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 AND REVERSAL

Alan Gura
Brett R. Nolan
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.
Suite 801
Washington, DC 20036
202-301-3300
bnolan@ifs.org

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Counsel for amicus curiae

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 has an interest here because the Court'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.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). And under our Constitution, "individuals are certainly free *to think* and *to say* what they wish about '[one's own concept of] existence,'" even if "they are not always free *to act* in accordance with those thoughts. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 255–56 (2022) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

While students may freely identify as having genders that do not correspond to their biological sex, other students enjoy the same right to credit their own perceptions of reality—and to speak their minds when addressing their classmates. Students cannot be compelled to speak in a manner that confesses, accommodates, and conforms to an ideology they reject—even if that ideology's adherents are offended by any refusal to agree with them or endorse their viewpoint. Yet that is what the Olentangy school district's speech code does.

"Pronouns are political." Dennis Baron, *What's Your Pronoun?* 39 (2020). History shows that people have long used pronouns to express

messages about society and its structure—often in rebellion against the prevailing ideology. And the same is true today. Choosing to use "preferred" or "non-preferred" pronouns often "advance[s] a viewpoint on gender identity." *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021). So mandating that students use "preferred" pronouns or none at all elevates one viewpoint while silencing the other. It compels students to adopt the district's ideology on gender identity while at school, and in doing so, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

ARGUMENT

I. THE FIRST AMENDMENT BARS PUBLIC SCHOOLS FROM COMPELLING STUDENTS TO CONFORM THEIR SPEECH TO THE GOVERNMENT'S GENDER IDEOLOGY.

A. Pronouns have always conveyed ideological messages.

"[G]ender identity [is] a hotly contested matter of public concern," *Meriwether*, 992 F.3d at 506, but the notion that "titles and pronouns carry a message," *id.* at 507, is not. Although people have strong personal preferences about how they should be addressed and

discussed, the mode of referring to others is often fraught with social and political meaning. *See, e.g.*, Joseph Epstein, *Is There a Doctor in the White House? Not if You Need an M.D.*, Wall St. J. (Dec. 11, 2020), https://bit.ly/3ZUXpfS. Americans can call themselves "Lady Gaga" or "Sir Mix-a-Lot," but titles of nobility—self-proclaimed or not—cannot carry official imprimatur. U.S. Const., art. I, § 9, cl. 8; *id.* § 10, cl. 7. No American may be required to refer to Charles III as "His Majesty," even though he is indisputably a king whose status as such is not conferred by self-identification.

"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), https://bit.ly/4g7Bw32. 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 the commoners. But 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.* Pronouns took center stage during the women's suffrage movement. "In both England and the United States there was . . . a lot of talk about the language of the election laws, and a lot of that wrangling concerned the politics of the pronoun *he*." Baron, *supra*, at 41. Activists like Susan B. Anthony and Elizabeth Cady Stanton argued that the masculine pronoun—as it appears "in all the constitutions and laws"—must refer to both women and men, or else women would be exempt from all sorts of criminal laws. *Id.* at 48–49. And some proponents of universal suffrage sought to make that explicit by modifying the law so that "words referring to men also included women." *Id.* at 39.

But for those opposed to granting women the right to vote, using the masculine pronoun "he" was not an oversight that needed clarification. Nor was it simply a matter of grammar. Masculine language reinforced "how absolutely inconceivable and unnatural the idea of Women's

Suffrage [had] hitherto seemed." *Id.* (quoting *Mr. Jacob Bright's Bill to Remove the Electoral Disabilities of Women*, The Times (London), Apr. 30, 1873, at 9). And so opponents of women's suffrage urged people to "watch [their] pronouns" to stop activists from shifting society by "revolutioniz[ing] the commonest modes of thought and expression." *Id.* at 39–40.

Yet society did shift, and so did views on using gendered pronouns. "[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 reenforcing prejudice. *Meriwether*, 992 F.3d at 508–09 (citation omitted). While the activists for women's suffrage fought legal battles to interpret masculine pronouns as gender neutral, Baron, *supra*, at 46–72, "the feminist call in the 1970s for an end to sexist language led to a sharp decline in generic *man* and *he* in edited prose," *id.* at 40.

Today, "the use of gender-specific titles and pronouns has produced a passionate political and social debate." *Meriwether*, 992 F.3d 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, 913–14 (2018) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). Speech about this topic "'occupies the highest rung of the hierarchy of First Amendment values' and merits 'special protection.'" *Id.* (quoting *Snyder*, 562 U.S. at 452). And pronouns are the quintessential means by which people express their views about gender identity.

In today's age, "more and more people are taking the gender debate away from the medics and grammarians and making it their own." Baron, *supra*, at 120. "Never before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity." *Meriwether*, 992 F.3d at 509. "All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern." *Id.* at 508.

