

United States Court of Appeals for the Tenth Circuit

CHRISTINA AXSON-FLYNN, *Plaintiff/Appellant*

v.

XAN JOHNSON, SANDY SHOTWELL, SARAH SHIPPOBOTHAM, BARBARA SMITH, AND JOHN
DOES 1-20, *Defendants/Appellees*.

**Appeal from the United States District Court
for the District of Utah, No. 2:00-CV-00336
The Honorable Judge Tena Campbell**

OPENING BRIEF FOR APPELLANT

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Oral Argument Requested

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. It granted defendants' motion for summary judgment on August 3, 2001, finally disposing of all claims. App. 162. Plaintiff timely filed her notice of appeal on August 31, 2001. App. 163. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

- I. Whether the Free Speech Clause protects a public university student from being compelled to engage in the use of profane speech, in violation of her conscience, in the context of classroom acting exercises.
- II. Whether the Free Exercise Clause protects a public university student from being compelled to engage in the use of profane speech, in violation of her religious convictions, in the context of classroom acting exercises.
- III. Whether defendants' First Amendment violations are protected from challenge under the doctrine of "qualified immunity," where the illegality of their actions was well established by Supreme Court and Tenth Circuit precedent and plaintiff seeks equitable as well as monetary relief.

STATEMENT OF THE CASE

This case arises out of the University of Utah's insistence that a student enrolled in its acting degree program engage in the use of profane speech in the context of classroom acting exercises, in violation of her conscience and religious convictions. The district court granted summary judgment to defendants, reasoning that the First Amendment's protections against compelled speech are limited to cases involving the espousal of "ideological points of view," and that defendants had a "more than reasonable" interest in ensuring that graduates of its acting program are competent to take on roles involving the use of profane speech. That decision is contrary to precedent and should be reversed.

A. Christina Axson-Flynn

The plaintiff, Christina Axson-Flynn, is a practicing member of the Church of Jesus Christ of Latter-Day Saints ("LDS" or "Mormon" Church) who believes that her spiritual convictions must permeate every aspect of her life. See App. 35-36. Because of her faith, she is prohibited from using certain blasphemous and profane language: she may not use God's name "in vain" (*i.e.*, in a disrespectful way), and she may not say the expletive "f--k" (which she refers to as the "F-word"), without violating her conscience. Axson-Flynn has no objection to any

other forms of profanity, or to participating in acting dialogues in which others use the words that she is unwilling to say.

Axson-Flynn’s “refusal to use the words ‘God’ or ‘Christ’ as profanity is based on one of the Ten Commandments, which prohibits believers from taking ‘the name of the Lord thy God in vain.’” Op. 2; see *Exodus* 20:7; Book of Mormon, *Mosiah* 13:15.¹ Like the adherents of many religious traditions, she believes that saying God’s name in a disrespectful manner—even while acting—is blasphemous. Likewise, saying the “F-word” is “religiously offensive to her because she finds that it vulgarizes what [she], as a Mormon, believes is a sacred act, appropriate only within the bounds of marriage.” Op. 2; see *Hebrews* 13:4 (“Marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and the sexually immoral”); *Acts* 21:25 (warning against “fornication”); *1 Corinthians* 6:13, 18 (same); accord Book of Mormon, *Jacob* 3:12; *id.* *Helaman* 8:26. Axson-Flynn also feels compelled to heed the admonition of LDS church leaders that believers should avoid the use of profane language. App. 37.

Axson-Flynn’s understanding that it is possible to be a successful member of the acting profession without engaging in roles that involve the use of profanity is rooted in her upbringing. She is the daughter of two professional actors who have

¹ “Op.,” as used herein, refers to the district court’s summary judgment opinion.

made successful careers without performing such roles—her father, for example, has starred in productions ranging from TV’s “Touched by an Angel” to the movie “Footloose”—and she grew up “in theater and doing theater.” App. 32-33. However, although Axson-Flynn has wanted to be a professional actor all of her life, if faced with a conflict between her love of acting and her faith, her faith will always come first. App. 35-36, 85.

B. The University of Utah and the Actor Training Program (“ATP”)

The University of Utah (“University”) is a public university located in Salt Lake City, Utah. Its website boasts that it is “the most heterogenous * * * community in the state” (< http://www.utah.edu/newstudents/about/acad_excellence.html> (visited Feb. 20, 2002)), and presents the University as a place where the “right of free inquiry is zealously preserved” and “diversity is encouraged and respected.” < <http://www.admin.utah.edu/president/mission.html>> (visited Feb. 20, 2002).

The University offers numerous degree programs, including a four-year undergraduate Actor Training Program (“ATP”). The ATP is a well regarded drama school that prepares undergraduate students for professional acting careers. < <http://www.theatre.utah.edu/atp.html>> (visited Feb. 20, 2002); App. 87. Its curricular requirements are considered “state policies, written and developed

pursuant to state law, and subject to review for their conformity with * * * constitutional protections.” Op. 7 n.1 (citing Utah Code Ann. §§ 53B-16-101, -102 (1997)).

C. Axson-Flynn’s Audition for the ATP

Axson-Flynn applied to the ATP and was accepted in April 1998. Prior to her acceptance, she attended an audition for the program conducted by Barbara Smith, Sandra Shotwell, Jerry Gardner, and Sarah Shippobotham²—all drama instructors in the ATP (and all, with the exception of Gardner, defendants in this case)—where she performed two monologues. Op. 2.

Axson-Flynn was complimented on her performance of the monologues. App. 39. In addition, she was asked if there was anything she was “uncomfortable doing as an actor.” Op. 2; App. 40. She responded by informing the auditioners “that she would not take her clothes off, take the name of God or Christ in vain (*i.e.* us[e] those words as profanity), or say the word ‘f--k.’” Op. 2; App. 40. They in turn challenged Axson-Flynn concerning her reasons for refusing to use profanity, attempting to convince her that using such language is necessary to succeed as an actor. App. 41-43, 47. Axson-Flynn repeatedly stressed, however, that she would rather not be accepted into the program than be forced to use words that offended

² The record is not entirely clear whether Shippobotham was present at the audition.

her conscience. App. 44-45. Indeed, at the end of the audition, defendant Shotwell opined in reference to the language issue: “Well, see, it isn’t black and white, is it?” App. 44. But Axson-Flynn responded: “I guess it comes down to the individual actor. But as for myself, I will not say the F word, take the Lord’s name in vain, or take off my clothes.” *Ibid.* She was subsequently admitted to the program, and it was her understanding—based on the extended discussion at her audition—that her acceptance into the ATP was not conditioned upon her willingness to say God’s name disrespectfully or to use the “F-word.” App. 48.

D. Axson-Flynn Omits Offensive Language From In-Class Exercises

Axson-Flynn enrolled in the ATP in August 1998. In September, one of her instructors, defendant Smith, asked her to perform an in-class monologue (entitled “Friday”) that included two instances of “goddamn,” a word she had identified as objectionable at her audition. App. 50-51, 99. Consequently, Axson-Flynn omitted these two words and substituted appropriate language that conveyed a substantially similar meaning. Op. 3; App. 49-51. Smith did not notice the substitution, and Axson-Flynn “still received a high grade”—an “A”—on the performance. Op. 3; App. 51.

The next month, Smith again asked Axson-Flynn to perform a scene (called “The Quadrangle”) containing words she had made clear she was unable to say.³ App. 52. At this point, Axson-Flynn reiterated her objection to the language. Smith’s initial reaction was to ask Axson-Flynn why the same words had not caused a problem for her in “Friday.” When Axson-Flynn told Smith that she had altered the offensive words in that scene, Smith grew visibly angry and insisted that this behavior was “unacceptable” and “would have to change.” App. 53-54.

When Axson-Flynn reminded Smith that her conscience forbade her from saying “f-k” or using God’s name disrespectfully, Smith “pressed [her] even harder to use the language” and threatened her with a “zero” on the assignment (and a class grade of no better than “C”) if she refused to comply. Op. 3; App. 54. She further attempted to convince Axson-Flynn that “[y]ou can still be a good Mormon and say these words,” while informing her “that her grades would be lowered if she refused to comply with curricular requirements in the future.” Op. 3; App. 56. Ultimately, however, in the face of Axson-Flynn’s refusal to alter the position she had outlined at her audition, Smith allowed her to omit offensive language from her performance

³ App. 100-110 (“The Quadrangle” script); *id.* at 101 (“goddamn”), 103 (“goddamn” and “for christ sake”), 105 (“Jesus!” and “f-king”), 108 (“goddamn”), and 109 (“f-kin”).

of “The Quadrangle.” Once again, Axson-Flynn received a high grade for her presentation. App. 57-58.

