech.

The policies also unconstitutionally compel speech because they force students to alter their speech or use other students' "preferred pronouns"—despite the Students' firmly held beliefs that sex is immutable. The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. AFSCME*, 585 U.S. 878, 892 (2018). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can 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.

Here, Parents A-C and their children believe that biological sex is immutable. *E.g.*, Parent A Decl. ¶¶4, 10-12; Parent B Decl. ¶¶4, 9-12; Parent C Decl. ¶¶5, 8-10. They do not want to be forced to "affirm" that a biologically male student is female—or vice versa—or that another student is neither male nor female because doing so would contradict their deeply held beliefs. Parent A Decl. ¶11; Parent B Decl. ¶10; Parent C Decl. ¶8. Yet that is exactly what the policies require. That compulsion violates the First Amendment.

The Sixth Circuit's decision in *Meriwether v. Hartop* is directly on point. 992 F.3d 492 (6th Cir. 2021). There, the Sixth Circuit held that a gender-identity policy requiring a university professor to affirm a student's gender identity, even if inconsistent with the student's biological sex, violated the professor's First Amendment rights. *Id.* at 503. "Pronouns can and do convey a powerful message implicating a sensitive topic of public concern" and by requiring a person to use a "preferred pronoun," the school is compelling a person "to communicate a messag[e] [that] [p]eople can have a gender identity inconsistent with their sex at birth." *Id.* at 507-08. A policy that compelled speech on such a pivotal issue is viewpoint-based and violates the First Amendment. *Id.* at 511-12; *accord Vlaming v. W. Point Sch. Bd.*, 302 Va. 504, 563-74 (2023) (concluding that a preferred-pronoun policy unconstitutionally compels speech). So too here. As in *Meriwether*, the District requires affirming another's

gender identity even when inconsistent with the person's biological sex. And under the logic of *Meriwether*, the policies compel speech and are viewpoint-based.

That compulsion dooms the policies. "No government … may affect a speaker's message by forcing her to accommodate other views; no government may alter the expressive content of her message; and no government may interfere with her desired message." *303 Creative*, 600 U.S. at 596 (cleaned up). Including K-12 schools. After all, in the Supreme Court's landmark decision in *Barnette*, the Court held that a school could not compel a student to say the Pledge of Allegiance in class. 319 U.S. at 642. There, even strong government interests—like promoting "national unity," "patriotism," and "national security" during World War II—could not justify compelling a student "to utter what is not in his mind." *Id.* at 634, 640-41. The challenged policies thus trample over the First Amendment.

c. The policies are unconstitutionally overbroad.

"In the First Amendment context," courts recognize a special kind of facial challenge based on overbreadth. *Ams. for Prosperity Found. v. Bonta (AFPF)*, 594 U.S. 595, 615 (2021). A regulation is facially invalid if "'a substantial number of its applications are unconstitutional, judged in relation to the [policy's] plainly legitimate sweep.'" *Id.* The overbreadth doctrine applies no differently in the K-12 context. If a school policy is unconstitutional in a substantial number of applications, then the policy is overbroad. The policies here are.

All the policies are at least content-based. A policy "is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A policy can be content-based "on its face" or because of its "purpose and justification." *Id.* at 166. At a minimum, the policies are facially content-based. Their prohibitions hinge on the listener's response—whether the speech is "unwelcome," "hate[ful]," "demeaning," etc. *E.g.*, Ex. B at 1-2; Ex. D at 1-2; Ex. F at 15-16; Ex. H at 1-3. It's well-established that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*,

505 U.S. 123, 134 (1992); *accord Saxe*, 240 F.3d at 209 (same); *Cartwright*, 32 F.4th at 1126 (policy content-based because it "imposes differential burdens upon speech on account of the topics discussed, and draws facial distinctions defining regulated speech by particular subject matter, when it prohibits speech about any of a long list of characteristics" (cleaned up)).

The policies also do not hew to *Tinker*'s line between protected and proscribable speech.

