

**United States Court of Appeals for the Tenth Circuit**

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CHRISTINA AXSON-FLYNN, *Plaintiff/Appellant*

v.

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

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

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**REPLY BRIEF FOR APPELLANT**

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***Oral Argument Requested***

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## REPLY BRIEF FOR PLAINTIFF-APPELLANT AXSON-FLYNN

This case tests the extreme outer boundaries of the power of school officials to insist upon strict compliance with curricular requirements that they know to violate a student's deeply-held religious convictions. The decision below can be affirmed only if faculty and administrators at state universities are *never* required to accommodate conscientious objectors, no matter how reasonable and modest the student's request, and no matter how trivial the curricular requirement at issue. Reversal of the district court's opinion, on the other hand, would reaffirm that the First Amendment imposes at least *some* limitations on the behavior of university officials in the classroom setting.

In our opening brief we demonstrated that the Free Speech Clause affords far greater protection against compelled speech than the district court recognized. We showed that the right not to speak extends beyond situations in which the speaker is compelled to "espouse an ideology on behalf of the state" (Opening Br. 21-29) or to affirm a proposition "for its truth" (*id.* 29-32), and discussed numerous cases (including this Court's decision in *Bauchman*) demonstrating that the state may not compel students to engage in religiously offensive speech, even for purposes of an artistic performance (*id.* 20, 33-36). We also explained that Axson-Flynn has a Free Exercise claim under *both* exceptions to the rule of *Smith*: defendants granted

“individualized exemptions” in a discriminatory manner (by honoring the Jewish student’s request but not Axson-Flynn’s) (*id.* 51-54), and this case is subject to strict scrutiny under the “hybrid rights” rule since Axson-Flynn has raised colorable claims under both the Free Exercise and Free Speech Clauses (*id.* 54-56). Finally, we showed that defendants cannot possibly justify their insistence on the use of particular profanities under any form of heightened scrutiny. *Id.* 36-49, 56-58.

Defendants offer no serious answer to the vast majority of our points. Instead, they devote most of their brief to irrelevant arguments — such as whether the University’s curriculum was “neutral” (Def. Br. 23-32) and whether it violated the Establishment Clause (*id.* 38-40) — and, along with their amicus American Association of University Professors (AAUP), to a lengthy digression on “academic freedom” (*id.* 9-14; AAUP Br. *passim*). Moreover, rather than explaining why demanding that Axson-Flynn violate her conscience is necessary to serve a compelling state interest, they offer up the straw-man justification that students must learn to take on uncomfortable roles and play characters different from themselves (Def. Br. 28) — generalized goals to which Axson-Flynn has no objection, and which can be met in any number of ways that would not offend her conscience.<sup>1</sup>

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<sup>1</sup> Defendants’ argument (at 22 n.7) that Axson-Flynn lacks standing is baseless. Axson-Flynn need not suffer an actual violation of her conscience to raise a claim  
(continued...)

**I. Defendants Have Offered No Justifications For Requiring Axson-Flynn To Violate Her Conscience.**

Defendants sought to compel Axson-Flynn to “get over” religious objections to using certain profanities — objections they considered illegitimate and inappropriate for an aspiring actress. App. 51. They told her that her interpretation of her religion was unreasonable and not truly required by her Mormon faith — that “a good Mormon” need not have such objections and that she needed to “get over” her religious beliefs. App. 66. Defendants told Axson-Flynn that her grades, and ultimately her ability to remain a student in the acting program, depended on getting over her religious objections. App. 67-70.<sup>2</sup>

It is important to emphasize that defendants had previously led Axson-Flynn to believe that her objections were perfectly acceptable. At her audition for the

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<sup>1</sup> (...continued)

that she should not be compelled to give up her First Amendment rights. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 567 n.3 (1992) (plaintiff has standing where alleged injury was “certainly impending”); *Acorn v. City of Tulsa*, 835 F.2d 735, 739 (10<sup>th</sup> Cir. 1984); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3532.3 (2002) (First Amendment claims “are particularly apt to be found ripe because of the need to protect against chilling First Amendment rights”).

<sup>2</sup> Defendants’ attempt (at 5-6 & n.3) to cast doubt on the fact that they insisted Axson-Flynn leave the acting program if she refused to utter these words is entirely unavailing. Because this is an appeal from a grant of *summary judgment*, the facts must be taken in the light most favorable to Axson-Flynn, with all disputed issues resolved in her favor and — most importantly — giving her the benefit of every favorable inference from those facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

actor training program (ATP), Axson-Flynn explained her religious objections and made clear to defendants that she would rather not be accepted if it would mean being forced to violate her religion. Defendants understood her position and accepted her into the program notwithstanding their disagreement with her. App. 40-48.

