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.

BRIEF OF *AMICI CURIAE* INDEPENDENT WOMEN'S LAW CENTER AND MANHATTAN INSTITUTE SUPPORTING APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certifies that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in either *amicus*.

Dated: September 2, 2024

s/ Ilya Shapiro
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a nonprofit, nonpartisan organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes access to free markets and to the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit government.

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. Drawing on research, reporting, and analysis of the highest caliber, MI works to improve the quality of life, overcome ethnic and cultural divides, promote educational excellence, and expand economic freedom.

IWLC has a particular interest in preserving women's sex-based civil rights and liberties, including the freedom from coerced speech for all women and girls. MI has a particular interest in defending constitutional speech protections because its scholars have been targets of speech-suppression efforts.

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[1] No party's counsel authored this brief in any part. No person other than *amici*, their members, or their counsel funded its preparation or submission. A motion for leave to file is required at the en banc stage, but counsel for movants also sought consent as a courtesy. Appellant consented, but Appellees did not.

SUMMARY OF ARGUMENT

The school board's pronoun policies violate the First Amendment because they impermissibly compel students to speak contrary to their beliefs—whether rooted in science, faith, or philosophy—regarding the binary and immutable nature of biological sex. Neither in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), nor anywhere else has the Supreme Court allowed schools to compel students to speak contrary to their beliefs.

The pronoun policies also fail the test of when student speech and conduct may be regulated because the use of pronouns that match a student's sex does not constitute harassment, let alone harassment that is "severe, pervasive, and objectively offensive." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). Indeed, pronoun usage that conflicts with gender ideology reflects both longstanding common practice and scientific truth.

Moreover, the policies here would harm the interests of girls and women, who benefit from sex-based spaces, rights, and privacies in schools, universities, and elsewhere. They would harm girls and women by reducing self-esteem and sense of personal control. The restrictions on student pronoun usage would also cause males to steal opportunities from females in athletics, where males have a significant physiological advantage, and would also lead to physical injuries to girls and women.

ARGUMENT

I. Forcing Adherence to Gender Ideology Violates the First Amendment

Eighty years ago, the Supreme Court confirmed that "[i]f there is any fixed star in our constitutional constellation" it is that the government cannot compel schoolchildren to speak words they do not believe. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). A quarter-century later, *Tinker* further expanded protections for student speech, and while it articulated limited exceptions, none override the rule set forth in *Barnette* barring any official control over "the sphere of intellect and spirit." *Id*.

A. The First Amendment bars schools from compelling student speech.

The Supreme Court has never permitted schools to compel students to speak contrary to their beliefs, whether in *Tinker* or elsewhere. Even though the First Amendment applies somewhat differently "in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 504, the government can regulate student speech only if it falls into one of two narrow categories. First, schools can regulate speech that invades "the rights of other students to be secure and to be let alone." *Id.* at 508. Second, schools may regulate speech that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 508–09.

Neither of those exceptions permits schools to compel speech contrary to a student's personal belief. To the contrary, the *Tinker* Court held that students "may

not be confined to the expression of those sentiments that are officially approved," *id.* at 511, and that school administrators "cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

As the Supreme Court recently observed, compelling speech causes unique First Amendment harms, because when "speech is compelled, . . . individuals are coerced into betraying their convictions." *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018). Although *Barnette* involved a student who objected to reciting the Pledge on religious grounds, the Court carefully noted that the restriction on compelled speech did not "turn on one's possession of particular religious views or the sincerity with which they are held." 319 U.S. at 634. So whether an Olentangy student's belief on pronoun usage is rooted in science, faith, or philosophy, that student's right not to be compelled to violate that belief is protected by the First Amendment.

B. Mandating the use of particular sex pronouns constitutes compelled speech.

Olentangy's policies compel speech on pronouns in violation of students' beliefs and thus reach far beyond what the Supreme Court authorized in *Tinker*. The district court here stated that, in the K-12 context, the question "is not whether the Policies compel speech, but whether they do so for an impermissible reason." *Parents Defending Education ("PDE") v. Olentangy Local School Dist.*, No. 2:23-cv-01595, 2023 WL 4848509, at *14 (S.D. Ohio July 28, 2023). That gets the

analytical framework backwards. Our starting principle is that the "compulsion of students to declare a belief" violates the First Amendment, *Barnette*, 319 U.S. at 631, and that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506. This Court must thus take a narrow view of what exceptions are allowed, particularly for compelled speech, instead of assuming that all regulation is permissible absent a bad reason.