At no point did Axson-Flynn ever request that she be excused from performing a role—even a role involving representation of conduct that she finds distasteful—or that the ATP otherwise alter its curriculum. Nor did she request that defendants alter any scenes or plays presented to the public, or that any other students omit (or be required to omit) offensive language from their performances. Axson-Flynn’s sole objection was to saying a handful of profane and blasphemous words that offend her conscience. For example, during her performance of “The Quadrangle,” another student sharing the stage with her used the very language she finds objectionable. Axson-Flynn had no problem with this, as she views the use of profane language as a matter of “the actor’s choice.” App. 59. As she explained at her deposition: “I wasn’t asking for the whole [ATP] to omit every personally offensive word to me. I was asking that I didn’t have to [use such words] in the classroom. * * * [T]he actor that was playing opposite me kept * * * all of his words * * * . And I was fine with that.” *Ibid.*

E. Defendants' Accommodation of Jeremy Rische

Despite the ATP's refusal to accommodate Axson-Flynn, the program "allowed a Jewish student to miss classes and practices on holy days without penalty" during the same period when she was enrolled there. Op. 11. In September 1998, Jeremy Rische—a classmate of Axson-Flynn's who enrolled when she did—informed Smith that he would need to skip a mandatory in-class improvisational exercise because of Yom Kippur, a Jewish holy day. App. 122-123. Smith had told the class that this particular exercise "couldn't be made up." *Ibid.*; accord App. 74 (noting that Smith told the class: "[Y]ou have got to be here, to perform on this day. There [are] no exceptions. You must be here."). Nonetheless, when Rische told her about his religious obligations on that day, Smith responded simply, "[O]kay, that's fine. I understand." App. 123. Rische was not penalized in any way for missing this exercise. App. 124.

The ATP again excused Rische from its curricular requirements during Yom Kippur in the following years. As a result of these accommodations, Rische was allowed to skip several important curricular activities: a play rehearsal; a test that had to be made up in a specially scheduled session with defendant Shotwell (director of the ATP); and a class that necessitated a "private coaching session" during which Shotwell reviewed the curricular material Rische had missed because of his religious

obligations. App. 124-129. At no time did any ATP official hesitate to grant Rische's requests, and—despite the additional time and effort his absences required on the part of defendants—he never suffered any adverse consequence as a result of his objection to complying with the ATP's mandatory participation requirements.

F. The ATP's Insistence That Axson-Flynn Engage in the Use of Profanity or Leave the Program

Despite the narrowness of her conscientious objection, the ease with which the University could accommodate it (by allowing substitution of alternative language), defendants' willingness to accommodate Rische, and the fact that her performance was otherwise acceptable, defendants ultimately demanded that Axson-Flynn either violate her conscience or leave the program. Op. 15 (“Defendants acknowledge that Plaintiff will be required to use the language that she finds objectionable as part of her curricular requirements as a student in the ATP”). She received high marks during her first semester in 1998, but throughout the remainder of that year and into 1999 the ATP faculty and administration became increasingly hostile to her position. Numerous university officials insisted that she “‘get over’ her objection” to using the handful of profane words that offend her conscience. Op. 2-3. And at Axson-Flynn's December 1998 semester-end review—ordinarily, an opportunity to discuss academic progress and share constructive criticism about the student's acting skills—defendants Smith, Shippobotham, and Shotwell used the allotted time to

“confront[] her about her refusal to use the language that she found offensive and [tell] her that she would ‘no longer be given an allowance on language.’” Op. 3. As in her earlier conversation with Smith, Axson-Flynn was told “you can still be a good Mormon” while engaging in the use of profanity, and admonished that she should “go talk to these other Mormon girls, and they can tell you how.” App. 71-72. At the conclusion of this meeting, defendants informed Axson-Flynn that she “would have to find another place to study acting if she did not modify her stance on the use of such language.” Op. 3; App. 65, 70.

Shortly after her review, Axson-Flynn requested a meeting with then-department chair Xan Johnson to discuss what had occurred. Johnson, however, simply informed her that he “supported the other Defendants’ position on the matter.” Op. 3. When Axson-Flynn asked Johnson whether the ATP’s position was legal, he assured her he would look into the matter and get back to her, but never did. App. 73, 75-76, 83.

After the new semester began in January 1999, Axson-Flynn had several more encounters with Shotwell and Smith, in which they reiterated their position on offensive language and continued to pressure Axson-Flynn to change her stance. Although Axson-Flynn had stayed in the Program in the hope that the ATP might become more flexible, Shotwell and Smith raised the topic numerous times over a

period of just a few days, again suggesting that if Axson-Flynn would only “talk[] to other people,” they would help her “get[] over that language thing.” App. 77-78.

Recognizing that she would not be permitted to complete the program, Axson-Flynn went to Shotwell’s office in a final attempt to resolve the matter. Axson-Flynn stated: “[T]his is what I understand. If I do not—and this is what you said—modify my values by the end of the semester, I’m going to have to find another program. Is that right?” Shotwell responded: “[Y]es. We talked about that, yes.” App. 82. At this point, Axson-Flynn informed Shotwell that she would leave the ATP because it was clear that she would fail unless she altered her religious convictions. She told Shotwell: “I don’t want to go, * * * but I am not going to change.” Shotwell replied: “Well, neither are we.” App. 84.

At Shotwell’s suggestion, Axson-Flynn stood in front of her class and explained her reasons for leaving the ATP. She told her fellow students that, although she loved acting and had wanted to be an actress since she was a little girl, “even more than I value being an actress, even more than I value theater, I value my integrity. And I feel that if I was asked to do things that violated my religion, I would be a hypocrite, and I wouldn’t have integrity.” App. 85.

Axson-Flynn subsequently enrolled in the acting program at Utah Valley State College, a much lower-ranked program than the ATP. Although Utah Valley

permitted her to omit offensive language from in-class exercises, Axson-Flynn ultimately received “incomplete” marks on her University of Utah transcript, thus impeding her ability to obtain admission to another highly regarded program. App. 86, 92.

G. The Instant Lawsuit

Following further failed attempts to resolve the issue of offensive language with David Dynak, Johnson’s successor as department chair, Axson-Flynn filed this lawsuit. App. 90-98. She alleges that defendants’ conduct was unconstitutional under the Free Speech and Free Exercise Clauses of the First Amendment, and she seeks declaratory and equitable relief as well as monetary damages. App. 9, 13.

The district court granted defendants’ motion for summary judgment on all claims. On the free speech issue, the court cited as “nearly on point” (Op. 15) the Supreme Court’s decision in *Board of Education v. Barnette*, 319 U.S. 624 (1943), that religious students may not be required to salute the flag in violation of their understanding of the Second Commandment, which forbids paying respect to any “graven image.” See *Exodus* 20:4-5. The court acknowledged that Axson-Flynn “was instructed * * * to break the [Third] Commandment in order to conform to the

* * * policies of the University of Utah’s ATP curriculum,”⁴ but nonetheless distinguished *Barnette* on the ground that Axson-Flynn was “not being asked to espouse an ideology that is not her own.” Op. 6, 17. According to the district court, Axson-Flynn was “merely asked * * * to read some lines which she finds offensive.” Op. 16.

On the free exercise claim, the district court first reasoned that strict scrutiny does not apply here under the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The court acknowledged “two exceptions” to *Smith*’s rule that religiously neutral and generally applicable laws do not generally offend the Free Exercise Clause. Op. 10. Under the first of these exceptions, strict scrutiny applies where the government grants “individualized exemptions” to the challenged policy’s requirements. *Ibid.* But despite the fact that Jeremy Rische had been granted a similar religious accommodation, the court held that this exception was inapplicable because Axson-Flynn “pointed to no *written* policy or course description” that contained a “system of exemptions.” Op. 12 (emphasis added).

⁴ The biblical prohibition on using God’s name “in vain,” found in Exodus 20:7, is sometimes referred to as the Third Commandment and sometimes as the Second Commandment, depending on one’s religious tradition. We refer to the “Third Commandment.”

Turning to *Smith*'s second exception—the “hybrid rights” doctrine, which applies where a party raises a free exercise claim coupled with another constitutional claim (494 U.S. at 881-882)—the court began by observing that Axson-Flynn had stated a valid hybrid speech/religion claim warranting heightened scrutiny under *Smith*. Op. 21. It then cited *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court decision credited with having established the hybrid rights doctrine (see *Smith*, 494 U.S. at 881), recognizing that *Yoder* “dealt directly with plaintiffs’ desire for an exemption from educational policy requirements due to religious objections—the subject matter of this case.” Op. 22. Although *Yoder*'s central holding was that “only those interests of the highest order and those not otherwise served can overbalance” hybrid claims (406 U.S. at 215), however, the court went on to hold that the government can override hybrid claims by satisfying only “intermediate scrutiny.” Op. 18, 22-26. The court held that defendants’ refusal to grant an allowance to Axson-Flynn was acceptable because it bore “more than merely a reasonable relationship” to defendants’ purpose of “ensuring that ATP graduates have sufficient competency in their chosen field.” Op. 26.

Finally, the district court concluded that defendants were entitled to qualified immunity on all claims, reasoning that Axson-Flynn’s constitutional rights were not “clearly established” at the time of the challenged conduct. The district court made

no mention of the fact that Axson-Flynn sought *both* equitable relief and monetary damages. Op. 28.

STANDARD OF REVIEW

This Court reviews decisions granting summary judgment de novo, affirming only if “there is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). *Ortiz v. Norton*, 254 F.3d 889, 893 (10th Cir. 2001).

