No. 23-3630

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PARENTS DEFENDING EDUCATION,
Plaintiff-Appellant,

v.

OLENTANGY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,
Defendants-Appellees.

On Appeal from the Judgment of the United States
District Court for the Southern District of Ohio
(Dist. Ct. No. 2:23-cv-01595-ALM-KAJ)

BRIEF OF *AMICI CURIAE* STATES OF OHIO, SOUTH CAROLINA, AND 21 OTHER STATES SUPPORTING PLAINTIFF-APPELLANT

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STATEMENT OF *AMICI* INTERESTS AND SUMMARY OF ARGUMENT

Amici States' interests ordinarily repose in defending exercises of their power. Today, the States find themselves in a rare position: urging this Court to reaffirm *limits* on governmental power—in public education no less, an area that "is a traditional concern of the States." *Tennessee v. Dep't of Educ.*, 104 F.4th 577, 593 (6th Cir. 2024) (quoting *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring)). They take that position even though the governmental entity here is one of the largest school districts in one of the Amici States, Ohio.

If that seems significant, it should. Amici States' unusual legal position reflects the unusually egregious government action here. Defendants ask this Court to bless a pernicious, compelled-speech regime for public school students. Moreover, Defendants' speech policies target what the parties, this Court, and the Supreme Court all agree is a "matter[] of profound value and concern to the public"—the debate over the proper interpersonal and cultural response to transgenderism. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (internal quotation and citation omitted).

"[P]ronouns matter." *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 466 (6th Cir. 2024), *vacated by grant of rehearing en banc* (6th Cir. Nov. 1, 2021) ("panel op."). That is because "titles and pronouns carry a

message." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). Some believe that people can have a gender identity inconsistent with their sex. Using preferred pronouns expresses this view. Others disagree. They hold a different view of sex and gender—that to use pronouns inconsistent with someone's sex is to speak a lie.

The Olentangy Local School District Board of Education ("Board") took sides in the debate and embraced the first view. And it undertook to eradicate opposing views by forcing students—including those who disagree—to use their peers' preferred pronouns. Specifically, the Board adopted three policies purportedly prohibiting "harassment" based on protected characteristics including "transgender identity" ("policies"). Order, R.28, PageID#815–16. By the Board's own admission, its policies punish students who "fail[] to address a student by [his or her] preferred pronouns," among other things. *Id.*, PageID#810. Ultimately, these policies put students who disagree with the Board's views on gender identity to a Hobson's choice: violate their consciences or violate school policy. The policies thus contravene a "fixed star in our constitutional constellation": "no official, high or petty, can prescribe what shall be orthodox in … matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Amici States have a strong interest in ensuring that children in their public

schools enjoy learning environments free from ideological compulsion. Defendants' policies infringe the First Amendment freedoms of one Amici State's school children and set a dangerous precedent for others, requiring the Court's correction. Ohio law empowers local school boards to set school policies. Because the Ohio State Department of Education and Workforce has no statutory authority to establish (or revoke) student-conduct policies, the State executive branch cannot correct Defendants' unconstitutional school policies. Ohio's students remain subject to Defendants' unconstitutional speech mandate absent Court intervention.

ARGUMENT

The First Amendment forbids school officials from coercing students to express messages inconsistent with the students' values. *Barnette*, 319 U.S. at 642. To the contrary, "the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015). Defendants' policies defy those bedrock First Amendment principles and this Court's recent compelled-speech decision in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

It follows that plaintiff-appellant likely will prevail in the First Amendment challenge to the policies. Because the likelihood of success factor is "the key

inquiry" in First Amendment cases, Amici States focus on that analysis. *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 403 (6th Cir. 2022).

A. The policies compel speech because students cannot avoid using pronouns in a school setting.

"Pronouns are ubiquitous in everyday speech." Panel Op. at 40 (Batchelder, J., dissenting). That is why this Court held in *Meriwether* that a university's preferred-pronoun policy compelled speech: the pervasive nature of personal pronouns makes it virtually impossible to avoid them in ordinary human interaction. 992 F.3d at 507, 517. Even the district court acknowledged that "student[s] in a school hallway" must "use[] pronouns because it is required by the English language when … greeting classmates, exchanging pleasantries, and joking with friends." Order, R.28, PageID#843.

No one contests that the policies compel students to refer to certain students using sex-specific pronouns that do not correspond to the referent's sex. For most students zoned to attend Olentangy schools, compliance is "a virtual necessity." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Ohio law compels school attendance. Ohio Rev. Code §3321.01(A)(1). And approximately 80 percent of Ohio students attend traditional public-school districts. Thomas B. Fordham Institute, *Ohio Education by the Numbers 2024*, 19 (7th ed.), https://perma.cc/Z4N7-Q7VP. By leaving only one pronoun option—transgender students' preferred pronouns—the

policies thus "in effect require[]" students to use their peers' preferred pronouns. *Wooley*, 430 U.S. at 715.