It is also important to emphasize what is *not* in dispute in this case. To begin with, Axson-Flynn has not sought to modify the curriculum generally or as to any other student. She does not seek to be shielded from *hearing* offensive words, or to prevent others from reciting them in classroom exercises. Her claim is limited to *herself*. App. 44.

Axson-Flynn also does not seek relief that would permit her unilaterally to “alter scripts” in *public performances* of plays. App. 132. Nor has she objected to playing characters that engage in behavior she finds morally problematic. App. 60. And Axson-Flynn has no problem using any *other* profanities beyond those she specifically mentioned at her audition. *Ibid*.

Moreover, Axson-Flynn is unconcerned with *how* school officials accommodate her religious needs. If school officials prefer that she omit a phrase, that is fine with her. If they prefer that she recite other material, be excused from a particular exercise or class session altogether (as was Jeremy Rische), or substitute language during in-class exercises, that is fine with her too. She simply asks that

she not be forced to choose between violating her conscience and leaving the program.

Defendants, however, have not even *suggested* any overriding interest in forcing Axson-Flynn to say “f—k” — or to use God’s name disrespectfully — in classroom acting drills. They baldly state (at 34) that changing even a *single word* in a classroom exercise “voids the purpose of the curriculum as structured,” and (at 31) that in-class exercises “must be performed as written.”<sup>3</sup> But the undisputed record evidence demonstrates that:

- another Utah state university acting program, in which Axson-Flynn later enrolled, accommodated her request (App. 88-89);
- defendants admitted Axson-Flynn into their program with full awareness of her convictions (App. 39-48);
- defendants did not notice and gave her high marks when she modified the objectionable profanities in her performance of certain assignments (App. 49-51, 57-58);
- defendants exempted Jeremy Rische from *entire mandatory assignments* within the curriculum (App. 122-129);
- Axson-Flynn’s parents have enjoyed successful acting careers without using the very same profanities to which she objects (App. 32-33);
- there is a large and growing market for the dramatic entertainment that Axson-Flynn wishes to provide (Actors’ Br. 9-13; Opening Br. 38);

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<sup>3</sup> There is no evidence of record indicating that this was in fact part of the curricular materials or communicated to ATP students. Axson-Flynn was not made aware of any such requirement before entering the program.

- acting professionals are able to select which roles they wish to audition for, commonly negotiate contractual concessions of various kinds, and frequently make language substitutions in scripts (Actors’ Br. 7-9); and
- Axson-Flynn’s objection is easily accommodated (*e.g.* App. 51).

Defendants completely ignore these facts. Instead, they simply reiterate their position that ATP students must learn to perform “modern scripts exemplifying the modern theater,” explaining that they wish to “challenge students with characters and stories that might be quite different from their own life experiences.” Def. Br. 11, 31. Axson-Flynn is in agreement with these generalized goals. But they can be accomplished in any number of ways, most of which would *not* violate her conscience. Thus, the real question is not whether defendants may insist *generally* that ATP students be willing to “portray characters substantially different from themselves,” but whether they can show a “compelling” (or “important”) interest in forcing a religious objector to use *particular profanities* in violation of her conscience. Defendants have not even begun to answer *that* question.

## **II. Defendants’ Conduct Violated the Free Speech Clause.**

### **A. The First Amendment’s Protection Against Compelled Speech Is Not Limited To “Ideological Points Of View.”**

Defendants insist (at 15) that they could not have violated the Free Speech Clause because they “merely required Axson-Flynn to ‘act.’” They state that “there is no federal court precedent precisely defining the bounds of the ‘sphere of intellect

and spirit,” but nonetheless contend that the right not to speak cannot extend beyond situations where an individual is “required to communicate an official state view or carry [a] message on the state’s behalf.” *Id.* 17.

Although defendants purport to base this view on *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Board of Educ. v. Barnette*, 319 U.S. 624 (1943), and an incorrect reading of an isolated comment in this Court’s decision in *Phelan v. Laramie County Community College Bd.*, 235 F.3d 1243 (10<sup>th</sup> Cir. 2000), we showed in our opening brief (at 21-29) that none of these cases establishes that freedom from compelled expression is limited to “ideological” speech. Both *Barnette* (in which the plaintiffs expressly disavowed any ideological disagreement with the government) and *Wooley* (which recognized protection for “religious” *as well as* “ideological” speech, 430 U.S. at 714) point strongly in the opposite direction. Moreover, *Phelan* cannot possibly establish this Circuit’s standard for the scope of First Amendment protection, since the Court there strongly emphasized that there had been *no governmental compulsion* concerning speech. 235 F.3d at 1248.<sup>4</sup>

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<sup>4</sup> *Phelan* was not about the right *not* to speak, but involved the question whether the First Amendment permitted a community college board to censure one of its members for speaking out on an issue of public concern. 235 F.3d at 1245-46. The language from *Phelan* relied upon by defendants does not speak to the scope of First Amendment protection; indeed, the Court had previously found plaintiff’s speech at issue to be “clearly protected.” *Id.* at 1247 n.2; see Opening Br. 27 n. 5.