SUMMARY OF ARGUMENT

I. Defendants’ actions violate the Free Speech Clause. It is well established that governmental coercion of speech must be justified by a compelling state interest and narrowly tailored to that end, and learning to perform profane acting dialogues is not remotely necessary to defendants’ interest in preparing students to succeed as actors. The district court held that heightened First Amendment scrutiny *does not apply* here, reasoning that Axson-Flynn was not required to engage in “ideological” speech or to accept the challenged statements “for their truth.” The Supreme Court, however, has expressly rejected the view that strict scrutiny is inapplicable in such circumstances. Thus, reversal is warranted.

II. Defendants’ actions violate the Free Exercise Clause. Government regulations are subject to strict scrutiny under the Free Exercise Clause if

government decisionmakers have discretion to grant “individualized exemptions,” or if they interfere with religious exercise as well as another constitutional right (a “hybrid” claim). Both circumstances are present here: defendants exempted a Jewish student from classroom exercises, but declined to accommodate Axson-Flynn; and defendants’ conduct implicates not only Axson-Flynn’s religious exercise, but her freedom of speech. Defendants’ actions cannot be justified under any form of heightened First Amendment scrutiny, let alone strict scrutiny, because learning to take on profane roles is not necessary to success as a professional actor.

III. Defendants are not entitled to qualified immunity for their constitutional violations. The illegality of their actions is established by longstanding Supreme Court precedent, and Tenth Circuit precedent confirms that the First Amendment prohibited them from compelling Axson-Flynn to engage in the speech at issue in this case. Moreover, even if the governing law were not clearly established, the district court erred in dismissing Axson-Flynn’s claims in their entirety: Axson-Flynn seeks not only monetary but *equitable* relief, and qualified immunity protects defendants only from liability for *damages*.

ARGUMENT

I. Defendants' Conduct Violated The Free Speech Clause.

It has long been a “fixed star in our constitutional constellation” that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This “freedom of thought” protected by the First Amendment against state interference “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714-716 (1977); see also *Barnette*, 319 U.S. at 642 (government may not invade the “sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control”).

These rights—to speak and *not* to speak—are “complementary components of a broader concept of individual freedom of mind.” *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). Accordingly, the Supreme Court has consistently reviewed compelled speech claims with *at least* as exacting scrutiny as that applied to claims challenging interference with the right *to* speak. *E.g.*, *Barnette*, 319 U.S. at 633 (speech may be “commanded only on *even more* immediate and urgent grounds than silence” (emphasis added)); *Riley v. National Federation of Blind*, 487 U.S. 781, 795, 800 (1988) (“Mandating speech that a speaker would not otherwise make necessarily

alters the content of the speech” and is not justified “absent compelling necessity, and then, only by means precisely tailored”); *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 642 (1994) (“Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny” as content-based restrictions, which are subject to “the most exacting scrutiny”); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038 n.4 (9th Cir. 1999) (“When personal speech is compelled, as in [*Wooley*] and [*Barnette*], state action is valid only if it is ‘a narrowly tailored means of serving a compelling state interest’”); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 906 (1st Cir. 1988) (en banc) (Coffin, J.) (“We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression,” and “silence traditionally has been more sacrosanct than affirmative expression”).

As the First Circuit has observed: “[a] distinguished line of cases has underscored a private party’s right to refuse compelled expression,” and “[p]rotection for free expression in the arts should be particularly strong when asserted against a state effort to *compel* expression, for then the law’s typical reluctance to force private citizens to act augments its constitutionally based concern for the integrity of the artist.” *Id.* at 905 (citation omitted; emphasis in original). Moreover, such First Amendment protections apply with particular force “in the

University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835 (1995).

The decision below represents a drastic departure from these principles. In addressing Axson-Flynn’s free speech claim, the district court did not apply *any* level of scrutiny to defendants’ actions—let alone the exacting scrutiny required by precedent—for two reasons. First, the court reasoned that the government may compel speech provided it does not compel an individual “to espouse *an ideological point of view* on behalf of the State.” Op. 15 (emphasis added). Second, the court concluded that the Free Speech Clause does not apply because Axson-Flynn is not being compelled to espouse offensive views “for their truth,” but merely as part of “a classroom exercise.” *Id.* at 16, 17. As shown below, neither of these rationales is supported by precedent, and neither rationale has any basis in the purposes of the First Amendment.

A. The District Court Misread *Barnette* as Limited to “Ideological Points of View.”

In *Barnette*, the Supreme Court addressed whether the First Amendment prevented the state from compelling public school students to salute the flag over their religious objections. 319 U.S. at 625-631. The plaintiffs there were Jehovah’s Witnesses who could not salute the flag without violating their understanding of the

Second Commandment, which proscribes paying respect to any “graven image.” *Id.* at 629 (quoting *Exodus* 20:4-5). The state claimed that its mandatory flag salute requirement served to “increas[e] the knowledge of the organization and machinery of the government,” and sought to justify it on the ground that it was critical to “national unity” and “national security” at the height of World War II. *Id.* at 626-626 & n.2, 640. It further argued that for courts to interfere with discretionary judgments concerning educational requirements “would in effect make [them] the school board for the country.” *Id.* at 637.

The Supreme Court rejected the state’s arguments, explaining that the freedom of speech “may not be infringed on such slender grounds” or merely because the state “may have a ‘rational basis’ for its actions. 319 U.S. at 639. Rather, speech is “susceptible of *restriction* only to prevent grave and immediate danger” to the state, and speech may be *compelled* “only on *even more immediate and urgent grounds than silence.*” *Id.* at 633, 639 (emphasis added). Because the state failed to demonstrate “that remaining passive during a flag salute * * * would justify an effort even to *muffle* expression,” there was plainly insufficient reason to *compel* it. *Id.* at 634 (emphasis added). Moreover, the Court flatly rejected the defendants’ appeal for deference to the “important, delicate, and highly discretionary functions” of public educators, stating: “That they are educating the young for citizenship is

reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *Id.* at 637. The Court thus concluded that the First Amendment embodies “a right of self-determination in matters that touch individual opinion and personal attitude”—an “individual freedom of mind in preference to officially disciplined uniformity”—that provides strong protection against compelled speech. *Id.* at 631, 637.

Barnette compels reversal of the decision below. The principal difference between that case and this one is that *Barnette* involved the Second Commandment, which forbids paying respect to any “graven image” (*Exodus* 20:4-5), whereas this case involves the Third Commandment, which proscribes taking the Lord’s name “in vain.” See *Exodus* 20:7 (“Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain”). Here, as there, Axson-Flynn’s refusal to say a handful of offensive words in a classroom exercise “does not interfere with or deny rights of others to do so.” 319 U.S. at 630. And here, as there, the state lacks any overriding interest in compelling a student to say words that deeply offend her religious conscience. See *infra* Part I.D.

In granting summary judgment to defendants, the district court did not purport to conclude that the state satisfied the exacting scrutiny applied in *Barnette*. It simply held that such scrutiny *does not apply*, based on its erroneous determination that the First Amendment bars compelled speech only “where persons [are] bound to espouse an ideology not their own on the State’s behalf.” Op. 16. Accord *id.* at 15 (“the logic of the *Wooley* and *Barnette* opinions suggest[s] that a student cannot be required to espouse an ideological point of view on behalf of the State”); *id.* at 16 (Axson-Flynn “is not being asked to bear an ideological message or accept as her own an ideological proposition of the State”). Because Axson-Flynn was “not being asked to be an instrument for, or adhere to, an ideological point of view”—defendants “merely asked her to read some lines which she finds offensive”—the court concluded that defendants’ actions were justified because it was “reasonable for an acting program faculty to use such exercises to foster an actor’s ability to take on roles of persons they might find disagreeable.” Op. 16, 17. The fact that *Barnette* was “nearly on point” was deemed irrelevant. Op. 15.

Setting aside for the moment whether there *is* an ideological component to the speech at issue here, the district court’s reasoning lacks support in either precedent or logic. The Supreme Court has never distinguished between compelled speech that is objectionable on ideological or political grounds and compelled speech that is

objectionable on religious grounds. The plaintiffs in both *Barnette* and *Wooley* were Jehovah's Witnesses, and the primary basis for their claims was *religious* rather than ideological. See *Barnette*, 319 U.S. at 634 (noting that “religion supplies [the plaintiffs'] motive for enduring the discomforts of making the issue in this case”); *Wooley*, 430 U.S. at 707-708 & n.2 (noting that Maynard's objection was rooted in “religious training and belief” and that the state's “Live Free or Die” motto was “directly at odds with [his] deeply held religious convictions”).

Indeed, the plaintiffs in *Barnette* expressly disavowed any attempt to make a political or ideological statement—they were willing to pledge their “respect [for] the flag of the United States and acknowledge it as a symbol of freedom and justice to all,” but could not salute the flag because doing so was respecting a “graven image,” in violation of their understanding of the laws of God. 319 U.S. at 628 n.4, 629. If the Court had insisted that *Barnette* raise an *ideological* objection, he would not have had a claim. See also *Wooley*, 430 U.S. at 714 (observing that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind,’” which encompasses “*religious, political, and ideological*” speech (emphasis added)).

