No. 23-3630

In the United States Court of Appeals for the Sixth Circuit

PARENTS DEFENDING EDUCATION,

Plaintiff-Appellant

v.

OLENTANGY LOCAL SCHOOL DISTIRCT BOARD OF EDUCATION, *et al.*,

Defendants-Appellees

On appeal from the United States
District Court for the Southern District of Ohio
Hon. Algenon L. Marbley, District Judge
(Dist. Ct. No. 2:23-cv-1595)

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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DISCLOSURE STATEMENT

Counsel for *amicus curiae* Institute for Free Speech, Brett R. Nolan, certifies that IFS is not a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation has a substantial interest in the outcome of this litigation.

/s/ Brett R. Nolan

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, petition, and press. Along with scholarly and educational work, IFS represents individuals and civil society organizations in litigation securing their First Amendment liberties. IFS also files *amicus* briefs in cases raising important First Amendment questions, and it has an interest here because the panel's decision will have widespread effects, influencing how governments regulate speech in many different contexts.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. By separate motion, IFS requests leave to file this brief. Fed. R. App. P. 29(b)(2), (3).

INTRODUCTION AND SUMMARY OF ARGUMENT

Is it viewpoint discrimination to ban students from using certain words only when doing so communicates a "divisive" message? In this case about pronouns, the panel said no. Schools can tell students when and how they use words like "he" and "she" to express their beliefs.

What about other words? Suppose a school tells students that they can only use "preferred adjectives" to talk about military conflicts, banning them from referring to Israel's military operation in Gaza as "lawful?" Or how about "preferred titles," prohibiting students from calling Donald Trump a "dictator?" The words "lawful" and "dictator" might be fine in some contexts, but not when expressing a "divisive" viewpoint. The panel's reasoning here requires upholding these speech bans as well.

But "[t]he First Amendment has no carve-out for divisive speech." *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 487 (6th Cir. 2024) (Batchelder, J., dissenting). Otherwise, the government could ban divisive trademarks, divisive advertisements on public property, or divisive language during the public-comment period at a county board meeting. That's because the rule against

viewpoint discrimination applies to school speech codes the same as any other government regulation. *Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008). Thus, the panel's decision is not just wrong—it "does violence to a great swath of . . . First Amendment jurisprudence," *McCullen v. Coakley*, 573 U.S. 464, 498 n.2 (2014) (Scalia, J., concurring).

The Court should grant rehearing *en banc* to undo this "precedent-setting error" that threatens to wreak havoc on free speech throughout this circuit. *See* 6 Cir. I.O.P. 35(a).

ARGUMENT

The panel's decision conflicts with one precedent after another—both from this circuit and the Supreme Court. That alone merits *en banc* review. Fed. R. Civ. P. 35(a).

But that's not the whole story. Throughout the opinion, the panel cabins this case within the unique context of a public school. Yet much of the decision has nothing to do with schools at all. Viewpoint discrimination is "presumed impermissible." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). And the "meaning of 'viewpoint discrimination'" does not "change depending on the context in which it is used." *See Am. Freedom Def. Initiative v. Suburban*

Mobility Auth., 978 F.3d 481, 501 (6th Cir. 2020). So the panel's holding that a ban on "non-preferred pronouns" is viewpoint neutral extends far beyond the facts here, affecting all kinds of government regulations on speech. The "exceptional public importance" of this issue only amplifies the problems with a decision that "directly conflicts with Supreme court [and] Sixth Circuit precedent." 6 Cir. I.O.P. 35(a).

I. THE DECISION MAKES A MESS OF THE LAW GOVERNING VIEWPOINT DISCRIMINATION.

Banning students from using pronouns only when referring to biological sex—rather than gender identity—discriminates based on viewpoint. The panel's holding otherwise scrambles this circuit's precedent and conflicts with recent Supreme Court decisions.

A. The decision conflicts with *Meriwether*.

Just three years ago, this Court held that "refusing to use gender-identity-based pronouns" conveys a message "that one's sex cannot be changed." *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021). That means using the word "he" to refer to a biological male "advance[s] a viewpoint" different than using the word "he" to refer to a biological female who identifies as male. *Id.* at 509. One word. Two viewpoints.

This case should have been easy after *Meriwether*: The First Amendment's prohibition against viewpoint discrimination applies to public schools the same as any other government body. *Barr*, 538 F.3d at 571. So a school cannot ban "disruptive speech" unless it applies that ban across the board. *Id.* at 572. But the District's policy does no such thing. Some students are prohibited from using pronouns to "advance[] a viewpoint on gender identity," *Meriwether*, 992 F.3d at 509, while other students can use the same pronouns to express a different message. This is viewpoint discrimination, and it is not allowed in public schools. *See Barr*, 538 F.3d at 572.

B. The panel's carve-out for "divisive speech" conflicts with Supreme Court and Sixth Circuit precedent.

The panel evaded *Meriwether* by relying on a line of this Court's cases holding that a ban on "divisive" speech is sometimes "a permissible content-based restriction." *Parents Defending Educ.*, 109 F.4th at 468 (citing *Barr*, 538 F.3d at 572). The panel read those cases as deciding that distinguishing between divisive speech and non-divisive speech is viewpoint neutral. That is wrong, and the panel's opinion conflicts with the earlier decisions upon which it relies.