By compelling appellant's student members to speak against their sincerely held convictions, Olentangy is requiring them to "affirm[] . . . a belief and an attitude of mind" they do not share. *Barnette*, 319 U.S. at 633.

C. Nothing in *Tinker* elevates the "rights of others" over a student's freedom of conscience.

Compelling students to use preferred pronouns to avoid invading "the rights of others," as the district court did here, is a dangerous and unconstitutional expansion of that narrow exception to student speech rights. The court incorrectly found that "using pronouns contrary to an individual's preferences intentionally (or repeatedly)" constituted "verbal bullying" that can be punished under *Tinker*. *PDE*, 2023 WL 4848509, at *9, *13.

Tinker contemplated the "invasion of the rights of others" exception as requiring far more extreme acts than students using particular pronouns generally in the hallway. *Tinker* defined what it meant by invading or "colliding with the rights of others" in express reference to two Fifth Circuit cases. *Tinker*, 393 U.S. at 513

(citing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), and *Burnside*). Those two cases involved segregated schools that banned their students from wearing "freedom buttons." *Blackwell*, 363 F.2d at 752; *Burnside*, 363 F.2d at 747.

In *Burnside*, the Fifth Circuit held the school must allow the buttons to be worn because there was no evidence that the students "caus[ed] a commotion or disrupt[ed] classes." *Id.* at 748. But the same court held that the *Blackwell* school did *not* violate the First Amendment by banning them because the students who wore them caused serious disruption by physically intimidating other students and forcing them to speak a political message. The student speech here would not result in such an extreme collision with the rights of others.

II. Expressing Beliefs That Conflict with Gender Ideology—That Sex Is Binary and Biological Sex Is Immutable—Is Not Harassment

Schools have dual legal and moral obligations: to prevent discriminatory student-on-student conduct and abide by the First Amendment. The Supreme Court explained when and how to balance these commitments in *Davis*: first, to be punishable, harassment must rise to the level of conduct, not just speech; and second, student conduct must be "severe, pervasive, and objectively offensive" before it can be punished as harassment. 526 U.S. at 650. Because Olentangy's policies fail to bridge the speech-conduct divide and burden pure speech, they flunk the *Davis* test.

A. *Davis* establishes a high bar for verbal "harassment."

Davis began with a straightforward question: Are local school boards liable under Title IX for peer-on-peer sexual harassment on campus? Justice O'Connor laid out the overall standard:

> We thus conclude that [Title IX] funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment . . . that is *so severe, pervasive, and objectively offensive* that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

526 U.S. at 650 (emphasis added).

The requirement that harassment be "severe, pervasive, and objectively offensive" resulted from a debate over First Amendment implications between Justice O'Connor and the dissenting Justice Kennedy. Justice Kennedy feared that a broad definition of harassment would require schools to restrict speech and trample on student speech rights. *Id.* at 682–83 (Kennedy, J., dissenting). Without First Amendment protections, schools would "label even the most innocuous of childish conduct [] harassment." *Id.* at 681.

In response, and recognizing that K-12 students cannot be held to adult standards, Justice O'Connor expressed the need to not restrict student speech, for "schools are unlike the adult workplace and [] children may interact in a manner that would be unacceptable among adults." *Id.* at 651. To address Justice Kennedy's concern about the interplay between harassment and First Amendment-protected

conduct, the Court further affirmed that mere "teas[ing]' and "offensive name[-calling]" were excluded from harassment. *Id.* at 652. Harassment instead requires "persistence and severity" of action. *Id.*

B. *Davis* regulates harassing conduct, separate from speech.

With the separation of conduct and speech established, *Davis* provides the required standard to balance those interests. Harassment codes that fail to track the *Davis* standard run afoul of the First Amendment. *See, e.g.*, *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) (affirming district court's invalidation of university harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (invalidating sexual harassment policy because it failed to require that the speech in question "objectively" create a hostile environment and thus provided "no shelter for core protected speech."). Indeed, this understanding applies beyond the bounds of Title IX and into most areas where schools carry a legal and moral obligation to prevent harassment.

C. The use of different pronouns and other manifestations of disagreement with gender ideology does not rise to the level of regulable harassment.