Policies 0110 and 0110-R: These policies prohibit speech with "the purpose *or* effect of substantially or unreasonably interfering with … a student's academic performance" or of "creating an intimidating, hostile or offensive … educational environment." Ex. B at 1-2 (emphasis added). The purpose-or-effect language is fatal. As then-Judge Alito explained, policies with this language "punis[h] not only speech that actually causes disruption, but also speech that merely intends to do so": "This ignores *Tinker*'s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it." *Saxe*, 240 F.3d at 216-17. And "by focusing on the speaker's motive rather than the effect of speech on the learning environment," the policies "appea[r] to sweep in those simple acts of teasing and name-calling that" the Supreme Court has "explicitly held were insufficient for liability" for harassment. *Id.* at 210-11 (cleaned up) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999)). But "even if the 'purpose' component is ignored," the policies' definition does not "necessarily ris[e] to the level of a substantial disruption under *Tinker*." *Id.* at 217. The policies prohibit "substantially *or unreasonably* interfering," Ex. B at 1 (emphasis added), when only "*substantial* interference" may satisfy the *Tinker* standard, 393 U.S. at 511 (emphasis added). And the policies' other criterion of "creating an intimidating, hostile or offensive … educational environment" fares no better. *Id.* This "'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness," so "it could conceivably be applied to cover any speech about [the] enumerated personal characteristics the content of which offends someone." *Saxe*, 240 F.3d at 217. That the policies don't care whether "the complaining individual is … the intended target" of the

speech exacerbates the policies' breadth. Ex. B at 1. So does the fact that the policies "emplo[y] a gestaltish 'totality of known circumstances' approach to determine whether particular speech" warrants discipline. *Cartwright*, 32 F.4th at 1125; Ex. B at 2-3. Policies 0110 and 0110-R are overbroad.

Policies 0115, 115-R, and 0115-E: These policies suffer from the same constitutional infirmities. The policies prohibit speech that merely "cause[s] … emotional harm to a student." *E.g.*, Ex. C at 1. But schools can't prohibit speech that "'is merely offensive to some listener.'" *Linn Mar*, 83 F.4th at 667. There is no "generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students." *Zamecnik*, 636 F.3d at 877. Schools must regulate based on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. *Tinker* "requires a specific and significant fear of disruption, not just some remote apprehension or disturbance." *Saxe*, 240 F.3d at 211. The policies, however, do not require "any threshold showing of severity or pervasiveness," so they "could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone." *Id.* at 217. Their prohibitions could include "much 'core' political," "religious," and philosophical speech, *id.*, given that the policies make clear that a violation can be "verbal … actions" about "any characteristic," Ex. D at 1-2. "Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights." *Saxe*, 240 F.3d at 217.

There's more. The policies proscribe speech that "has *or would have*" an effect on a student's education, Ex. C at 1 (emphasis added); Ex. D at 2 (same), but that means the District prohibits speech that does not affect any student. Nor do the policies require a "reasonable forecast" that the speech will cause substantial disorder. Ex. C at 1-2; Ex. D at 2. And like Policies 0110 and 0110-R, these policies prohibit "*unreasonabl[e]* interfer[ence]," Ex. C at 1 (emphasis added); Ex. D at 2, which again differs from *Tinker*'s "*substantial* interference," 393 U.S. at 511 (emphasis added).

Policies 5300, 4526, 4526-R: The Student Code of Conduct and the appropriate use policies have many speech restrictions—each overbroad. They prohibit speech that is merely "hostile," "degrading," "intimidating," "abusive," "hate[ful]," "discriminatory," "inflammatory," "ridiculing," or "demeaning." Ex. F at 3, 14-16; Ex. H at 2. While "non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause," there is "no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or [another characteristic]." *Saxe*, 240 F.3d at 206. The District's "[l]oosely worded anti-harassment" policies are thus overbroad because they could "conceivably be applied to cover any speech … the content of which offends someone." *Id.* at 207, 217. They "sweep in … simple acts of teasing and name-calling"—on top of political, religious, and philosophical speech. *Id.* at 211, 217. Plus, these terms (*e.g.*, "abusive," "hateful," "demeaning") are "amorphous" because their "application would likely vary from one student to another" and thus exacerbate the restrictions' breadth. *Cartwright*, 32 F.4th at 1121. At bottom, speech that "may offend is not cause for its prohibition, but rather the reason for its protection." *Saxe*, 240 F.3d at 210. "By prohibiting disparaging speech," the policies "strik[e] at the heart of moral and political discourse," the First Amendment's "core concern." *Id.* These unbounded policies are overbroad.

* * *

Finally, the policies are overbroad for another reason: They do not limit their reach to speech made on schoolgrounds or during school-sponsored activities. Policies 0115, 0115-R, and 0115-E, for example, cover "off school property" if the speech "create[s] or foreseeably" "would create a risk of substantial disruption within the school environment" or "would adversely affect the educational performance … or mental, emotional or physical well-being of any individual or group of individuals." Ex. C at 1-2; Ex. D at 1-2. Policies 0110 and 0110-R apply to speech "that occurs off school grounds … if there is some nexus or relationship between the conduct at issue and the district, including where

off-campus conduct … adversely affects the educative process." Ex. A at 1. And Policy 5300 applies to all "[o]ff-campus conduct … if there is a nexus or relationship between the conduct at issue and the district," such as "using electronic means to convey … derogatory … comments." Ex. F at 18.