That the principles established in *Barnette* and *Wooley* are not limited to ideological speech is confirmed by several other decisions. Just last Term, for

example, in *United States v. United Foods, Inc.*, 121 S. Ct. 2334 (2001), the Supreme Court held that the First Amendment prevents the government from compelling mushroom growers to contribute to a fund to support advertising for mushrooms. Although commercial speech is accorded less constitutional protection than other categories of speech, *e.g.*, *Edenfield v. Fane*, 507 U.S. 761 (1993), and although the objecting company was not required to engage directly in the objectionable speech, the Court—citing *Barnette* and *Wooley*—concluded that “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.” 121 S. Ct. at 2338. It is hard to imagine *less* ideological speech than “[t]he message * * * that mushrooms are worth consuming”; indeed, the Court in *United Foods* readily acknowledged that “the mandated scheme *does not compel the expression of political or ideological views.*” *Ibid.* (emphasis added). The decision thus confirms that the right not to speak first recognized in *Barnette* extends far beyond not being compelled to “espouse an ideological position.” Op. 16. Accord *Riley*, 487 U.S. at 795-800 (citing *Barnette* and *Wooley* in invalidating a requirement that professional fundraisers disclose the percentage of contributions kept as fees, and holding that this requirement was “content-based” and could be justified only by “compelling necessity, and then, only by means precisely

tailored”); *Oklahoma Hosp. Ass’n v. Oklahoma Pub. Co.*, 748 F.2d 1421, 1424-1425 (10th Cir. 1984) (citing *Barnette* and *Wooley* for the proposition that the First Amendment prevents courts from requiring parties to a lawsuit to disseminate “hundreds of thousands” of nonideological Medicare documents to nonparties).⁵

It would be particularly surprising if ideological speech were entitled to greater protection than *religious* speech, which is core speech that has always received full protection under the First Amendment. *E.g.*, *Capitol Square Rev. & Advis. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (“precedent establishes that private religious speech * * * is as fully protected under the Free Speech Clause as secular private expression”). The Court has been especially vigilant about policing interferences with religious conscience, and it is well known that protection from religious conformity was one of the principal grounds for passage of the First Amendment. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985) (“an individual’s freedom of conscience” is the “central liberty that unifies the various Clauses in the First

⁵ The only decision cited by the district court (at 15) to support its view that *Barnette* and *Wooley* are limited to cases involving ideological speech was *Phelan v. Laramie County Community College Bd.*, 235 F.3d 1243 (10th Cir. 2000). But *Phelan* was not a compelled speech case: the issue there was whether a state college could censure a board member for advertising a position contrary to the board’s on a municipal bond issue, and the Court found no First Amendment violation because the college’s censure did not compel the plaintiff to “suppress” any speech. *Ibid.* There was no allegation that the government required her to *engage in* speech, as here. Thus, *Phelan* is inapposite.

Amendment”); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (the First Amendment bars the government from “forc[ing] a person ‘to profess a belief or disbelief in any religion’”).⁶

Even if *Barnette* were limited to cases involving ideological or political speech, however, Axson-Flynn’s speech qualifies for protection. Axson-Flynn’s refusal to say “f--k,” or to use God’s name disrespectfully, sends a strong *ideological* message: that the government has no legitimate right to compel profane speech, and that the authority of the government must give way to the authority of God. Indeed, Axson-Flynn’s refusal to use profane speech is at once an act of radical dissent (from governmental authority) and an act of radical obedience (to God). Her refusal to speak communicates powerfully some of her most fundamental religious and ideological beliefs: “*There is a God. God is concerned with my public example. How I speak about God is a direct reflection of my relationship with Him. Obeying God’s commandments is more important than what my peers and temporal superiors think of me.*” As in *Barnette*, Axson-Flynn’s objection is based on the view “that the obligation imposed by the law of God is superior to that of laws enacted by

⁶ Indeed, compelling Axson-Flynn to say God’s name in an objectionable manner might well violate not only the Free Speech and Free Exercise Clauses, but the Establishment Clause. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962).

temporal government.” 319 U.S. at 629. Plainly, that is sufficiently “ideological” to warrant heightened scrutiny under the First Amendment.⁷

B. The District Court Erred In Concluding That The First Amendment Does Not Apply Because Axson-Flynn Was Not Compelled To Make Objectionable Statements “For Their Truth.”

Perhaps aware that *Barnette* cannot be read so narrowly, the district court offered a second reason for declining to apply heightened First Amendment scrutiny: its conclusion that Axson-Flynn was not required to espouse offensive views “for their truth,” but merely as part of “a classroom exercise.” Op. 16, 17. Because Axson-Flynn was not being asked to “accept *as her own* an ideological proposition of the State,” the court reasoned, the Free Speech Clause simply was not implicated. *Id.* at 16 (emphasis added).

The district court’s conclusion that First Amendment scrutiny is not triggered unless the state compels someone to espouse objectionable propositions “for their truth” is squarely foreclosed by precedent. In *Wooley*, for example, the Supreme Court held that New Hampshire violated the First Amendment by forcing objecting drivers to display the state’s motto (“Live Free or Die”) on their vehicle’s license

⁷ Defendants expressly told Axson-Flynn that she would have to leave the Program if she did not “modify [her] values” (App. 82), which suggests that they were concerned not only with her professional competence but with her “ideological point of view” on the use of profane language.

plates. 430 U.S. at 717. The Court acknowledged that the case merely involved “the passive act of carrying the state motto on a license plate,” and there was no suggestion that having to display the motto required Wooley to accept it as true. *Id.* at 715. Nonetheless, the Court did not hesitate to hold that individuals have a First Amendment right not to be associated with “morally objectionable” ideas (*ibid.*), and it would have none of the dissent’s view that there was no constitutional violation because New Hampshire did not place Wooley “in the position of either apparently or actually ‘asserting as true’ the message.” *Id.* at 721 (Rehnquist, J., dissenting).

As one distinguished commentator has explained in reference to *Wooley*:

It is hard to take seriously the notion that those who saw the license plate on the Maynards’ car—or the plate on any other car registered in New Hampshire—actually thought that the driver of the vehicle endorsed the state’s motto. A license plate, after all, is not a bumper sticker; one has no choice about displaying the state plate on one’s car. * * * The real problem * * *, therefore, is not that it compels car owners to take a stand or forces them to support a position to which they may object, but that, in a more existential way, it ‘invades the sphere of intellect and spirit.’ Whether or not anyone else ever noticed the motto embossed on the Maynards’ license plate or gave it a second thought, the Maynards saw it there every day and it offended *them*.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-5, at 1317 (2d ed. 1988) (footnotes omitted).

So it is here. As in *Wooley*, the issue is not whether others *would attribute to her personally* the statements that she is required to make in the context of defendants’ acting drills, but whether saying those words offends her conscience. Just as it violated *Wooley*’s conscience to be forced to “foster the idea” that it is better to die than to live without freedom, so it violates *Axson-Flynn*’s conscience to be forced to “foster the idea” that a person of her faith may properly engage in vulgar or blasphemous speech. 430 U.S. at 715. The fact that many people—even those who generally find profane speech distasteful—might not feel that using such speech in an acting class is the same as using it in their personal lives is legally irrelevant: “The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the state] commands, an idea they find morally objectionable.” *Ibid.*; accord *Barnette*, 319 U.S. at 632-633 (“[a] person gets from a symbol the meaning *he* puts into it,” and strict scrutiny applies even where one is compelled to make “a gesture barren of meaning”); *TRIBE*, *supra*, § 15-5, at 1315 (for government to “compel[] an individual to express beliefs and convictions, whether actually held *or only vacantly mouthed*,” would be a “particularly insidious regulation” (emphasis added)).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), likewise confirms that the First Amendment’s protections against compelled speech are not

limited to cases where the claimant is forced to assert an objectionable proposition *for its truth*. The Court there invalidated a statute requiring a newspaper to publish the replies of political candidates whom the paper criticized, even though such replies could not reasonably be attributed to the newspaper, and even though the statute at issue did not prevent the paper from printing disclaimers. *Id.* at 244 n.2. If the First Amendment’s bar on compelled speech were limited to cases where the government required someone to profess certain views “as her own” (Op. 16), *Miami Herald* would have come out the other way. See also *Pacific Gas & Elec. Co. v. Public Utils. Comm’n*, 475 U.S. 1, 18 (1986) (the government may not require a public utility to include a third party’s newsletters in its quarterly billings, even where it is clear that the utility does not endorse their viewpoints; the First Amendment prevents such “forced association with potentially hostile views”). The court below thus erred in holding that Axson-Flynn could not invoke the First Amendment’s protections absent a showing that she was being required to make objectionable statements “as her own” or to accept them “for their truth.” Op. 16, 17.

