IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3630

PARENTS DEFENDING EDUCATION,

Plaintiff-Appellant,

v.

OLENTANGY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION; MARK T. RAIFF, in his official capacity as Superintendent of Olentangy Local School District; RANDY WRIGHT, in his official capacity as Olentangy's Chief of Administrative Services; PETER STERN, in his official capacity as Olentangy's Assistant Director of Equity and Inclusion; KEVIN DABERKOW, BRANDON LESTER, KEVIN O'BRIEN, LIBBY WALLICK, and LAKESHA WYSE, in their official capacities as members of the Olentangy Board of Education

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of Ohio, No. 2:23-cv-01595

Brief of *Amicus Curiae* Hamilton Lincoln Law Institute in Support of Petitioner

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Under 6th Cir. R. 26.1, *Amicus Curiae* Hamilton Lincoln Law Institute ("HLLI") makes the following disclosures:

HLLI is a nonprofit law firm incorporated under the laws of the District of Columbia. HLLI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. HLLI is operated by a volunteer Board of Directors. To *amicus*'s knowledge, there is no publicly owned corporation, not a party to the appeal, that has a significant financial interest in the outcome.

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Interest of *Amicus Curiae*

Hamilton Lincoln Law Institute ("HLLI") is a public interest organization dedicated to protecting free markets, free speech, limited government, and separation of powers. *See*, *e.g., Stock v. Gray*, 2023 WL 2601218, 2023 U.S. Dist. LEXIS 48300 (W.D. Mo. Mar. 22, 2023) (preliminarily enjoining enforcement of law that restricts pharmacist speech based on viewpoint); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020) (same; attorney speech).

HLLI worries that the panel opinion constricts the free speech rights of students beyond the bounds set by this Circuit and the Supreme Court. Chief among those concerns, the panel opinion misreads *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) as affording greater expressive rights to public employees than to students. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 466. (6th Cir. 2024). As a recognition of the state's interest as proprietor and educator, the First Amendment accepts some constraints on the speech rights of teachers, professors, and other public employees during their official duties or when they speak about private matters. But these limitations don't apply to non-employee students, who attend school under compulsory state laws. *E.g., B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020), *aff'd,* 141 S. Ct. 2038 (2021); *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 586-87 (6th Cir. 2008). Likewise, even within the scope of the school's general authority to regulate disruptive student speech, the further removed from the classroom, the less the school's legitimate interest in regulation. *E.g., Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

HLLI submits this brief in support of granting Plaintiff's petition for rehearing. Under Fed. R. App. P. 29(b), a motion for leave to file accompanies this brief.

Federal Rule of Appellate Procedure 29 Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus* affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Introduction

Boards of education must provide "scrupulous protection of Constitutional freedom of the individual" lest they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 318 U.S. 624, 637 (1943). That includes "ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy*, 141 S. Ct. at 2046. "Our nation's future depends upon" students getting "wide exposure to [a] robust exchange of ideas—not through the authoritative compulsion of orthodox speech." *Meriwether*, 992 F.3d at 505 (internal quotation omitted).

Olentangy's policies—mandating that students use the preferred pronouns of other students, any place, at any time—betray this civic duty.

Argument

I. The panel majority relied on an upside-down interpretation of *Meriwether*.

In *Meriwether v. Hartop*, this Court addressed whether a school may constitutionally mandate that a professor use the preferred pronouns of his students during classroom instruction. 992 F.3d 492 (2021). "[S]tart[ing] with the basics," *Meriwether* says "no": Government officials may not compel citizens to affirm officially approved "orthodox" views; students and professors do not "shed" this right at the schoolhouse gate. *Id.* at 503 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *Barnette*, 319 U.S. at 642). Turning then to the thorny question of whether the plaintiff professor lose anyway because the "rules apply differently" "when a government employee is doing the talking?," *id.* at 503-04, *Meriwether* again answers "no": employee speech doctrines do not abrogate the professor's speech rights in this context, *id.* at 504-12.