We also showed (at 27-28) that religious speech is entitled to full First Amendment protection, and discussed the numerous cases finding a right not to engage in specifically *non-ideological* speech. *E.g.*, *United States v. United Foods, Inc.*, 121 S. Ct. 2334, 2338 (2001) (citing *Barnette* and *Wooley* in sustaining a compelled speech claim despite the lack of attribution to the individual plaintiff and the fact that “the mandated scheme *does not compel the expression of political or ideological views*”) (emphasis added). We cited still other cases showing that the First Amendment applies with full force in the acting context. *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.”); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 906 (1<sup>st</sup> Cir. 1988) (en banc) (“We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.”)

Finally, we showed (at 29-32) that the government may not compel expression regardless of whether the speaker is also forced personally to affirm or embrace the idea expressed, or whether an observer would think that the compelled speech truly reflected the position of the individual forced to convey it. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (recognizing first amendment right of newspaper not to be compelled to publish replies of political candidates, even if newspaper was permitted to print a disclaimer); *Pacific Gas &*

*Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 20-21 (1986) (recognizing free speech right of utility company not to be required to include third party's newsletters with its bills, even though it was clear the utility did not endorse such views).

Defendants completely ignore these principles, and fail to grapple with the substantial body of cases holding that government-compelled speech must be narrowly tailored to a compelling state interest. *E.g.*, *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 most exacting scrutiny”); *Redgrave, supra*, at 906 (“silence traditionally has been more sacrosanct than affirmative expression”); Opening Br. 19-20.<sup>5</sup>

**B. Defendants Misconstrue This Court's Decision In *Bauchman*.**

We previously explained (at 33-36) how defendants' position flies in the face of this Court's recent decision in *Bauchman v. West High School*, 132 F.3d 542 (10<sup>th</sup> Cir. 1997). *Bauchman* is a key precedent. It establishes this Circuit's baseline rule with respect to student challenges to aspects of a state curricular program on Free Speech and Free Exercise grounds. *Bauchman* holds that, while a student cannot “dictate a school's curricula to conform to her religion” in the sense of “the

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<sup>5</sup> Defendants' brief does not even *cite* many of the most important cases, including *United Foods*, *Schacht*, *Redgrave*, *Tornillo*, *Pacific Gas*, and *Turner*.

prohibition of a school activity,” 132 F.3d at 557, a student *does* state a valid First Amendment claim, under both the Free Speech and Free Exercise Clauses, when she is required, on pain of academic penalty, to engage in expression or conduct contrary to her religious beliefs in a curricular context. *Id.* (“[T]o state a Free Exercise claim, Ms. Bauchman must allege facts showing she was ‘coerced’ into singing songs contrary to her religious belief.”); *id.* at 558 (a student states a valid free speech claim when she is “coerced or compelled to engage in” speech or expressive conduct within the curriculum that she finds offensive). The government fulfills its constitutional duty by permitting the student not to participate and imposing no penalty for non-participation. The government is *not* required to change its academic program as to others; but it must accommodate the individual student by “not coercing [her] to violate her religious beliefs.” *Id.* at 558.<sup>6</sup>

Defendants do not seriously attempt to distinguish *Bauchman*. They offer just two responses. First, they suggest (at 21-22), quite implausibly, that *Bauchman*

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<sup>6</sup> Defendants, like the district court, suggest (at 20-21) that *Bauchman*’s discussion of the plaintiff’s free speech and free exercise claims was dictum, since plaintiff’s claims were rejected, and that the Court’s discussion therefore need not be followed in subsequent cases. See Op. 9 & n.2. *Bauchman* cannot be so casually dismissed. It is true that the free speech and free exercise claims were rejected, but the Court’s discussion of what *is required to establish such claims, in the context of a curricular challenge*, was essential to its ultimate disposition of the case. Plainly, the case would have come out the other way if the school district had not excused Rachel Bauchman from the singing of Christian songs. Forced participation would violate her First Amendment rights, but the ability to opt-out was a sufficient remedy.

contains an implicit further requirement that the speech or expression compelled by the government have required the student actually to affirm belief in an ideological message. But *Bauchman* says nothing of the kind; it simply says that the government may not compel speech and that the First Amendment is satisfied by not requiring a student to engage in such speech.

