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 SOUTH CAROLINA, OHIO, AND 20 OTHER STATES SUPPORTING PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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STATEMENT OF *AMICI* INTERESTS AND SUMMARY OF ARGUMENT

Amici States' interests normally lie in *defending* exercises of their power. Today, the States find themselves in the unusual position of 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. And it prompts the question *why*. The answer: a divided panel of this Court broke with constitutional status quo and binding precedent to bless a pernicious, compelled-speech regime for public school students. South Carolina, Ohio, and other Amici States have an interest in protecting the First Amendment rights of their citizens. The stakes are even higher here because the compelled speech involves what the parties, the panel, this Court, and the Supreme Court all agree is a "matter[] of profound value and concern to the public"—the debate over the right interpersonal, cultural, and policy 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). That's 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 at birth. Using preferred pronouns expresses this view. Others disagree. They hold a different view of sex and gender, under which to use pronouns inconsistent with someone's biological sex is to speak a lie.

Olentangy Local School District Board of Education ("Board") took the first of these views. And it undertook to eradicate any opposing view by forcing students—including those who disagree—to use their peers' preferred pronouns. By the Board's own admission, its Policies punish students that "fail[] to address a student by [his or her] preferred pronouns," among other things. Order, R.28, PageID 810. Ultimately, these Policies put students that disagree with the Board's views on gender identity to an unconstitutional Hobson's choice: conform or be punished. The Policies thus contravene a "fixed star in our constitutional constellation": "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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

A panel of this Court disagreed. Over Judge Batchelder's dissent, a majority of the panel affirmed the district court's denial of the Appellants' motion for preliminary injunction, leaving the Policies in place. In doing so, the panel held that

the Policies did not impermissibly compel student speech or prefer a viewpoint affirming gender identity. That decision departed from venerable First Amendment principles, creating intra- and inter-circuit splits in the process. And it implicates what this Court recently said is a "hotly contested matter of public concern." *Meriwether*, 992 F.3d at 506. This case thus checks all the en banc boxes.

ARGUMENT

The First Amendment does not allow school officials to coerce students into expressing 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." *New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 593 (6th Cir. 2018) (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015)). The panel majority hollowed out this principle, splitting from *Meriwether* on compelled speech and creating a circuit split on the *Tinker* test. *Parents Defending Educ.*, 109 F.4th at 495 (Batchelder, J., dissenting). As a result, the panel decision injects confusion into this Court's precedent on an exceptionally important issue increasingly before the Court.

A. The Panel Decision Creates Intra- and Inter-Circuit Splits.

The Panel acknowledged that "pronouns matter" and that "[t]he intentional use of preferred or non-preferred pronouns therefore represents speech protected by

the First Amendment." *Parents Defending Educ.*, 109 F.4th at 466. It then upheld as constitutional Policies mandating the use of preferred pronouns. That result conflicts with this Court's compelled-speech and viewpoint-discrimination holdings in *Meriwether*. The Panel also created a circuit split by relieving the Board of its burden to show that the Policies satisfy *Tinker*. *Parents Defending Educ.*, 109 F.4th at 489–90, 495 (Batchelder, J., dissenting).

1. The Preferred-Pronoun Policies are at odds with *Meriwether*.

The panel's holding guts *Meriwether*'s determinations that mandating preferred-pronoun usage compels speech and elevates one view on gender identity.

Begin with compelled speech generally. "Pronouns are ubiquitous in everyday speech." *Parents Defending Educ.*, 109 F.4th at 484 (Batchelder, J., dissenting). That's why *Meriwether* held that a university's preferred-pronoun policy compelled speech: the pervasive nature of personal pronouns make it virtually impossible to avoid them in ordinary human interaction. 992 F.3d at 507, 517. Even the district court recognized 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. By leaving only one pronoun option—transgender students' preferred pronouns—the Policies thus "in effect require" students to use their peers' preferred pronouns. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

It is no defense to say, as the panel does, that the Policies do not compel protected speech because "students 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." *Parents Defending Educ.*, 109 F.4th at 466–67. 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 (biological pronouns). *Meriwether* never suggested that the existence of such a compromise is constitutionally *sufficient*—it merely faulted the university for not accepting the professor's offer of compromise. Regardless, the *Meriwether* professor's self-imposed compromise is not analogous to a forced "accommodation" that was never actually offered by the Board.