But the panel opinion endorsed the district courts upside-down interpretation of *Meriwether*. It—and the lower court opinion—understands *Meriwether* to *extend* speech rights to employee professors that ordinary students do not have, even at home on their own time. That is not the law; *Meriwether* does not work an expansion from the default full panoply of First Amendment rights. To the contrary, it considers whether the public employee context requires a *contraction* from the foundational "basics." It asks whether professors cede or "retain" their speech rights when discharging job responsibilities in the classroom. *Id.* at 505. As Judge Batchelder's dissent cogently puts it, "*Meriwether* sets a floor, not a ceiling, on First Amendment protection." *Olentangy*, 109 F.4th at 483. Yet

the majority endorses the district court's reading of *Meriwether* to privilege speech or expression that occurs "in the classroom setting" while more readily permitting school restrictions outside that setting. Opinion & Order, RE 28, PageID # 840

Again, this reading is untenable. School authority wanes, not waxes, the farther away the speech is from the classroom itself. *E.g., Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (observing schools' "diminished" "leeway" to regulate off-campus speech); *Id.* at 2049 (Alito, J., concurring) (observing schools' "more limited" "authority" outside school grounds).

The panel majority was simply wrong to adopt the district court's view that *Meriweather* is "an imperfect analogy" to this case. *Olentangy*, 109 F.4th at 466. Perhaps the majority shares the district court's thinly veiled disagreement with *Meriwether*.[1] But that offers no license to deviate from Circuit law. *George v. Youngstown State Univ.*, 966 F.3d 446, 469 (6th Cir. 2020). Nor does it offer a license to mangle *Meriwether*'s reasoning and holding. Plaintiff's claims here follow *a fortiori* from *Meriwether*.

A. Government employee speech rights are more circumscribed than student speech rights.

The panel majority adopted the district court's backwards reasoning that while a professor teaching (*Meriweather)* is one thing, a student greeting classmates or joking with friends (this case) is quite another. *Olentangy*, 109 F.4th at 466; Opinion & Order,

[1] Opinion & Order, RE 28, PageID # 840 (citing faculty blog post arguing that *Meriwether* "erred for several reasons"); *see also Olentangy*, 109 F.4th at 480 (Batchelder, J., dissenting) ("[T]he district court relied on evidence that the District never submitted, including law-review and journal articles, newspaper stories, examples from its other pending cases, and its own personal opinions.").

RE 28, PageID # 843. A student uses pronouns, as that thinking goes, "because it is required by the English language" as a "mechanical exercise," but not as a matter of "reflection." Opinion & Order, RE 28, PageID # 843. "But such a sanitized view of language ignores the reality that 'titles and pronouns carry a message.'" *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-cv-02237, 2024 U.S. Dist. LEXIS 142938, *34 (N.D. Ohio August 12, 2024) (quoting *Meriwether*, 992 F.3d at 507); *see also Tennessee v. Cardona*, 2024 U.S. Dist. LEXIS 106559 at *66 (E.D. Ky. June 17, 2024), *stay pending appeal denied*, 2024 U.S. App. LEXIS 17600 (6th Cir. July 17, 2024) (Department of Education's preferred pronouns rule compels speech).[2]

Moreover, First Amendment case law does recognize a distinction between the speech rights of professors and students. As a condition of paid public employment, teachers are subject to *greater* speech regulation from their employer (the school) than are ordinary citizens, parents, or students. *Olentangy*, 109 F.4th at 183 (Batchelder, J., dissenting). Thus, for example, while students have the free speech right to criticize their teachers on social media, teachers lack the right to do the reverse. *Contrast Mahanoy*, 141 S. Ct. 2038 (recognizing student's right to disparage her coaches and cheerleading

[2] Divergence amongst decisions of this Court and amongst district courts on the issue is a "traditional grounds for full court review." *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, Kethledge, JJ., concurring in denial of rehearing). Circuit law ought not sow "contradiction and confusion in an area of the law that demands consistency and clarity." *Int'l Union v. Kelsey-Hayes Co.*, 872 F.3d 388, 392 (6th Cir. 2017) (Griffin, J., dissenting from denial of rehearing).

team), *with Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454 (3d Cir. 2015) (denying teacher's right to disparage her students online).