Indeed, *Bauchman* powerfully *refutes* defendants' claim that a student's freedom from compelled speech is limited to affirmations of belief — like a flag salute or pledge, or where a student is asked “to speak words as the truth or to advocate a viewpoint of the state.” Def. Br. 17. Rachel Bauchman had exactly the same objection as Axson-Flynn: she objected to being forced to perform material written by others and selected by others, the performance of which was inconsistent with her religious beliefs. The only difference is that in *Bauchman* the state did *not* require the plaintiff to participate, while here the state *did* require Axson-Flynn to participate. Were defendants correct in asserting that the First Amendment's protections against compelled speech are limited to cases of ideological speech, the Court in *Bauchman* would have disposed of her claim simply by saying so. The opinion contains no suggestion, however, that the government may compel speech provided it is nonideological.

Second, defendants quote a passage from *Bauchman* out of context to make the case appear not to stand for one of its key propositions. Defendants' brief

states: “The *Bauchman* court specifically ‘reject[ed] any invitation to obscure the appropriate scope of her Free Exercise claim by addressing issues of curriculum content.’ *Id.* at 558.” Def. Br. 26. But the relevant passage states in full (with the language omitted by defendants in italics): “*Having concluded the State of Utah is not coercing Ms. Bauchman to violate her religious beliefs*, we reject any invitation to obscure the appropriate scope of her Free Exercise claim by addressing issues of curriculum content.” 132 F.3d at 558. The difference is fundamental. The state’s brief deletes the key substantive predicate for this Court’s holding — that the State of Utah was not coercing the student to violate her religious beliefs by engaging in compelled expression. That, of course, is the core difference between *Bauchman* and this case, and that is why the district court’s decision is inconsistent with *Bauchman*.<sup>7</sup>

**C. The Goal Of “Academic Freedom” Does Not Relieve University Officials From Their Constitutional Obligations.**

Defendants attempt to turn the First Amendment on its head so that, rather than protecting individual citizens from abuse of power by the *government*, it

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<sup>7</sup> Inexplicably, the district court also thought this Court’s decision in *Bauchman* to be questionable authority, at least on the Free Exercise Clause, on the theory that this Court might have believed that *Employment Division v. Smith*, 494 U.S. 872 (1990), had been superseded by the Religious Freedom Restoration Act (RFRA). Op. at 9-10. That is plainly wrong. *Bauchman* noted that a RFRA claim had been dismissed below and not appealed, 132 F.3d at 547 n.5, and proceeded to evaluate the First Amendment claims on their own terms.

immunizes public university officials from claims by *students*. This bizarre argument is supposedly based on the doctrine of “academic freedom,” which defendants claim stands for the proposition that “schools set the curriculum and courts do not enter the process.” Def. Br. 13. Defendants’ novel theory should be rejected.

Defendants display a fundamental misunderstanding of the nature of academic freedom. *First*, as defendants’ *amicus* AAUP well knows, the academic freedom of professors is primarily the privilege to write and speak freely, without *government* control. See, *e.g.*, AAUP Statement of Principles on Academic Freedom and Tenure (1940); Donna R. Euben (AAUP staff counsel), *Academic Freedom: The Current Legal Landscape* (May 2002), <<http://www.-aaup.org/Com-a/aeuben.HTM>> (visited June 14, 2002) at 1 (“academic freedom cases have focused primarily on faculty freedom from *institutional intrusion*”); *id.* at 3 (Supreme Court academic freedom cases involve professors’ right “to be *free from state regulation*”) (emphasis added);<sup>8</sup> Ailsa W. Chang, *Resuscitating the Constitutional “Theory” of Academic Freedom*, 53 STANFORD L. REV. 915, 931 (2001) (“The academic freedom highlighted in judicial opinions seeks to limit

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<sup>8</sup> Defendants’ suggestion (at 6) that it is inappropriate to include Internet citations in a brief is ridiculous. Courts have frequently taken judicial notice of websites, see, *e.g.*, *Grimes v. Navigant Consulting, Inc.*, 185 F. Supp. 2d 906, 914 n.7 (N.D. Ill. 2002), which are clearly part of the public domain. The AAUP’s brief in this case (at 9) cited to the University’s website.

*government action*”) (emphasis added). Those concerns are not present here. Far from being engaged in a dispute *against* the government, in this case defendants have been sued as *agents* of the government. Moreover, no one is seeking to tell defendants what they may or may not *say* — what they may write, teach, or advocate — but only to limit what they may *require students to say or do*, in violation of their religious consciences.

*Second*, defendants appear to advance the extreme argument that curricular decisions of state university instructors *always* prevail over students’ religious beliefs and right to be free from compelled speech. *See* Def. Br. 9-10, 13 (“Issues related to a university’s curriculum should be decided in the context of the faculty’s and university’s academic freedom \* \* \* . [C]ourts do not enter the process.” “The issue [in this case] is the ability of the defendant professors to set their curriculum as they see fit, within their professional judgment.”).