Nor is the panel majority's suggestion to shun transgender students a viable option. *Parents Defending Educ.*, 109 F.4th at 467. 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. Pronoun usage is a "virtual necessity for most Americans" because it's a ubiquitous part of their "daily life." *Id.*

The panel's decision separately conflicts with *Meriwether*'s holding that preferred-pronoun policies are viewpoint discriminatory. 992 F.3d at 507. That is because 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." *Parents Defending Educ.*, 109 F.4th at 475 (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 biological pronouns), the Board unconstitutionally enforces its preferred viewpoint as "state-mandated orthodoxy." *Meriwether*, 992 F.3d at 507.

The panel sought to avoid *Meriwether* by casting 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 biological pronouns 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). 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," however. *Parents Defending Educ.*, 109 F.4th at 487 (Batchelder, J., dissenting); *see also Beard v. Falkenrath*, 97 F.4th 1109, 1117 (8th Cir. 2024) ("If the Constitution offers no protection against an insult or vulgar language, then how can it extend to the misuse of a pronoun? The answer is it cannot."). 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. The Panel Created a Circuit Split on *Tinker*.

The panel also charted its own course regarding the *Tinker* test. *Tinker* provides that schools may impose content-based speech restrictions only when the speech causes, or school officials can "reasonably" forecast that it will cause, "substantial disruption." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). The burden to show that rests on the State; an absence of evidence renders the restriction unconstitutional. *Id.* The panel held, however, that this burden shifts to *plaintiffs* at the preliminary injunction stage—splitting from the other circuits that have addressed *Tinker* in the preliminary injunction context. *See* Pet. at 11; *Parents Defending Educ.*, 109 F.4th at 489–90 (Bachelder, J., dissenting).

That flips *Tinker* on its head, to disastrous effect. To produce evidence that their speech does not "substantially disrupt" school proceedings, plaintiffs necessarily must have engaged in the prohibited speech to build that record. That eviscerates core First Amendment concepts—pre-enforcement challenges and overbreadth doctrine—premised on the need to prevent regulations that chill speech before it occurs. *See, e.g., FEC v. Cruz*, 596 U.S. 289, 302, 313 (2022); *United States v. Hansen*, 599 U.S. 762, 769–70 (2023). Such a drastic departure from longstanding First Amendment law warrants the full Court weighing in.

B. Amici States' Unique Position Underscores that This Case Involves an Issue of Exceptional Importance.

The States have an obligation to ensure "state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. That's why Amici States are willing to do the rare thing—ask this Court to reinforce a limit on regulatory authority. This marks a noted 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 uniquely flagrant First Amendment violation at issue and uniquely important interests it implicates.

There is no dispute that this case involves a "matter[] of profound value and concern to the public." *Janus*, 585 U.S. at 913–14 (internal quotation and citation omitted). This Court has said so. *Meriwether*, 992 F.3d at 508–09. The panel has said so. *Parents Defending Educ.*, 109 F.4th at 474; *id.* at 475 (Bachelder, J., dissenting). And the parties agree. *Id.* at 466.

Experience bears that out. The panel's decision marks this Court's third decision involving preferred-pronoun policies in as many years. *See, e.g.*, *Meriwether*, 992 F.3d 492 (6th Cir. 2021); *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024) (order denying stay of preliminary injunction of Department of Education rule requiring use of preferred pronouns in public

schools). Challenges to increasingly frequent pronoun mandates are nothing new to this Court. What is novel is the panel majority's approach.

That approach has steep consequences for parents and students in this Circuit, including many residing in Amici States. Under the panel decision, "ideological discipline" is now, perversely, the lawful province of the State. *But see Barnette*, 319 U.S. at 637. But Amici States have no interest in regulating past the boundaries of the First Amendment—even when a divided panel of this Court gives its blessing.

CONCLUSION

This Court should grant the Petition for Rehearing En Banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 1,990 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman font) using Microsoft Word (the same program used to calculate the word count).

The Amici States are authorized to file this brief without the consent of the parties or the leave of the Court. Fed. R. App. P. 29(b)(2).

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September 3, 2024

CERTIFICATE OF SERVICE

I certify that on September 3, 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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