C. This Court’s Decision In *Bauchman v. West High School* Confirms That Reversal Is Warranted.

The district court’s reading of *Barnette* is also foreclosed by this Court’s decision in *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997). There a Jewish student objected to the performance of sacred choral music—including “music with lyrics that sing praise to ‘Jesus Christ our savior’ and ‘Jesus Christ our Lord,’ and that include other devotional references to God”—as part of a public high school’s choral curriculum. *Id.* at 553. Although her principal claim was that including such music within the curriculum violated the Establishment Clause, the plaintiff also claimed a violation of her free speech and free exercise rights.

Acknowledging that “[t]he First Amendment certainly prohibits the government from compelling speech,” the court rejected *Bauchman*’s free speech claim solely on the ground that the school had granted her an individual exemption—the “choice of not participating in the singing of songs she found offensive”—and assured her “that her nonparticipation would not adversely affect her Choir grade.” *Id.* at 557-558. Absent either “the element of coercion” or any “adverse impact on her academic record,” there was no First Amendment violation. *Ibid.*; see *id.* at 558 (Bauchman was not “coerced or compelled to engage in any Choir activities”).

Bauchman confirms that the court below erred at every step of its reasoning. The district court held that Axson-Flynn had no claim because she was not forced

to espouse any objectionable “ideology” (Op. 15), but that could just as easily be said of the performance of sacred music. The district court held that Axson-Flynn was merely required to participate in a “classroom exercise” rather than to espouse any ideas “for their truth” (Op. 16, 17), but that could also be said of performing religious songs. The district court suggested that curricular decisions were beyond objection on free speech grounds (Op. 13), but this Court indicated that a student could have a valid objection to performing sacred music even after concluding that there were legitimate pedagogical reasons to include such music in the curriculum. 132 F.3d at 554 (noting that “[a]ny choral curriculum designed to expose students to the full array of vocal music culture * * * can be expected to reflect a significant number of religious songs”). The court below dismissed Axson-Flynn’s objection to offensive language because she is only “acting” (Op. 16), but there is no constitutional basis for treating the performance of religiously offensive *music* differently from the performance of religiously offensive *drama*. See *Schacht v. United States*, 398 U.S. 58, 63-65 (1970) (“An actor, like everyone else in our country, enjoys a constitutional right to freedom of speech”). Indeed, Axson-Flynn’s objection is *narrower* than was Bauchman’s, as she is willing to perform all but a few *words* in the objectionable scripts, and to modify those words to ensure that her performance conveys a substantially similar meaning.

In sum, if there is a First Amendment right to avoid using God’s name in a *reverent* fashion by not performing religiously objectionable choral music (as this Court indicated in *Bauchman*), then surely there is a First Amendment right to avoid using God’s name in an *irreverent* fashion by not performing religiously objectionable dramatic scripts (as here). Indeed, the only meaningful difference between this case and *Bauchman* is that Axson-Flynn, unlike *Bauchman*, was not accommodated.

The district court offered just one reason for declining to follow *Bauchman*: its conclusion that this Court’s analysis in that case was “*dictum*” because the plaintiff there was not compelled to engage in the objectionable speech. Op. 14 n.8. The fact that there was no compulsion in *Bauchman*, however, does not diminish the force of the Court’s reasoning. As this Court recognized, there was no constitutional violation there *precisely because* there was no compulsion. 132 F.3d at 557-558. This Court did not hesitate to state that the First Amendment imposes clear limits on government-compelled speech, or to indicate that a very different case would have been presented if *Bauchman* had been forced to engage in the speech to which she objected on religious grounds. Indeed, this case is the mirror image of *Bauchman*: Axson-Flynn was forced to choose between engaging in religiously objectionable speech and finding another school, whereas Rachel *Bauchman* was accommodated

in the face of an indistinguishable objection. Thus, *Bauchman* cannot be so lightly dismissed.⁸

D. Defendants’ Conduct Fails To Satisfy The Exacting Scrutiny Required By Governing Supreme Court Precedent.

Once it becomes evident that the district court erred in holding that Axson-Flynn’s refusal to speak was not protected expression, it is clear that reversal is warranted. Defendants’ interest in forcing Axson-Flynn to use a handful of profane words is not remotely compelling, and they can easily accomplish their objective of preparing her to act professionally without violating her conscience. See *Riley*, 487 U.S. at 795, 800 (speech may not be compelled by the government “absent compelling necessity, and then, only by means precisely tailored”); *Turner Broadcasting*, 512 U.S. at 642 (“Laws that compel speakers to utter or distribute speech bearing a particular message” are subject to “the most exacting scrutiny”);

⁸ Citing *Hamilton v. Regents of Univ. of California*, 293 U.S. 245 (1934), defendants argued below that there was no constitutional violation here because Axson-Flynn could simply choose to attend another school. App. 118-119. But *Hamilton* pre-dated the Supreme Court’s recognition of the doctrine of unconstitutional conditions, which holds that the state may not, absent compelling justification, condition one’s entitlement to government benefits on the surrender of one’s constitutional rights. It is well established that this doctrine applies to First Amendment claims. *E.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958) (free speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (free exercise).

Barnette, 319 U.S. at 633 (compelled speech “[can] be commanded only on even more immediate and urgent grounds than silence”).

At the outset, it bears emphasis that Axson-Flynn does not object to playing “disagreeable” roles that may “challenge” her “point of view”—as the district court suggested. Op. 14, 16. She has no objection to the vast majority of classroom exercises, she has never refused to play an assigned *role*, and she willingly performed scripts involving the portrayal of characters and conduct (including abortions and extra-marital affairs) that she finds distasteful or even immoral. App. 34-35. Nor does Axson-Flynn seek any modification of the curriculum for other students: she is willing to listen to other actors use profane language, and she has performed dialogues with others who use the very words that she will not say. App. 59. Accordingly, Axson-Flynn’s conscientious objection is quite narrow—she will not say “God” or “Jesus Christ” in an irreverent way, and she will not say “f--k”—and the accommodation she seeks is modest.

Defendants seek to justify their refusal to grant an accommodation here on the ground that certain acting roles require use of profane language, and the district court held that they had a “more than reasonable” interest in “assuring that [the program’s] graduates are proficient in their chosen field of study.” Op. 24, 25. Although it was their burden in seeking summary judgment, however, defendants

proffered no evidence that having to portray characters who use the words at issue serves any pedagogical objective that cannot be learned by taking on *other* uncomfortable roles, and no evidence that there are insufficient career opportunities for people who will not perform roles that require use of profane language. That is not surprising. Family entertainment is a growing, multi-billion dollar industry, and there are myriad plays, movies, and TV shows that involve no profane speech whatsoever. See Rachel Abramowitz, *Studios Are Playing It Safe with Numerous Sequels, Prequels and Reworkings of Tried-and-True Themes*, L.A. TIMES, Jan. 20, 2002, at F3 (noting that “[s]ix films grossed more than \$200 million each [last year], five of them with significant kid appeal”). As Columbia Pictures Chairman Amy Pascal recently stated: “Family entertainment was king last year. If we learned anything last year, it’s that families like to go to the movies together, and if you give them good movies, they will go.” *Ibid.* That there are professional opportunities in this sector of the entertainment industry is confirmed by the experience of Axson-Flynn’s parents, who have made successful acting careers without compromising their values (App. 32-33), and by the *amicus* brief of members of the acting profession, which explains that there are numerous opportunities for those who will not use profanity, and that professional actors routinely decline objectionable parts.

Defendants' own conduct belies their insistence that having to use the particular words to which Axson-Flynn objects is necessary to success as a professional actor. Axson-Flynn told defendants at her audition that she was unwilling to use the words at issue, and that she would rather not be admitted to the program than be required to violate her conscience. App. 40-45. If defendants really believed it was essential to use such words, it is difficult to understand why they accepted her application: Why admit someone who, by her own acknowledgment, cannot complete a critical component of the educational program?

The University's subsequent behavior further confirms the point. When Axson-Flynn substituted comparable language in the "Friday" dialogue, her ATP professor *failed to notice* and gave her an "A" for her performance. See *supra* p. 7. Moreover, defendants did not hesitate to accommodate Jeremy Rische, who sought an even broader exemption from curricular participation requirements than did Axson-Flynn. App. 122-129. In light of Rische's *complete absence* from several mandatory classroom exercises, defendants cannot plausibly assert a compelling interest in preventing Axson-Flynn—who attended every class, performed every assignment, and received uniformly high marks—from substituting alternative words in a handful of instances.

Defendants' position is completely untenable in light of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which, although a free exercise case, is relevant because it applied strict scrutiny to an Amish family's objection to sending its children to two years of public high school under a compulsory education statute. See Op. 22 (observing that *Yoder* "dealt directly with plaintiff[s] desire for an exemption from educational policy requirements due to religious objections—the subject matter of this case"). In *Yoder*, the state argued that it had a compelling interest in ensuring that all citizens received a high school education, to "prepar[e] [them] to be self-reliant and self-sufficient participants in society." 406 U.S. at 221. The Court rejected this argument, however, explaining that "an additional one or two years of formal high school * * * would do little to serve those interests." *Id.* at 222. As the Court concluded: "It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation for life in the separated agrarian community that is the keystone of the Amish faith." *Ibid.* Because success in the Amish way of life did not require additional education, the state lacked a compelling interest in mandating it.