The Olentangy pronoun policies directly restrict speech that does not rise to the level of regulable harassment under *Davis*. Using a pronoun for a student that accords with his or her sex is longstanding common practice and reflects scientific truth. The National Institute of Health (NIH) describes sex as "a classification based on biological differences . . . between males and females rooted in their anatomy and

physiology." Nat'l Inst. of Health, "Sex & Gender," https://orwh.od.nih.gov/sex-gender. Until recently, our society recognized two sexes and this was not a matter of controversy, despite the recent protestations of gender ideologues. The use of pronouns that is common and reflects truth cannot constitute severe, pervasive, and objectively offensive conduct that becomes harassment under *Davis*.

III. The School Board's Policies Harm the Interests of Girls and Women

Girls and women have unique needs, particularly in school settings. Using biologically accurate sex-based pronouns is necessary to preserve sex-based spaces. Studies have found that girls and women in single-sex schools at both the secondary and college levels have higher levels of self-esteem and sense of personal control. *See*, *e.g.*, Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. Educ. Psychol. 381 (1986).

Forcing the use of the biologically incorrect pronouns is the first step towards allowing males to intrude on females' private spaces, including locker rooms, restrooms, social clubs, and living quarters. This is no hypothetical issue. In *Westenbroek v. Kappa Kappa Gamma Fraternity*, IWF challenged the sorority leadership's bad-faith failure to abide by their own bylaws, which preserve membership for "women." No. 23-cv-51 (D. Wyo.). Leadership sought dismissal, asserting that "the term [woman] is *unquestionably open to multiple interpretations*." Motion to Dismiss for Defendants at 13, ECF No. 20, *Westenbroek*,

No. 23-cv-51 (D. Wyo. June 13, 2023). Using female pronouns for males endorses and reinforces the harmful falsehood, promoted by the sorority's leadership, that the term "women" can mean men. Males who refer to themselves as female then can and do insist on access to all girls' and women's spaces and programs.

IWF is also actively challenging the Biden-Harris Administration's rewrite of Title IX to include (an undefined) gender identity that would eviscerate female-only spaces. Perversely, the Biden-Harris Administration maintains that Title IX's promise of sex nondiscrimination is *upheld* by requiring that biological males be allowed into women's facilities—based on their mere assertion that they're female. *See*, *e.g.*, Statement of Interest of the United States at 7, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. June 17, 2021) ("B.P.J. is a girl, not a boy. She describes herself as a girl."). Decisions by students and coaches to limit the use of female pronouns to females preserve girls' sports by dismantling the idea that some biological males should be able to compete with females. Such a limitation prevents boys and men from stealing opportunities from girls and women, who tend to be at a drastic physiological disadvantage in athletics.

For example, two dozen American boys under the age of 17 swim faster than multiple gold medalist Katie Ledecky in her best event. Doriane Lambelet Coleman, *Why Elite Women's Sports Need to Be Based on Sex, Not Gender*, Wash. Post, Aug. 16, 2024. On average, due to biology, male bodies have at least a 10% athletic

advantage over female bodies. *See, e.g.*, Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to the Boys and Men*, Duke Ctr. for Sports L. & Pol'y (Summer 2017), https://tinyurl.com/352my9z8. Competing with males demoralizes those females; they are outclassed and often effectively excluded altogether. Female-only sports platform females in the same way that senior-division sports platform senior citizens. Female-specific sports have positive outcomes for girls and women, including boosting self-confidence, physical health, and a sense of teamwork.

Such sports also protect females from injury by males, who tend to be much bigger, stronger, and solidly built. For example, during a high school volleyball game in September 2022, Payton McNabb received a devastating head and neck injury from a spike by a trans-identifying male. Luke Andrews, *Female Volleyball Player, 17, Left Paralyzed with Brain Damage by Transgender Opponent Who 'Cackled with Delight' after Knocking Her to Ground*, Daily Mail, July 31, 2024, https://tinyurl.com/4k9aavhm. Sports have thus established rules banning male participation on women's teams. *See, e.g.*, *Rugby Says Transgender Women Should Not Play for Elite Teams*, Associated Press, Oct. 9, 2020, https://tinyurl.com/546k999n.

Olentangy's policies would lead to the normalization of boys in girls' spaces, severely harming those girls.

CONCLUSION

Any claim that a school can prophylactically limit and even compel a change in common word use with deep personal and scientific meaning should be met with extreme skepticism. This Court should grant the petition for en banc rehearing and reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 2,599 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as determined by the word counting feature of the software (Microsoft Office 365) used to prepare this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman.

Dated: September 2, 2024

/s/ *Ilya Shapiro*
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2024, I electronically filed the above with the Clerk of Court using the CM/ECF system which will send notification of this filing to counsel for all parties.

/s/ *Ilya Shapiro*
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