It is no defense to say, as the panel majority did, that the policies do not compel protected speech because "[s]tudents who do not want to use their transgender classmates' preferred pronouns may permissibly use no pronouns at all, and refer to their classmates using first names." Panel Op. at 14. This faux "compromise" compels students to choose one of two options (preferred pronouns or names) they otherwise would not speak, in lieu of their chosen message (pronouns that correspond to sex). *Id.* *Meriwether* never suggested that the existence of such a compromise is constitutionally *sufficient*. Rather, it merely faulted the university for not accepting the professor's offer of compromise. *Meriwether*, 992 F.3d at 510–11. Regardless, Professor Meriwether's self-imposed compromise is not analogous to a forced "accommodation" that was never actually offered by the Board. Panel Op. at 14.

Nor is it a viable option for objecting students to shun transgender students. *Id.* These choices are as illusory as the unconstitutional option in *Wooley* to forgo driving a car to avoid displaying a state motto on license plates. 430 U.S. at 715. To apply the Supreme Court's reasoning in *Wooley*, pronoun usage is a "virtual necessity for most Americans" because it is at least as ubiquitous a part of their

"daily life" as "driving an automobile." *Id.*

B. The policies require students to affirm one viewpoint on gender identity and do not advance legitimate pedagogical interests.

The District Court upheld the polices, notwithstanding that they compel speech, because it thought they promoted the "legitimate pedagogical concern" of "maintain[ing] a safe and civil learning environment," Order, R.28, PageID#839, 841, without "compel[ling] the speaker's affirmative belief," *id.*, PageID#838 (quotation omitted). Every aspect of that analysis is wrong. The policies compel students to use language that affirms beliefs contrary to their convictions. And such compulsory speech cannot be upheld based on the goal the District Court cited.

1. The policies force students to affirm beliefs they do not hold.

The policies compel students to affirm the Board's preferred beliefs about gender. A gender-specific pronoun necessarily conveys the message that the gender of the person addressed corresponds to the pronoun. Why else would the Board care so deeply about controlling pronoun usage? Likewise, the "awkward adjustment (of using no pronouns) requires the speaker to recognize and accept that gender transition is a real thing and that it applies to these particular students." Panel Op. at 27 (Batchelder, J., dissenting). By allowing some students to express their views on gender transition (via use of preferred pronouns) while forbidding others from doing so (via use of pronouns corresponding with sex), the Board unconstitutionally

enforces its preferred viewpoint as "state-mandated orthodoxy." *Meriwether*, 992 F.3d at 507.

Return once more to what this Court has already held: preferred-pronoun policies discriminate between viewpoints. *Meriwether*, 992 F.3d at 507. *Meriwether* concluded that a university's preferred-pronoun policy likely violated the First Amendment "by compelling [a professor's] speech or silence and casting a pall of orthodoxy over the classroom." *Id.* at 503. The professor's "continued refusal to address [a transgender woman] as a woman … advanced a viewpoint on gender identity." *Id.* at 509. Apply that same logic here. By using a transgender student's preferred pronouns, a fellow student is not expressing, "I acknowledge that you think your gender is X." That a transgender student believes they are transgender is obvious. Instead, a fellow student is expressing, "I accept that your gender is X." That is an affirmation of the transgender student's worldview, and compelling that ideological conformity is the policies' true and impermissible purpose.

The District Court suggested that students' pronoun use, unlike that of professors in classrooms, seems more "mechanical" than the "expression of substantive content." Order, R.28, PageID#840 (quotation omitted). But the District Court reveals its own disbelief of that assertion in holding that conventional pronoun usage conveys gender-identity based hostility that creates a "hostile

environment," amounts to "verbal bullying," and causes physical harm. *Id.*, PageID#835–36. If conventional pronoun usage is so powerful, it is only because pronouns inherently express a position in "the gender identity debate" and "a personal belief about gender identity." *Id.*, PageID#840. Pronoun usage is not a "non-ideological ministerial task [that] would not be protected by the First Amendment." *Meriwether*, 992 F.3d at 507.

The panel majority's efforts to avoid *Meriwether* were no more persuasive. The panel first cast the policies as a content-based restriction on one means of communicating a view and emphasized that students could still express views on transgenderism—as long as they did not use pronouns corresponding with sex to do so. But it is a First Amendment fundamental that a government burden on protected speech may not be excused merely because "it leaves open" another "avenue" to speak. *See, e.g.*, *Fed. Elec. Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality op.). And the panel's suggestion that the Board's viewpoint discrimination is permissible because biological pronouns are "divisive" while preferred pronouns are not merely adopts the Board's viewpoint as its own. "The First Amendment has no carve-out for divisive speech." Panel Op. at 44 (Batchelder, J., dissenting). Nor does this Court's precedent. *See, e.g.*, *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001).

2. A mere rational relation to learning does not justify compelling students to express views contrary to their deeply held beliefs.