This is an *a fortiori* case under *Yoder*. Axson-Flynn does not seek an exemption from two years of compulsory educational requirements, or from an entire class or subject matter, or even from an entire assignment or role. She asks only that she be exempted from saying *a few words*, and words that many people find distasteful and refuse to say. Moreover, Axson-Flynn has no interest in taking on roles that require the use of profane words when she enters the profession; following in her parents' footsteps, she intends to perform roles in family entertainment. If the state in *Yoder* lacked a compelling interest in requiring Amish students to receive a *high school* education—which is far more basic to one's ability to function in society—defendants cannot possibly have a compelling interest in requiring Axson-Flynn to say “f--k,” or to use God's name disrespectfully, so that she can act professionally.⁹

⁹ The district court purported to distinguish *Yoder*, reasoning that “ATP curricular requirements do not carry with them ‘a very real threat to undermining [Plaintiff's] community and religious practice as they exist today.’” Op. 25. But of course they do. Axson-Flynn's objection is based on the Ten Commandments, on biblical injunctions against using profane language, and on the teaching of LDS church leaders. See *supra* p. 4. If requiring a religious believer to violate biblical commands and the teachings of clergy does not “undermine religious practice,” we do not know what would. To be sure, Mormons do not isolate themselves from society like the Amish, but it is nonetheless sinful and hypocritical, in the eyes of faithful believers, to use blasphemous speech. Moreover, it makes no constitutional difference whether one practices one's faith alone or as part of a community. *Thomas v. Review Bd.*, 450 U.S. 707, 715-716 (1981).

The argument that being equipped to act professionally necessarily requires that one develop an ability to say words such as “f--k” can only be described as Orwellian. See Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. L. REV. 1083, 1116 (1999) (“There can only be one perspective in the totalitarian state. * * * Forced speech can readily serve as the mechanism by which the state makes its propaganda all-pervasive, completely preempting all other perspectives”). The degree to which one divorces oneself from the roles one plays as an actor—or, conversely, the degree to which one brings one’s own life experiences to those roles—is a matter of subjective artistic judgment. For her part, Axson-Flynn cannot in good conscience say “f--k,” or use God’s name disrespectfully, without fostering the view that it is appropriate for a practicing Mormon to use such speech. But nearly all actors object to playing *some* roles—whether because they involve nudity, obscenity, or simply offensive characters—and there is a major market for the family entertainment that Axson-Flynn seeks to provide. It is therefore hard to fathom why defendants would insist

on requiring Axson-Flynn to “modify her values” by using profane speech, unless their objective is to stamp out all other intellectual perspectives on the subject.¹⁰

Defendants’ conduct is ironic in light of the University’s professed view that nothing is “more important than [its] diversity of people, thought, and experience,” < <http://www.utah.edu/newstudents/about/diversity.html>> (visited Feb. 20, 2002), and its stated commitment to creating a place where the “right of free inquiry is zealously preserved.” < <http://www.admin.utah.edu/president/mission.html>> (visited Feb. 20, 2002).¹¹ In any event, this is just the sort of imposed orthodoxy the First Amendment was designed to prevent. *Barnette*, 319 U.S. at 637, 641 (the First Amendment protects “individual freedom of mind in preference to officially disciplined uniformity” and guards the “freedom to be intellectually and spiritually

¹⁰ In this regard, it is noteworthy that defendants demanded that Axson-Flynn “get[] over that language thing” by attempting to convince her that she could “still be a good Mormon and say these words.” App. 56, 71-72, 77-82.

¹¹ According to its promotional literature, the University also “challenges” its students “to explore and to allow [their] individuality to grow to its fullest potential,” < <http://www.saff.utah.edu/orient/resources/index.html>> (visited Feb. 20, 2002), and presents itself as a place where “diversity is encouraged and respected.” < <http://www.admin.utah.edu/president/mission.html>> (visited Feb. 20, 2002). See < <http://www.utah.edu/newstudents/about/diversity.html>> (visited Feb. 20, 2002) (“We value the differences in our students, faculty, and staff as unique teaching tools that will help our students expand the fullness of their education.”); < http://www.utah.edu/newstudents/about/acad_excellence.html> (visited Feb. 20, 2002) (boasting that the University is “the most heterogenous * * * community in the state”).

diverse or even contrary”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (the First Amendment protects “the subtle shaping of thought which characterizes all artistic expression”).

The district court’s decision was based in part on the fear that granting an accommodation would open the floodgates to other litigants alleging objections to curricular requirements. The court compared the requirement that Axson-Flynn use profane speech to a creationist being “required to discuss and master the theory of evolution in a science class,” to a “neo-Nazi” being required to “discuss, write or consider the Holocaust in a critical manner in a history class,” and to a Catholic law student being “required to make an argument in favor of capital punishment during an in-class exercise.” Op. 16. These scenarios, according to the district court, “illustrate the fact that learning in a University setting involves the ability to discuss and take on other points of view in a serious manner.” Op. 17.

These concerns are unfounded. As an initial matter, requests for modest accommodations like Axson-Flynn’s are typically dealt with outside the courtroom, as a matter of pedagogy and common decency. A decision in Axson-Flynn’s favor will simply confirm that educators should respect the conscientious objections of their students where, as here, accommodation is not burdensome and would not significantly interfere with basic educational objectives. See *Barnette*, 319 U.S. at

637 (public educators have “important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights”). A decision for defendants, by contrast, will grant educators *carte blanche* to insist on compliance with “educational” requirements, no matter how trivial to the educational process and no matter how easy it is to administer an accommodation. See *id.* at 630 (accommodation is appropriate where it is “peaceable and orderly” and “does not interfere with or deny rights of others”).

Furthermore, none of the classroom examples cited by the district court is analogous to this case. To begin with, in each of them the speaker retains discretion regarding how to communicate the position or argument, and thus can avoid presenting it in a way that offends her conscience. A creationist can explain the theory of evolution in several ways, while indicating that she does not subscribe to it; a Neo-Nazi can convey an understanding of the Holocaust using a variety of words, while disclaiming concern for it; and a Catholic law student can present any number of arguments for the death penalty, while stating that she does not agree with them. None of these hypotheticals involves following a *script*, however, let alone a script containing vulgar or profane words. There is no comparable opportunity to make a disclaimer when one is required to say *specific words*: one

must either say them or not say them, and a post-statement disclaimer—“I didn’t really want to use that word”—does not cure the offense.

Finally, Axson-Flynn is perfectly willing to “discuss and take on other points of view in a serious manner”—as demonstrated by the undisputed record evidence that she is willing to portray characters whose conduct she finds distasteful. For example, she played the role of a woman who gets an abortion, despite her moral opposition to abortion in most circumstances. App. 38, 58-60. In contrast to playing an objectionable *role*, however—where an actor need only *pretend* to engage in the offensive conduct—portraying a character who says “God” irreverently or uses the “F-word” *requires use of those words*. As one theologian has explained: “Unlike sins such as murder, which a person can describe without committing, to use words profanely is to commit the sin—God’s name is no less used in vain by putting it in quotes.” ROBERTSON MCQUILKIN, AN INTRODUCTION TO BIBLICAL ETHICS 164 (rev. ed. 1995). The only way around the moral dilemma in these circumstances is to “pretend” by substituting other language in place of the expletives, which is something that Axson-Flynn is perfectly willing to do. App. 38, 58-60. Thus, being compelled to utter *particular profanities* is not remotely comparable to the district court’s hypotheticals.

There is virtually no limit to the district court’s reasoning. Could defendants, for example, require an objecting student to perform nude?¹² By the district court’s reasoning, apparently so: performing nude does not require students to accept any “ideological” statement, let alone “for its truth.” Rather, such exercises may be viewed as part of a “classroom exercise” designed to ensure that students are able “to take on roles of persons they might find disagreeable.” Op. 16.

By using God’s name disrespectfully or making vulgar references to sexual activity, Axson-Flynn believes that she would subject herself to disfavor in the eyes of God. See *Exodus* 20:7 (“[T]he Lord will not hold him guiltless that taketh his name in vain”); *Hebrews* 13:4 (“Marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and the sexually immoral”). The Ten Commandments forbid saying God’s name “in vain,” and the word “f--k” is an especially vulgar reference to something she views as a sacred act. These views are commonly held by many religious believers, and may not be lightly dismissed, as the *amicus* brief of the theologians and scholars of religion attests.

¹² At the summary judgment hearing, defendants’ attorney clearly stated that it would be acceptable to require students to “perform nude” as part of an in-class exercise provided there was a “pedagogical curricular reason” for doing so. App. 132-133.