But even if the panel is right, that's more reason to rehear this case *en banc*. In recent years, the Supreme Court has clarified that banning offensive speech is viewpoint discrimination. *See Iancu v. Brunetti*, 588 U.S. 388, 393–94 (2019). And so the Court should grant rehearing if only "to examine whether [prior circuit precedent about divisive speech] still binds this court." *See United States v. Burris*, 912 F.3d 386, 390 (6th Cir. 2019) (en banc).

1. A school can restrict divisive speech when it's disruptive under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1968). But the restriction must be viewpoint neutral. That means a school cannot ban students from expressing one view on an issue simply because it is more divisive than the contrary position.

While this Court's cases are not a model of clarity, they're clear enough. In *Barr*, a school banned students from displaying the Confederate flag. 538 F.3d at 572. The Court held the ban was viewpoint neutral because it "applied equally" to students displaying the flag in "solidarity with hate groups" and to those in opposition. *Id.* Banning the Confederate flag for only one side of the debate would violate the First Amendment. Yet that's what the District has done

here. It bans students from using pronouns to "advance[] a viewpoint" that gender identity does not exist, *Meriwether*, 992 F.3d at 509, while allowing other students to use the same the words to send a different message.

To sidestep this, the panel treated "preferred pronouns" and "non-preferred pronouns" as though they are different words entirely. Thus, the panel reasoned, the school can restrict one but not the other because they "are [not] analogously divisive." *Parents Defending Educ.*, 109 F.4th at 469.

"But that is word play." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020). The difference between a "non-preferred pronoun" and a "preferred pronoun" is the message it conveys, not the speech itself. *See Meriwether*, 992 F.3d at 509. A preferred pronoun is the word "he" when conveying a message that gender identity exists. And a non-preferred pronoun is the word "he" when conveying a message that gender identity does not exist. Allowing a school to ban one but not the other requires "conclud[ing] that the government may permit designated [words] to be used to communicate only a limited set of messages." *Texas v. Johnson*, 491 U.S. 397, 417

(1989). The Supreme Court has "never before" allowed such censorship. *Id.*

It's not hard to see how this game can be played if the panel's "precedent-setting error" stands. 6 Cir. I.O.P. 35(a). Consider a ban on students describing Russia's invasion of Ukraine as "genocidal," while allowing students to talk about Rwanda or Bosnia using the same word. Is that restriction viewpoint neutral if the school characterizes it as a ban on "non-preferred adjectives" for military conflicts? If "non-preferred adjectives" are divisive, banning the word "genocide" to criticize Russia would be "viewpoint neutral."

Nor does it help to distinguish (as the panel did) between an offensive viewpoint, on the one hand, and "*how*" that viewpoint is expressed, on the other. *Parents Defending Educ.*, 109 F.4th at 469. Not only is that distinction wrong, *see Johnson*, 491 U.S. at 416, it does not apply. The "*how*" in this case is using pronouns to communicate a belief about gender identity. But the District hasn't banned students from using pronouns. It has banned them from using pronouns to communicate one viewpoint.

2. Yet even if the panel correctly applied *Barr*, that's just one more reason for granting the plaintiff's petition—as only the *en banc* Court can undo such a mistake.

Since *Barr*, the Supreme Court has held that restricting speech because it is "offensive to a substantial percentage of the members of any group" is viewpoint discrimination. *See Brunetti*, 588 U.S. at 393 (quoting *Matal v. Tam*, 582 U.S. 218, 243 (2017) (opinion of Alito, J.)). And banning speech because it is "divisive" is no different than banning it for being "offensive." *See Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (Alito, J.) ("A group is controversial or divisive because some take issue with its viewpoint."). Both restrictions suppress speech based only on how the listeners react—an "odious" form of viewpoint discrimination. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 248 (6th Cir. 2015) (en banc).

This Court has applied *Brunetti* to emphasize one simple point: "language" matters. *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 894 (6th Cir. 2021). Politely disagreeing with the mayor's budget proposal sends a different message than calling the mayor a fascist. And stating the "belief that sex is immutable," *Parents*

Defending Educ., 109 F.4th at 468, sends a different message than refusing to use someone's "preferred pronoun." Banning one but not the other is viewpoint discrimination. The Court should rehear this case *en banc* to say so, repudiating any language in *Barr* to the contrary.

II. THE DAMAGE EXTENDS FAR BEYOND PUBLIC SCHOOLS.

The fallout from this decision will not stop at the schoolhouse doors. The First Amendment prohibits viewpoint discrimination in all sorts of contexts, whether the issue is registering trademarks, *Brunetti*, 588 U.S. at 390, advertising on public property, *Am. Freedom Def. Initiative*, 978 F.3d at 491–93, giving comments at a local government meeting, *Ison*, 3 F.4th at 892–93, or funding student speech at a public university, *Rosenberger*, 515 U.S. at 829–31. Even when the government has "wide leeway" to regulate private speech, it cannot discriminate based on viewpoint. *Ison*, 3 F.4th at 893 (cleaned up).