Schools may impose content-based speech restrictions only when the speech causes, or school officials can "reasonably" forecast that it will cause, "material[] disrupt[ion]" of classwork or involve "substantial disorder or invasion of the rights of others." *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Critically, "*Tinker* places the burden of justifying student-speech restrictions squarely on school officials." *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022) (citing *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020)). Holding otherwise, as the panel did, would create a circuit split and flip *Tinker* on its head to disastrous effect. *See* Pet. at 11; Panel Op. at 46–47 (Bachelder, J., dissenting). The School Board has failed to satisfy its burden here on any level.

Material disruption or substantial disorder. The District Court began incorrectly by equating a "hostile environment caused by discriminatory speech" with a "substantial disruption." Order, R.28, PageID#831. But the traditional use of pronouns bears no resemblance to the material disruption of classwork envisioned by the courts. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 196 (2021) (Alito, J., concurring) ("In a math class, for example, the teacher can insist that students talk about math."); *Barr v. Lafon*, 538 F.3d 554, 576–77 (6th Cir. 2008) (upholding policy prohibiting display of confederate flag because history of racial

tensions showed it would materially disrupt school environment). As then-Judge Alito explained, an "undifferentiated fear or apprehension of disturbance" is not the "realistic threat of substantial disruption" required "to justify" a student-speech restriction. *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (internal citations omitted). The Board has demonstrated no such realistic threat.

Invasion of others' rights. As for invasions of the rights of others, "it is certainly not enough that the speech is merely offensive to some listener." *Id.* Simply put, "there's no generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students." *Sonnabend*, 37 F.4th at 426 (quotation omitted). Thus, even assuming school officials may rely on *Tinker* to compel speech rather than to restrict it—which is doubtful—the Board has not done enough to justify the policies.

C. Amici States' unique position underscores the seriousness of the constitutional violation.

The States have an obligation to ensure state-operated schools do not become "enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. That is why Amici States are willing to do the rare thing—ask this Court to reinforce a limit on regulatory authority. This marks a notable departure from the States' typical interests. Indeed, one of Amici States, Ohio, advocated in *favor* of the governmental speech policy in *Meriwether*—which involved the more-restrictive context of State employee speech,

rather than student speech. Amici States' unique posture in this appeal should underscore the singularly flagrant First Amendment violation at issue.

There is no dispute that this case involves a "matter[] of profound value and concern to the public." *Janus*, 585 U.S. at 914 (internal quotation and citation omitted). This Court has said so. *Meriwether*, 992 F.3d at 508–09. The panel and dissent agreed. Panel Op. at 24; *id.* at 27 (Bachelder, J., dissenting). And the parties agree, too. *Id.* at 13.

The District Court's blessing of a compelled-speech policy for politically sensitive issues is thus novel. And it has steep consequences for parents and students in this Circuit, including many residing in Amici States. Under the district court's decision, "ideological discipline" is now the lawful province of the State. *But see Barnette*, 319 U.S. at 637. Amici States have no interest in regulating past the boundaries of the First Amendment, and this Court should confirm that these constitutional limits have force.

D. Because Ohio law vests authority for school policy with school boards, State executive action cannot remedy unconstitutional policies.

Ohio law gives school district boards of education sweeping authority to set school policies. Each school board is statutorily required to "make any rules that are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises." Ohio

Rev. Code §3313.20(A). For example, school boards are empowered by statute to "be the sole authority in determining and selecting" textbooks and curriculum, *id.* §§3313.21, 3313.60(A); adopt disciplinary and anti-harassment policies, *id.* §§3313.534, 3313.661, 3313.666; and establish policies for participating in interscholastic extracurriculars, *id.* §3313.535.

By selecting a local-control approach to education, Ohio vests school-policy authority primarily in school boards rather than State executive agencies. As Ohio's Department of Education and Workforce acknowledges, the "locally elected school board of education (not the Ohio Department of Education and Workforce) has the authority to determine policy and establish procedures"—including a "[s]tudent code of conduct or rules for expected behavior." Ohio Dep't of Educ. & Workforce, *Having a problem with your school or district?*, https://perma.cc/YAS8-45BL (2024); *see also* Ohio Sch. Boards Ass'n, *Legislative Platform*, https://tinyurl.com/mcrah429 (2024). The executive branch thus cannot revoke or alter local school policies. Absent this Court's correction, Ohio's children remain at the mercy of the Board.

CONCLUSION

This Court should reverse and grant a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements because it does not exceed half the length (12.5 pages) of the party's en banc briefing limit (25 pages). *See* Fed. R. App. P. 29(a)(5), 32(a)(7); *see also* Briefing Schedule, Doc. 133 (Nov. 1, 2024).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

s/ T. Elliot Gaiser
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CERTIFICATE OF SERVICE

I certify that on December 18, 2024, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that the foregoing document is being served on this day to all counsel of record registered to receive a Notice of Electronic Filing generated by CM/ECF.

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