Just as the Court in *Barnette* held that the state lacked an overriding interest in forcing objecting students to salute the flag in violation of the Second Commandment (see *Exodus* 20:4-5), so does the University of Utah lack a compelling interest in requiring Axson-Flynn to use blasphemous speech in violation of the Third (see *Exodus* 20:7). And insofar as the First Amendment protects the right *to engage in* sacrilegious and profane speech, one would hope that it would also protect the right *not* to say such words. *Cohen v. California*, 403 U.S. 15, 22-25 (1971) (describing “f--k” as an “unseemly expletive,” a “scurrilous epithet,” and an “execration” that is “perhaps more distasteful than most others of its genre,” but protecting its use); *Burstyn*, 343 U.S. at 501 (the First Amendment protects “the subtle shaping of thought which characterizes all artistic expression,” including “sacrilegious” movies); *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 687 (1959) (First Amendment prevents state from banning film “portray[ing] adultery as proper behavior” on grounds that it is obscene and sacrilegious).

We are not suggesting that a public university student has an absolute right to opt out of any curricular requirement, no matter how critical it is to the educational process or how difficult it is to administer an accommodation. But where, as here, an accommodation is easy to administer and the objectionable requirement is not essential to preparing students for their chosen profession, the First Amendment

requires that the student’s rights of conscience be respected. See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”); *Healy v. James*, 408 U.S. 169, 180 (1972) (the First Amendment applies with special force in the “college classroom,” which is “peculiarly the ‘marketplace of ideas’”).¹³

II. Defendants’ Conduct Violated the Free Exercise Clause.

As the district court recognized (Op. 11), the general rule of *Employment Division v. Smith*, 494 U.S. 872 (1990)—that a neutral and generally applicable law need not be justified by a compelling governmental interest merely because it has the “incidental effect of burdening a particular religious practice,” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)—is subject to certain exceptions. For example, where the government establishes a system of

¹³ The court below mischaracterized our position as suggesting that the First Amendment’s prohibition against compelled speech is “an absolute command” and that “any requirement for a student to participate in an in-class exercise which challenges his or her conscience or point of view is constitutionally impermissible.” Op. 14. As we stated on the record below, however: “either side’s arguments in this case if taken to the extreme would create an unworkable situation for the University and something that’s inconsistent with the requirements of the law. Obviously students do not have a right to object to any aspect of the curriculum no matter how central it is to the educational process and no matter how difficult it is to administer an accommodation.” App. 134. We stand by our statement. But neither do *defendants* have an absolute right to insist on performance of every educational requirement, no matter how unnecessary to professional success, or how offensive to the First Amendment.

individualized exemptions from a general legal requirement, it “may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 494 U.S. at 884. In addition, the rule of *Smith* does not apply where the government’s actions implicate the free exercise of religion “in conjunction with other constitutional protections, such as freedom of speech.” *Smith*, 494 U.S. at 881-882. In such circumstances, known as “hybrid rights” cases, the plaintiff not only must demonstrate a plausible free exercise claim, but also must make a “colorable showing of infringement” of another constitutional right. *Swanson v. Guthrie Independent Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998).

Under each of these exceptions, the government may prevail only by satisfying “the most rigorous of scrutiny”—by demonstrating that its actions are narrowly tailored to a compelling governmental interest. *Lukumi*, 508 U.S. at 546 (individualized exemptions); see *Yoder*, 406 U.S. at 215 (hybrid rights). As shown in the following sections, the “individualized exemptions” and the “hybrid rights” exceptions both apply in this case, and defendants’ refusal to accommodate Axson-Flynn is not narrowly tailored to any compelling interest.

A. Defendants’ Accommodation of Jeremy Rische Confirms That *Smith*’s “Individualized Exemptions” Exception Applies In This Case.

Strict scrutiny applies under *Smith* “in circumstances in which individualized exemptions from a general requirement are available”—*i. e.*, where the government makes “an evaluation of the particular justification for [the requested exemption].” *Lukumi*, 508 U.S. at 537. For example, the Court in *Lukumi* applied strict scrutiny because the statute at issue permitted the killing of animals for nonreligious reasons, but not for purposes of animal sacrifice. *Id.* at 535-540.

Smith’s “individualized exemptions” exception is directly applicable here. Defendants’ “First Year Acting” curricular materials insist that “it is imperative that this class be attended at all times,” and they further provide that students “receive a grade for *each day’s* class work.” App. 111-112 (emphasis added). Nonetheless, when Axson-Flynn’s classmate, Jeremy Rische, asked to be excused from a mandatory in-class exercise because of Yom Kippur, defendant Smith told him that was “fine.” App. 123. Smith had previously insisted that the classroom exercise Rische missed “couldn’t be made up,” and that there would be “no exceptions.” App. 74, 123. But when Rische informed Smith that his religious obligations required him to be absent, Smith allowed it and did not penalize him in any way. App. 124. Thus, this is plainly a case where defendants made “individualized

governmental assessment[s] of the reasons for [exemption]” from their curricular requirements (*Smith*, 494 U.S. at 884), but exercised their discretion in a manner that discriminated among members of different religious faiths.

The court below acknowledged that “if the State makes religious accommodations for some individuals, it must make religious accommodations for all individuals,” but nonetheless rejected Axson-Flynn’s free exercise claim on the ground that the exemptions granted to Rische were not provided for within the “curriculum requirement rules or program policies *themselves*.” Op. 11, 12 (emphasis added). According to the district court, defendants’ policy toward Axson-Flynn is “neutral and generally applicable” because no “system of exemptions” was recorded in any “*written* policy or course description,” “guidelines,” or “syllabus.” Op. 12 (emphasis added). The only exemptions that count, the court reasoned, are those “*provided in the ordinance itself*.” Op. 11.

That is not the law. To be sure, *Lukumi* and the few other cases cited by the court below involved written or codified exemptions to the requirements at issue, but none of those cases suggests that this is a constitutional *requirement* for application of strict scrutiny. See *Swanson*, 135 F.3d at 701; *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-366 (3d Cir. 1999); *Keeler v. Mayor of Cumberland*,

940 F. Supp. 879, 885-886 (D. Md. 1996). Nor, despite careful research, are we aware of any such decision.

There is no reason for courts to be any less concerned with the granting of exemptions on an *ad hoc* basis. If anything, the opposite is true, as several Supreme Court decisions confirm. See *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969). As the Court stated in *Lukumi*, the Free Exercise Clause applies to situations where governmental officials have discretion to make “an evaluation of the particular justification for [the requested exemption].” 508 U.S. at 737; see *Sherbert v. Verner*, 374 U.S. 398, 401 & n.4 (1963) (invalidating the discriminatory *application* of a state requirement that, in order to receive unemployment compensation, one show “good cause” for declining work).

The rule stated by the district court, by contrast, would create a perverse incentive: by eliminating written standards or declining to memorialize their decisions, public officials could avoid constitutional scrutiny of arbitrary decisions in granting exemptions. That would be a sad day for the First Amendment. *Contra*, e.g., *Rader v. Johnston*, 924 F. Supp. 1540, 1552-1553 (D. Neb. 1996) (applying strict scrutiny where a public university’s administrators “grant exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the

rule and not well defined or limited” and “where no justifiable reason exists under the stated purposes of the policy”); *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1248-1249 (D. Colo. 1998) (applying *Smith*’s “individualized exemptions” exception in a case alleging “general tort liability theories,” which “require much more subjective judgment on the appropriateness of the conduct than the across-the-board prohibition in *Smith*”), aff’d on other grounds, 185 F.3d 873 (10th Cir. 1999). In sum, defendants’ policy of granting accommodations to some religious students, but not others, confirms that their actions must be subjected to “the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. And, as shown above, they cannot withstand that test. See *supra* Part I.D.¹⁴

B. Defendants’ Conduct Is Also Subject to Strict Scrutiny Under the “Hybrid Rights” Doctrine.

In *Swanson*, this Court confirmed that the general rule of *Smith* is inapplicable where a party not only demonstrates a plausible free exercise claim, but makes a “colorable showing of infringement” of some other “recognized and specific

¹⁴ Defendants’ conduct also fails the test of “neutrality.” *Smith*, 494 U.S. at 878-879. A policy that requires students to invoke God’s name disrespectfully—even in a perfunctory way—is not neutral toward religion. Just as the state cannot require use of God’s name in a respectful way, as in prayer, *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 224-225 (1963); *Engel*, 370 U.S. at 432-434, so too the state cannot compel students to use God’s name in a disrespectful way without violating the fundamental requirement of neutrality.

constitutional right.” *Swanson*, 135 F.3d at 700. As the Court elaborated in *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998), a mere determination that a claim “lacks merit * * * does not necessarily mean it is so lacking as to fail the colorable test.” Rather, a claim is “colorable” unless it is “immaterial and made solely for the purpose of obtaining jurisdiction or * * * is wholly insubstantial or frivolous.” *Ibid.*; see also *United States v. McAleer*, 138 F.3d 852, 857 (10th Cir. 1998) (defining “colorable” as having “some possible validity”).