Defendants’ position is truly breathtaking: state universities, in their academic programs, need *never* accommodate students’ religious consciences and *always* may compel students to express or recite things they find deeply offensive. Under their theory, not only can an acting student like Axson-Flynn be required to utter profanity against her religious conscience, she could be required to take off her clothes, if the instructor in his “professional judgment” chooses an acting exercise that calls for it and insists that students perform it. *See, e.g., Southeastern*

*Promotions v. Conrad*, 420 U.S. 546, 550 (1975) (involving controversy over performance of a play involving “group nudity and simulated sex”). Indeed, in the district court defendants’ counsel claimed that defendants could require students to “perform nude” so long as there was a “pedagogical curricular reason” for doing so. App. 132-133. An instructor’s power of control over the curriculum is, in defendants’ view, not properly subject to *any* judicial limitation.<sup>9</sup>

But this suggestion is completely unsupported by precedent. Even if academic freedom *were* applicable to defendants’ actions here, the doctrine has never been held to be absolute. *E.g.*, Euben (AAUP), *supra*, at 3 (“[I]t is clear that the First Amendment protection of individual academic freedom is not absolute.”).

Such a view is also directly contrary to the two cases most closely on point — the Supreme Court’s decision in *Barnette*, and this Court’s recent decision in *Bauchman*.<sup>10</sup> *Barnette* involved a *state curriculum requirement* for teaching

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<sup>9</sup> It would seem to follow from appellees’ argument that if “academic freedom” supplies a university instructor with a defense against First Amendment speech or religion claims by students, it likewise would supply the instructor with a defense to non-constitutional claims, like sexual harassment, if a particular requirement (like removing one’s clothes) is imposed under the auspices of the instructor’s “curricular choice.” *Cf.* Def. Br. 13 (“[S]chools set the curriculum and courts do not enter the process.”). This simply cannot be correct.

<sup>10</sup> Defendants cite *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6<sup>th</sup> Cir. 1987), and *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177 (6<sup>th</sup> Cir. 1993), as “the most factually analogous cases.” Def. Br. 43. But the facts of both cases actually *support* Axson-Flynn: the *Mozert* court stressed that no “plaintiff  
(continued...) ”

principles of “Americanism” and government. 319 U.S. at 625-626. The flag salute was mandated by the state board of education as part of the required curricular program for all public schools in the state. *Id.* at 626. The Court considered and explicitly rejected the argument that school officials’ control of curricular matters completely shields such choices from constitutional challenge. *Id.* at 626-627 (recognizing that school officials have “important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).<sup>11</sup> And, as explained above (pp. 9-12) and in our opening brief (at 33-36), *Bauchman* recognizes — without so much as *mentioning* “academic freedom” — that students in a curricular setting have the right not to be compelled

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<sup>10</sup> (...continued)

student was required to engage in *role play*” (implying that if they had been they may have had a valid claim), 827 F.2d at 1066, and the *Kissinger* court emphasized that — unlike *Axson-Flynn* — the plaintiff there had entered her program fully “forewarned” that she would be required to engage in the activity (in that case, animal dissection) to which she later objected. 5 F.3d at 178. Nor did *Mozert* or *Kissinger* involve the expressive rights of students; no Free Speech Clause claims were raised. See *Redgrave*, 855 F.2d at 906 (“We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.”). Tellingly, the words “academic freedom” do not appear in either opinion.

<sup>11</sup> The position that defendants advance here — that state universities possess plenary authority to design and impose curricular requirements, even ones that offend religious conscience — was the position of Justice Frankfurter’s *dissent* in *Barnette*. 319 U.S. at 648 (Frankfurter, J., dissenting). Justice Frankfurter’s vote in favor of patriotism in time of war surely cannot be construed as a vote in favor of compulsory profanity.

to engage in expression that violates their beliefs or conscience, and that the appropriate balance is struck by excusing them from such programs or exercises where it is possible to do so without changing the curriculum with respect to other students. 132 F.3d at 557-558.