But the District's ability to punish speech made off schoolgrounds is extremely limited. *See Mahanoy*, 594 U.S. at 189-90. "When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." *Id.* at 190. Especially where, as here, the policies cover opinions rather than speech targeted at a specific student. *See id.* at 188 ("serious or severe bullying or harassment targeting particular individuals"). For the same reasons the policies are overbroad as to speech on schoolgrounds, the policies are particularly overbroad because they prohibit speech off schoolgrounds.

Simply put, there is no First Amendment exception for "harassing" or "discriminatory" speech. *Saxe*, 240 F.3d at 209-10; *accord Linn Mar*, 83 F.4th at 667. Courts regularly find these types of far-reaching school policies to be unconstitutionally overbroad. *See, e.g.*, *Saxe*, 240 F.3d at 215-16 (high-school speech policy punishing "harassment" was overbroad because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech"); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 701-04 (W.D. Pa. 2003) (speech policy prohibiting "abusive," "inappropriate," and "offen[sive]" language was overbroad); *Smith ex rel. Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987, 990, 995 (E.D. Mich. 2003) (speech policy prohibiting "verbal assault" was overbroad because it allowed "curtailment of speech that questions the wisdom or judgment of school administrators and their policies, or challenges the viewpoints of [other] students"); *Westfield High School L.I.F.E. Club v. Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (school policy allowing only "responsible" speech was likely unconstitutional); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 259-60 (4th Cir. 2003) (policy forbidding students from wearing shirts that depicted weapons was overbroad

because there was no evidence the policy was necessary to prevent substantial disruption or invasion of rights of others). The same is true here.

d. Policy 4526 is unconstitutionally void for vagueness.

"A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Policy 4526 does both.

Policy 4526 prohibits speech regarding "[s]upport or opposition for ballot measures, candidates and any other political activity," Ex. G at 2, but the policy does not define "political," even though "the word can be expansive," *Mansky*, 585 U.S. at 17. The District provides no meaningful guidance about whether the ban applies to issue advocacy that is typically aligned with a certain party or whether it covers anything that anyone could deem political. These defects are fatal. "It is self-evident that an indeterminate prohibition carries with it the opportunity for abuse." *Id.* at 21 (cleaned up). And here the policy's vagueness "go[es] beyond close calls on borderline or fanciful cases." *Id.* Because the policy deprives the average student of "a reasonable opportunity to understand what conduct [the policy] prohibits," *Hill*, 530 U.S. at 732, the policy is likely unconstitutionally vague.

II. PDE satisfies the remaining criteria for a preliminary injunction.

"Consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Walsh*, 733 F.3d at 488; *New Hope Fam. Servs. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020) (same). And here it would be decisive. Because PDE has shown a likely constitutional violation (absent the erroneous Second Circuit precedent on standing and §1983), the remaining criteria are met.

Irreparable Harm: A "presumption of irreparable injury flows from a violation of constitutional rights." *Agudath*, 983 F.3d at 636 (cleaned up); *accord Barrett v. Maciol*, 2022 WL 130878, at *5 (N.D.N.Y. Jan. 14) ("'In the Second Circuit, it is well settled that an alleged constitutional violation

constitutes irreparable harm.'"). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Agudath*, 983 F.3d at 636. Especially so here, where the challenged policies are direct restrictions on speech, including political speech and other speech of public concern. *See Walsh*, 733 F.3d at 486-87.

Balance of Harms and Public Interest: The balance of harm and the public interest factors "'merge'" when, as here, the government "'is the opposing party.'" *Hartford Courant Co. v. Carroll*, 986 F.3d 211, 224 (2d Cir. 2021); *accord We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 295 (2d Cir. 2021). "'[S]ecuring First Amendment rights is in the public interest,'" so "all four requirements for a preliminary injunction have been met." *Hartford*, 986 F.3d at 224; *accord Robar v. Vill. of Potsdam Bd. of Trustees*, 490 F. Supp. 3d 546, 575 (N.D.N.Y. 2020).

Because PDE has "demonstrated a clear or substantial likelihood of success on the merits of [its] … First Amendment claim[s]," there is "little difficulty concluding that the remaining factors favor a preliminary injunction." *Hester*, 985 F.3d at 184. Thus, absent the erroneous Second Circuit precedent, PDE would likely prevail on its constitutional claim and thus readily meet the other requirements for a preliminary injunction. *Linn Mar*, 83 F.4th at 669.

CONCLUSION

This Court should grant PDE's motion for a preliminary injunction. But given *Pfizer* and *Aguayo*, this Court must deny PDE's motion and dismiss its complaint without prejudice.

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Respectfully submitted,

s/ J. Michael Connolly

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