The district court recognized that Axson-Flynn raised a “genuine” free speech challenge, and thus that she had made out a “colorable hybrid claim.” Op. 20-21. It also acknowledged “that the proper heightened standard is that which was applied in *Wisconsin v. Yoder*.” Op. 22 (citing *Swanson*, 135 F.3d at 699). However, citing an isolated passage from *Yoder*—to the effect that the government must show “more than merely a reasonable relation” between its law and “some purpose within [its] competency” to justify infringing religious exercise (406 U.S. at 233)—the court applied “intermediate scrutiny” to Axson-Flynn’s hybrid claim. Op. 25-26. Reasoning that the “curricular requirements of the ATP program are more than reasonably related to the University’s special competency of assuring that its graduates are proficient in their field of chosen study,” the court rejected her claim. *Ibid.*

This analysis is fundamentally flawed. *Yoder* was not an “intermediate scrutiny” case requiring the state to show *only* “more than a reasonable relationship” between the law and a legitimate state purpose; rather, *much* more than a “reasonable relationship” is required. The Court there explained that “only those interests *of the highest order* and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion,” and it “searchingly examine[d]” the interests that Wisconsin sought to promote in applying its compulsory education requirement to the Amish. 406 U.S. at 215, 221 (emphasis added). The Supreme Court itself has cited *Yoder* in applying strict scrutiny to free exercise claims. *E.g.*, *Lukumi*, 508 U.S. at 546 (citing *Yoder* for the proposition that “[t]he compelling interest standard” requires “the most rigorous of scrutiny”). But whether *Yoder* is *labeled* as a “strict scrutiny” or an “intermediate scrutiny” case, the reasoning of that decision makes it abundantly clear that defendants’ actions are not justified under the First Amendment. See *supra* Part I.D.

C. Defendants’ Conduct Fails to Satisfy Even Intermediate Scrutiny.

Under intermediate scrutiny, the question here is whether defendants’ conduct “advances important governmental interests unrelated to the [compulsion] of free speech and does not [compel] substantially more speech than necessary to further

those interests.” *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 189 (1997).¹⁵

Defendants’ actions plainly fail this test.

First, we doubt that a public university could ever assert a *reasonable*—let alone important—pedagogical interest in compelling a student to “modify her values” and violate biblical injunctions by saying “f--k” or using God’s name disrespectfully. Defendants say they are merely attempting to “ensur[e] that ATP graduates have sufficient competency in their chosen field” (Op. 26), but Axson-Flynn does not object to the overwhelming majority of the curriculum: she will take on uncomfortable roles, she listens to others who use profane speech, and she received top grades for every other aspect of her performance. Thus, the issue here is not whether Axson-Flynn can learn to act, but whether defendants may force her to act out *particular* roles requiring use of a handful of profane words without making any language substitutions.

For such an imposition to be genuinely “important,” it would have to be extraordinarily difficult (if not impossible) to succeed as a professional actor without using such words. But even to suggest as much seems ridiculous. Axson-Flynn’s

¹⁵ Apart from the decision below, our research produced no free exercise decision in which the Supreme Court (or any other court) has applied intermediate scrutiny. Accordingly, we rely on free speech precedent. To the extent that *Yoder* is properly viewed as an “intermediate scrutiny” decision, it simply confirms that defendants’ actions here fail that test. See *supra* Part I.D.

parents have enjoyed successful careers in contemporary theater without using such language. App. 63. The broadcast television industry has long maintained a “taboo” on using the words Axson-Flynn cannot say. Hollywood produces hundreds of “G-rated” and “PG-rated” movies each year, grossing billions in revenues. And the public university to which Axson-Flynn transferred allowed her to make script modifications to respect her conscience. App. 88-89. In short, by failing to recognize the fundamental distinction between a willingness to take on “disagreeable” roles and a willingness to say a handful of profane words, the district court allowed defendants to violate Axson-Flynn’s constitutional rights on very flimsy grounds indeed.

Second, defendants’ policy compels far more speech than is necessary to achieve their legitimate pedagogical objectives. Defendants have an interest in requiring actors to learn to role play, or to portray unfamiliar characters and sometimes uncomfortable conduct. But the notion that it is necessary to learn to play any *particular* role, or to use *particular* words—let alone particular *profanities*—is simply untenable.

III. Defendants Are Not Entitled To Qualified Immunity.

Under the doctrine of qualified immunity, government officials are “shielded from liability for civil damages [under 42 U.S.C. § 1983] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is “clearly established” if there is a “Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts * * * ha[s] found the law to be as the plaintiff maintains.” *Medina v. City of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992). However, the plaintiff “need not show that the very action in question was previously held unlawful.” *Horstkoetter v. Dep’t of Pub. Safety*, 159 F.3d 1265, 1278 (10th Cir. 1998).

The district court dealt with qualified immunity in cursory fashion, concluding in a paragraph that “Defendants did not violate Plaintiff’s First Amendment rights” and thus were “entitled to qualified immunity * * * on *all*” claims. Op. 28 (emphasis added). The court made no mention of the fact that plaintiff seeks *both* monetary and equitable relief.

A. Axson-Flynn’s Rights Were Clearly Established.

As we have shown, Axson-Flynn is entitled to relief under both the Free Speech and Free Exercise Clauses. Moreover, the law on each claim was “clearly

established” in her favor at the time of the challenged conduct. As for free speech, *Barnette* established 60 years ago that public schools cannot compel religious students to engage in speech that violates their conscience, and numerous subsequent decisions have held that compelled speech—whether or not ideological—must satisfy strict scrutiny. See *Barnette*, 319 U.S. at 634; *Riley*, 487 U.S. at 795, 800; *Turner Broadcasting*, 512 U.S. at 642; *Wooley*, 430 U.S. at 716. As the Second Circuit has explained: “Since at least 1943, when the Supreme Court decided [*Barnette*], it has been firm constitutional doctrine that the state cannot constitutionally compel individuals to speak or think in prescribed ways,” and “[t]he principles of *Barnette* have since been applied in a variety of contexts.” *Carroll v. Blinken*, 957 F.2d 991, 995-996 (2d Cir. 1992) (emphasis added). Similarly, the First Circuit has observed that “[a] distinguished line of cases has underscored a private party’s right to refuse compelled expression,” and that it was “unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.” *Redgrave*, 855 F.2d at 906. Although the issue has not arisen in the *precise* context of in-class acting drills, that is not required. *Horstkoetter*, 159 F.3d at 1278. Like *Barnette*, this case involves an objection to violating one of the Ten Commandments, and this Court’s decision in *Bauchman* confirms that the First Amendment protects students who object to religiously offensive content in a fine arts curriculum (choral music

there, drama here). In sum, it is hard to imagine a clearer infraction of the First Amendment.

As for free exercise, at the time of defendants' conduct it was well settled that the Free Exercise Clause *at a minimum* bars religious discrimination in the granting of accommodations. *Smith*, 494 U.S. at 884. The district court ignored defendants' accommodation of Jeremy Rische, and *Smith* itself (following prior precedent) confirmed that the government may not refuse to extend individualized exemptions to particular cases of "religious hardship" without compelling reason. *Id.* at 884. Indeed, any claim that defendants have a compelling interest in compliance with every jot and tittle of their curriculum is belied by their more favorable treatment of Rische, who was exempted from "mandatory" performance requirements without penalty. It is also foreclosed by *Yoder*, which established some 30 years ago that the state lacks a compelling interest in requiring compliance with educational requirements that are not critical to success in the particular community that one intends to serve.

Finally, although this Court has said that the "exact contours" of the hybrid rights doctrine are unclear (*Swanson*, 135 F.3d at 699), this case is nowhere near the outer bounds of its application. Citing *Yoder* and other established precedent, *Smith* expressly stated that a hybrid speech/religion claim warrants strict scrutiny

(494 U.S. at 881), and, as we have shown, Axson-Flynn’s free speech claim, even if not independently valid, would plainly warrant heightened scrutiny when taken together with her free exercise claim. Moreover, even if the district court had been correct in holding (Op. 18, 22-26) that hybrid claims receive only “intermediate scrutiny” (and it was not), it is beyond debate after *Yoder* that defendants lack a “more than reasonable” justification for requiring Axson-Flynn to violate her conscience. See 406 U.S. at 221. Thus, defendants should not be allowed to invoke qualified immunity.

B. Qualified Immunity Does Not Bar Axson-Flynn’s Claims For Equitable Relief.

Even if the rights at issue were not “clearly established” in 1998-99, however, that does not dispose of Axson-Flynn’s *entire case*. Qualified immunity protects officials ““from *suits for damages,*”” and the Supreme Court has declined to extend it to claims for equitable relief. *Ryder v. United States*, 515 U.S. 177, 185 (1995) (emphasis in original). In addition to her claim for monetary relief, Axson-Flynn has sought both equitable and declaratory relief. App. 9, 13. Accordingly, even if the district court’s truncated analysis were otherwise correct, qualified immunity *at most* could defeat only her claim for damages.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further factfinding and application of the correct constitutional standards.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. This appeal raises constitutional questions of importance to public university students throughout this Circuit, and the district court seriously misconstrued binding precedent from both this Court and the Supreme Court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for plaintiff-appellant Christina Axson-Flynn certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and contains 13,947 words, excluding the disclosure statement, table of contents, table of authorities, addendum, and certificates of counsel.

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CERTIFICATE OF SERVICE

I certify that I served two copies of the Opening Brief for Appellant and a copy of Appellants' Appendix, by overnight delivery, on February 20, 2002, addressed to:

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