And "the meaning of 'viewpoint discrimination'" does not "change depending on the context in which it is used." *See Am. Freedom Def. Initiative*, 978 F.3d at 501. If a law restricting speech is viewpoint neutral in a public school, it's viewpoint neutral everywhere else. The panel's holding that a school can ban students from using "non-

preferred pronouns" allows the government to ban all kinds of similar speech, for similar reasons, in other contexts. Consider just a few examples.

Could a city prevent former University of Kentucky swimmer Riley Gaines from purchasing an advertisement on public property that uses a "non-preferred pronoun" to criticize Lia Thomas,[2] while allowing someone else to run ads about the swimmer using a "preferred pronoun?" Before this case, the answer was no. *See Am. Freedom Def. Initiative*, 978 F.3d at 485–86. Now the answer is yes.

Or how about a local school board that allows citizens to give public comments during its meetings. Imagine a heated debate over whether to include books about gender identity in an elementary school library. Could a school board ban speakers from using "non-preferred pronouns" when giving public comments, but allow others to use "preferred

[2] *See* Paton D. Roberts & Sophia C. Scott, *Riley Gaines, Swimmer Who Criticized Trans Women's Participation in Athletics, Draws Student Demonstration at Harvard*, The Harvard Crimson (Oct. 27, 2023), available at https://perma.cc/5K3H-CL6Q (reporting that "Gaines repeatedly misgendered transgender athletes" during a speech at Harvard).

pronouns" in the same forum? Before this case, the answer was no. *See Ison*, 3 F.4th at 893. Now the answer is yes.

Or suppose a state bans voters from using non-preferred pronouns inside a polling location to prevent disruption. A "polling place" is—at least in many cases—a nonpublic forum, and so the government can impose reasonable, viewpoint-neutral restrictions on speech. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 12 (2018). Could Ohio or Michigan ban voters from using "nonpreferred pronouns" while waiting in line to vote? Before this case, the answer was no. *See id.* at 12–13. Now the answer is yes.

Each of these examples involves speech in a limited or nonpublic forum—a context in which the government has "wide leeway" to regulate private speech. *Ison*, 3 F.4th at 893 (cleaned up). That leeway allows the government to impose content-based restrictions so long as they're "reasonable," *id.*, a more lenient standard than *Tinker* imposes on schools. It's unthinkable that the government could tell citizens what pronouns to use at public meeting, on a public billboard, or while waiting in line to vote. But the decision here compels exactly that result.

III. REGULATING PRONOUN USE COMPELS STUDENTS TO EXPRESS PARTICULAR VIEWPOINTS.

"Pronouns are the most political parts of speech." Teresa M. Bejan, *What Quakers Can Teach Us About the Politics of Pronouns*, N.Y. Times (Nov. 16, 2019), available at https://bit.ly/4g7Bw32 (last visited Sept. 3, 2024). Seventeenth-century Quakers rebelled against the pronoun standards of their day, which proscribed what was then the second-person plural pronoun, "you," to address a higher-class individual, while assigning "thou" and "thee" to commoners. The egalitarian and humble Quakers used "thou" and "thee" with everyone, to some people's consternation. *Id.* "[Some] Quakers produced pamphlets . . . to argue that their use of 'thee' and 'thou' was grammatically—as well as theologically and politically—correct." *Id.*

Quakers were not alone in being "sensitive to the humble pronoun's ability to reinforce hierarchies by encoding invidious distinctions into language itself." *Id.* "[I]n the latter half of the twentieth century, gendered pronouns became imbued with new meaning," as "[t]he feminist movement came to view the generic use of masculine pronouns as 'a crucial mechanism for the conceptual invisibility of women'" and a

means of reinforcing prejudice. *Meriwether*, 992 F.3d at 508–09 (citation omitted).

Today, "the use of gender-specific titles and pronouns has produced a passionate political and social debate." *Id.* at 508. The Supreme Court recognizes that "gender identity" is among the "sensitive political topics [that] are undoubtedly matters of profound 'value and concern to the public.'" *Janus v. AFSCME, Council 31*, 585 U.S. 878, 914 (2018) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). And pronouns are the quintessential means by which people express their views about gender identity.

Thus, this Court got it right when it held that pronoun use "advance[s] a viewpoint on gender identity" protected by the First Amendment. *Meriwether*, 992 F.3d at 509. The panel's decision otherwise is "precedent-setting error" that must be fixed. 6 Cir. I.O.P. 35(a).

CONCLUSION

The Court should grant rehearing *en banc*.

September 3, 2024

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 29(b)(4) because it contains 2,596 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced Serif typeface, Century Schoolbook, in 14-point font using Microsoft Word.

/s/ Brett R. Nolan

CERTIFICATE OF SERVICE

I certify that on September 3, 2024, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brett R. Nolan