Thus, while academic freedom undoubtedly has its place, defendants' extreme stance is contrary to both law and common sense.<sup>12</sup> University students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969) and it is possible to respect the First Amendment without impairing academic freedom. Indeed, it is the duty and constitutional obligation — and it

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<sup>12</sup> It is relevant in this regard that, on the facts as they must be taken at this stage of the proceedings, defendants were fully aware of the nature and scope of Axson-Flynn's religious objections at the time they accepted her into the program. Axson-Flynn was led to believe that her religious objection to using certain profanity was not inconsistent with any essential aspect of the school's instructional program. Some instructors expressed disagreement with her views, but it was portrayed to her as an artistic disagreement, not a deal-breaker. Otherwise, Axson-Flynn expected she would not have been admitted to the program, for she had made it clear at her audition that she would rather not be admitted than be forced to use this particular profanity. This is not a case of an individual "coming to the nuisance," so to speak. On the contrary, the nuisance came to her. Axson-Flynn was accepted into the program on one understanding of what was and was not an essential part of the school's curriculum, and forced out under another.

ought to be a *welcome* duty and obligation — of state university instructors and officials to do so.<sup>13</sup>

*Third*, defendants’ position is not supported by the precedents they cite. *None* of the cases that have recognized a school’s prerogative to make academic choices has involved an instance of *compelled student expression*. “Academic freedom” cases cited by defendants (at 10-12) involved disputes over grades or university instructors’ evaluation of academic performance. *E.g.*, *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (rejecting due process challenge to university’s refusal to allow student to retake examination); *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (rejecting due process challenge to dismissal for failure to meet academic standards). And cases that have upheld school curriculum *content* decisions as against student challenges have (1) involved elementary or secondary curricula, (2) presented claims for relief that would change some aspect of the curriculum across-the-board, or (3) sought to require a school to publish views it thought inappropriate in its *own* publication —

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<sup>13</sup> Conflicts of this nature occasionally arise on university campuses, but most of them are worked out as a matter of pedagogy and common courtesy, outside the courts. That is as it should be, and we would have preferred a resolution of this conflict without resort to litigation.

or sometimes all three features simultaneously. *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).<sup>14</sup>

*Fourth*, defendants fail to recognize that several of the most important cases discussing academic freedom have done so in the course of vindicating *students'* “academic freedom” and First Amendment rights as against sweeping claims of power by university or secondary school officials.<sup>15</sup> As numerous decisions have recognized, these student expressive rights are not limited to the hallways or the campus grounds but also encompass the “classroom.” *Tinker*, 393 U.S. at 512-513; *Healy*, 408 U.S. at 180; *Keyishian*, 385 U.S. at 603.

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<sup>14</sup> *Hazelwood* addressed school officials’ right to control the content of an official school-sponsored publication, notwithstanding the fact that students wrote and edited the stories as part of a journalism class. In that sense, it is similar to *Miami Herald*, 418 U.S. 241. A newspaper publisher may control the content of the newspaper’s reports and articles.

<sup>15</sup> *See, e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Tinker*, 393 U.S. at 511 (“[S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students \* \* \* . [Students possess] fundamental rights which the State must respect \* \* \* [and] may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”); *Healy v. James*, 408 U.S. 169, 180-181 (1972); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 832-836 (1995); *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217, 240 (2000) (Souter, J., concurring) (although “academic freedom” has often prevented the *government* from imposing on university faculties, “we have never held that universities lie entirely beyond the reach of students’ First Amendment rights.”); Euben (AAUP), *supra*, at 8 (referring to the “free expression rights of \* \* \* students”).

We are not saying that First Amendment claims by students should always prevail over claims of instructional freedom of professors. We are merely saying that the reverse is not true, either: claims of academic freedom should not always prevail over the First Amendment rights of students. Either extreme would be unfaithful to the Supreme Court's precedents. What is required is a balance that respects legitimate claims to freedom from compelled expression and freedom of religious conscience, while also respecting academic prerogatives to write and teach freely.

There are many instances when that balance is difficult to draw. But this is not one of them. Here, the proper balance is obvious. Ms. Axson-Flynn asks only that she not be compelled to utter certain profanities in classroom exercises and that she be permitted to satisfy acting assignments *in any alternative way the instructors find academically appropriate*. This fully respects academic freedom. Surely defendants cannot plausibly maintain that it is impossible to satisfy their instructional objectives without requiring students to recite any and all profanities in class. Surely they cannot plausibly maintain that it is impossible to be an actor or actress unless one is trained, and willing, to use such words.<sup>16</sup> If there is a dispute in this regard, the case must be remanded for trial. Only if defendants' academic

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<sup>16</sup> As explained above (pp. 5-6), any such contention is foreclosed by the evidence of record.

freedom defense is *absolute* — an extreme position at odds with common sense, unsupported by any relevant precedent, and inconsistent with this Court’s decision in *Bauchman* — can the decision below be affirmed.