B. The First Amendment protects school children from being compelled to espouse views that they reject.

Because people's pronoun usage reflects their beliefs and values surrounding this contentious topic, the use of non-standard pronouns is often viewed—by speakers and listeners—as acquiescence in a sociopolitical theory that many people profoundly oppose. The Fifth Circuit observed that "if a court were to compel the use of particular pronouns at the invitation of litigants, it could raise delicate questions about judicial impartiality." *United States v. Varner*, 948 F.3d 250, 256 (5th Cir. 2020). "Increasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity." *Id.* (citations omitted). A court "may unintentionally convey its tacit approval of the litigant's underlying legal position" in such cases by conforming its pronoun usage to a litigant's preferences. *Id.* (citations omitted).

Many students do not agree with the implicit message that comes with using "preferred" pronouns. And the First Amendment "generally prohibits . . . compelling an individual 'to utter what is not in [her] mind' and indeed what she might find deeply offensive." *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (quoting *Barnette*, 319 U.S. at 634).

The "[Supreme] Court has enforced that prohibition, too, in the public school setting." *Id.* (citing *Barnette*, 319 U.S. at 634). Doubtless some of Barnette's classmates, whose fathers and brothers were fighting and dying in World War II, took umbrage at their fellow students' refusal to salute the flag. But the flag represents a country whose highest law forbids compulsory flag salutes.

So too for pronoun mandates. The district operates schools, not monasteries. It is unrealistic to expect students to refrain from speaking with or about each other, and the use of pronouns is thus inevitable. *Cf. Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Demanding that students respect gender identity and refrain from "misgendering" compels students to speak particular messages—conversations about gender theory to gauge which pronouns they must use, and then, the pronouns themselves.

This Court should follow its decision in *Meriwether* and enjoin the compelled use of the government's preferred pronouns. How others describe and view themselves is their own business. But whether parents—or more importantly, their impressionable school children—can be compelled to mouth the words of gender theory and acknowledge

the truth of that which they believe to be fundamentally false, is of profound concern to everyone. Indeed, the issue is broader than the gender debate. A government that can force people to deny their perception of reality might force people to do anything. "The Party told you to reject the evidence of your eyes and ears. It was their final, most essential command." George Orwell, *1984*, 162 (Houghton 2003). But here, the First Amendment gives effect to the plea, "let us at least refuse to say what we *do not* think!" Aleksandr Solzhenitsyn, *Live Not by Lies* (Feb. 12, 1974), https://perma.cc/3BWA-GA55.

II. THE DAMAGE FROM UPHOLDING THE DISTRICT'S PRONOUN RULES WILL EXTEND FAR BEYOND PUBLIC SCHOOLS.

Because pronouns convey ideological messages, allowing a school to dictate how students use pronouns will have untenable ripple effects. The First Amendment prohibits viewpoint discrimination in all sorts of contexts, whether the issue is registering trademarks, *Iancu v. Brunetti*, 588 U.S. 388, 390 (2019), advertising on public property, *Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 491–93 (6th Cir. 2020), giving comments at a local government meeting, *Ison v. Madison Loc. Sch. Dist*, 3 F.4th 887, 892–93 (6th Cir. 2021), or funding student speech at a public university, *Rosenberger v. Rector & Visitors*

of the Univ. of Va., 515 U.S. 819, 829–31 (1995). 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. A decision 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?" *Cf. Am. Freedom Def. Initiative*, 978 F.3d at 485–86. How about a local school board banning speakers during

[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), https://perma.cc/5K3H-CL6Q (reporting that "Gaines repeatedly misgendered transgender athletes" during a speech at Harvard).

public comment from using "non-preferred pronouns," while allowing others to use "preferred pronouns" in the same forum? *Cf. Ison*, 3 F.4th at 893. Or could Ohio or Michigan ban voters from using "non-preferred pronouns" while waiting in line to vote? *Cf. Minn. Voters All. v. Mansky*, 585 U.S. 1, 12–13 (2018).

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 regulating student speech. It's unthinkable that the government could tell citizens what pronouns to use at a public meeting, on a public billboard, or while waiting in line to vote. But a decision upholding the district's policy here would open that door.

CONCLUSION

The Court should reverse the decision below.

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Respectfully submitted by,

/s/ Brett R. Nolan
Alan Gura
Brett R. Nolan
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.,
Suite 801
Washington, DC 20036
202-301-3300
bnolan@ifs.org
Counsel for amicus curiae

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 length limitation in Fed. R. App. P. 29(a)(5) and this Court's en banc briefing order because it is 12 pages long, which does not exceed half the length of the party's en banc briefing (25 pages), 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 December 16, 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