### **III. Defendants’ Conduct Violated The Free Exercise Clause.**

#### **A. Defendants Granted Religious Exemptions In An Improperly Selective Manner.**

Defendants concede (at 32) that when the state “makes religious accommodations for some individuals, it must make religious accommodations for all individuals.” They also concede (at 33) that they *altered their instructional program* to accommodate Jeremy Rische’s religious needs, permitting him to perform alternative work — even to the point of affording him “private teaching sessions” — in substitution for mandatory group classroom exercises. *See App.* 124-129. Defendants engaged in this selective accommodation of religious needs even though, on one occasion, the instructor had previously announced that the missed session “couldn’t be made up” and that there would be “no exceptions.” *App.* 74, 123.

This is laudable, and we commend the university for accommodating Rische’s religious objection to being required to participate in class sessions or play rehearsals on Jewish holy days.<sup>17</sup> But in accommodating the conflict with Rische’s

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<sup>17</sup> We note, however, that under the legal position defendants take in this  
(continued...)

religious needs, while refusing similarly to accommodate Axson-Flynn’s religious needs, defendants violated the First Amendment.

Defendants defend their selective accommodation on three grounds, none of which is persuasive. First, they state that Rische was “required to make up the work on his own time, including attending private teaching sessions.” Def. Br. 33. This attempted distinction is baffling. Providing individualized, private teaching sessions would seem quite beneficial, and the lessons provided to Rische were not only “on his own time” but *on the ATP’s time* as well. Axson-Flynn is certainly willing to perform whatever alternative work the instructors choose, spending additional time in private sessions if necessary, if that is how the university chooses to accommodate her.

Second, defendants assert that accommodating Rische did not “change the curriculum,” whereas accommodating Axson-Flynn would. But this makes no sense. As demonstrated in our opening brief (at 51), the instructional program *was* changed for Rische: he was not required to attend a mandatory in-class group improvisational exercise — one that the instructor had initially said “couldn’t be made up” and for which she would make “no exceptions” — and he was provided with an out-of-class alternative. App. 123-129. Axson-Flynn asks not to be

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<sup>17</sup> (...continued)  
litigation, they *need not* have accommodated Rische’s request to be absent on Yom Kippur.

required to utter certain profanities, and she is willing to perform alternative work or simply to substitute less vulgar language, whichever the instructor directs. Defendants cannot seriously contend that uttering profanity is more central to actor training than class attendance. See App. 111-112 (ATP curricular materials stating “it is imperative that this class be attended at all times,” and students “receive a grade for each day’s class work”).

Finally, defendants take the remarkable position that they may selectively accommodate religion because they only made an “allowance” for Rische, and do not have a *written policy* creating “a *system* of individual exemptions.” Def. Br. 33-34 (“In fact, allowing the Jewish student to miss class was not an ‘exemption’ at all.”).<sup>18</sup> As we showed in our opening brief (52-54), neither *Smith* nor *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), limits the individualized-exemption requirement to written policies as opposed to ad hoc administrative practices. Such a limitation would be perverse, providing state officials with unchecked power selectively to accommodate religion — as long as they do not put anything in writing. The lower court case most similar on this point, *Rader v. Johnston*, 924 F. Supp. 1540, 1552-1553 (D. Neb. 1996), held that unwritten, ad hoc, administrative exception-granting by state university officials

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<sup>18</sup> There is no apparent difference between an “allowance” and an “exemption”; defendants are engaging in semantics.

was equally governed by the reasoning of *Lukumi*. Defendants provide no response to any of these points.<sup>19</sup>

**B. Defendants’ Conduct Is Subject To Strict Scrutiny Under The “Hybrid Rights” Doctrine.**

Defendants concede (at 35-38) that this is a “hybrid” case and that heightened scrutiny applies.<sup>20</sup> Like the district court, however, they are uncertain as to what that standard requires. *Ibid.*; see Op. 17-22. Although there is some uncertainty among lower courts as to the correct doctrinal formulation, there is no question that the hybrid rights doctrine is fully recognized in this Circuit, *Swanson v. Guthrie Indep. School Dist.*, 135 F.3d 694, 700 (10<sup>th</sup> Cir. 1998), and that both *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Barnette* — discussed by the Court in *Smith* as

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<sup>19</sup> Defendants’ apparent *reasons* for selectively accommodating religion are highly troubling. They evidently believed that Axson-Flynn’s religious principles (but not Rische’s) were *unreasonable* ones or, even worse, that Axson-Flynn’s interpretation of her own faith was *unsound* — that a “good Mormon” need not object to saying “f—k” or “goddamn,” or to using the name of Jesus Christ as an expletive. App. 66. It should go without saying that it is totally improper for state officials to set themselves up as judges of which religious beliefs are sound, required, consistent, or worthy of indulgence. *Thomas v. Review Board*, 450 U.S. 707, 714 (1981). *Lukumi* recognizes anti-religious motivation as a separate and independent ground for finding a violation of the Free Exercise Clause. 508 U.S. at 540-542 (Opinion of Kennedy, J.). This is an additional reason to reverse the grant of summary judgment by the court below.

<sup>20</sup> In *Smith*, the Court specifically identified “compelled speech” claims as cases of this sort. 494 U.S. at 882 (citing *Wooley* and *Barnette*).

paradigm illustrations of “hybrid” free exercise claims (494 U.S. at 881-882) — remain good law.<sup>21</sup>

The holdings of these cases, and the standards they applied, are more important than whatever doctrinal label is attached to them. As noted in our opening brief (at 56), *Yoder* holds that “only those interests of the highest order and those not otherwise served” can defeat free exercise claims in what *Smith* now calls a “hybrid” situation. 406 U.S. at 221. Similarly, *Barnette* holds that “freedoms of speech and of press, of assembly, and of worship may not be infringed on \* \* \* slender grounds” but are “susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.” 319 U.S. at 639. However one chooses to label such standards — be it “strict scrutiny” (as we think correct), or “heightened scrutiny” (as defendants concede), or something else — it is clear that the government bears an extraordinary burden of justification with respect to interference with such rights: the state interest at stake must be an extremely important one, and one not capable of being accomplished without insisting on the requirement at issue.

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<sup>21</sup> Defendants baldly assert (at 36 n.9) that “it may well be that *Yoder* is limited to its facts.” The Supreme Court has not so limited it. To the contrary, it explicitly reaffirmed *Yoder* as a case whose force and validity was not affected by the new rule announced in *Smith* (494 U.S. at 881), and has reaffirmed this understanding in numerous decisions since. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

As shown in our opening brief (at 40-41), if heightened scrutiny is applied, this is an *a fortiori* case under *Yoder*.<sup>22</sup> As in *Yoder*, the state’s legitimate objective — there, preparing students “to be self-reliant and self-sufficient participants in society” (406 U.S. at 221); here, teaching students “how to portray characters substantially different from themselves” (Def. Br. 31) — can easily be accomplished while accommodating the religiously-based conscientious objection at issue. And Axson-Flynn’s request (being exempted from saying *a few words*) is far narrower than the request the *Yoder* court ordered the state of Wisconsin to accommodate (excusing Old Order Amish students from two entire years of school). Defendants have utterly failed to address this argument.<sup>23</sup>

Why? What *is* the state’s asserted interest in requiring Axson-Flynn to utter the profanities in question without allowing her to recite substitute material? Presumably it is not an interest in being unyielding for the sake of being unyielding (since defendants accommodated Jeremy Rische’s religiously based request). Presumably it is not an interest in profanity for its own sake (since defendants gave

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<sup>22</sup> *Yoder* is persuasive authority here whether the basis for applying heightened scrutiny is the Free Speech Clause, the Free Exercise Clause, or both.

<sup>23</sup> Defendants also make no response to our qualified immunity arguments other than to insist that the law is too vague for them to be expected to comply with it. Def. Br. 41-43. In particular, they make no mention of the crucial fact that under no circumstances should the doctrine be applied to Axson-Flynn’s request for equitable and declaratory relief. We rest on the arguments in our opening brief. Opening Br. 59-62.

Axson-Flynn an “A” in class performances where she altered the offending words). Stripped to its essentials, defendants’ asserted justification is precisely their *belief that Axson-Flynn’s religious conscientious objection to the use of such language needs to be broken down*. From defendants’ perspective, Axson-Flynn’s objection is mere squeamishness, inappropriate for an actress — a childish weakness, almost like a bad habit, to be overcome through rigorous training under the direction of hardened acting professionals. Defendants’ intention is to advance a particular *ideology* of what it means to be an actor, and to overcome Axson-Flynn’s religiously-based resistance to that ideology.<sup>24</sup>

In starkest terms, the state’s asserted “educational” interest in this case is nothing more or less than an interest in *overcoming and defeating* a young woman’s religious objection to the use of certain words in acting. Defendants’ interest in enforcing this particular requirement is precisely to break Axson-Flynn of her religious sensibilities and her adherence to her religious principles.

Such an interest, we submit — far from being “compelling” or “important” — is not even *legitimate*, and thus fails *any* serious standard of scrutiny. It is an interest in compelling orthodoxy, a tyrannical form of government action that the

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<sup>24</sup> See Opening Br. 28-29 (demonstrating that Axson-Flynn’s refusal to use profanity sends an ideological message).

Supreme Court's decisions clearly forbid. As the Court stated in *Barnette*, 319 U.S. at 642:

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. If there are any circumstances which permit an exception, they do not now occur to us.

### CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the district court should be reversed.

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)(ii) and contains 6940 words, excluding the table of contents, table of authorities, and certificates of counsel.

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