A public employee asserting free speech rights must first show that his speech covers a matter of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983). Yet courts uniformly recognize that this public concern test does not apply to government attempts to restrict the speech of ordinary citizens, parents, or students. *Friend v. Gasparino*, 61 F.4th 77, 88 (2d Cir. 2023); *Peck v. McCann*, 43 F.4th 1116, 1135 n.11 (10th Cir. 2022); *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021); *Jenkins*, 513 F.3d at 586-87; *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 765 (9th Cir. 2006); *Garcia v. SUNY Health Scis. Ctr.*, 280 F.3d 98, 106 (2d Cir. 2001).

Extending the public concern test to these non-employment contexts, would "rend it from its animating rationale and original context." *Jenkins*, 513 F.3d at 587 (internal quotation omitted). The Supreme Court has described the "key" rationale for the enhanced authority itself: "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality op.). "The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* Employees have consented to on-the-clock

speech restrictions by accepting a job with a certain function. Public school students—for whom "attendance is not optional"—have not. *Barnette*, 319 U.S. at 632.

Thus it is wrong to "'graft[] a public concern requirement onto' student speech doctrine." *B.L.*, 964 F.3d at 183 (quoting *Lowery v. Euverard*, 497 F.3d 584, 598 n.5 (6th Cir. 2007)). And no federal appellate court has made the mistake. *Id.* But the panel majority reversed this distinction when it countenanced the district court's evasion of *Meriwether* "given the differences between the use of pronouns by a college professor and students in a K-12 public school." *Olentangy*, 109 F.4th at 466. Such analysis goes beyond even grafting a public concern test onto student speech doctrine; it doesn't even allow students to enter the conversation.[3]

Garcetti v. Ceballos holds that when public employees speak pursuant to their official duties, the First Amendment does not normally insulate their speech from employer discipline. 547 U.S. 410 (2006). That rule made *Meriwether* a difficult case, for this Court had to determine whether public employee professors nonetheless "retain" their First Amendment rights while teaching. *Id.* at 505. *Meriwether* decided that, as a matter of academic freedom, they do. *Id.* at 505-07.

Importantly, *Meriwether* also decided that nothing suggests a professor using non-preferred pronouns would "hamper[] the operation of the school" or "den[y] [students]

[3] The panel's majority's other purported distinction with *Meriwether*—the option to eschew pronouns entirely (109 F.4th at 466-67)—flounders too. Factually, it is no distinction. *See* Petition for Rehearing 7-8. And legally, the government cannot avoid the compelled speech framework by making the compulsion contingent on speaking at all. *E.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 572-73 (1995).

any educational benefits." *Id.* at 511. Although *Meriwether* couches that conclusion in *Pickering* balancing, it very much parallels the *Tinker* standard for restricting student speech that "substantially interfere[s] with the work of the school or impinge[s] the rights of other students." *Mahanoy*, 141 S. Ct. at 2041 (quoting *Tinker*).

Tinker sets a "demanding standard." *Id.* at 2048. If a teacher refusing to use his students' preferred pronouns while teaching cannot satisfy the *Tinker* standard, a student refusing to use classmates' preferred pronouns cannot satisfy it either. Worse still, the Olentangy policies have no temporal or geographic limits. A student's refusal to use a classmate's preferred pronouns on social media on the weekend cannot "creat[e] a hostile environment" with "severely negative effects" "on the orderly operation of the school and its mission" if the same speech from a teacher in the classroom does not. *Contra* Opinion & Order, RE 28, PageID ## 833-36. The panel majority does not even mention the breadth of Olentangy's rule.

At bottom, a teacher's speech in the course of his employment comes closer to school-sponsored speech than does a student's speech, in the hallway or otherwise. And "[t]he closer expression comes to school-sponsored speech, the less likely the First Amendment protects it." *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012). Given *Meriwether*, the Olentangy policies compelling students to use preferred pronouns are deeply unconstitutional.

B. The further removed from the classroom, the more diminished the school's authority to regulate speech.

It is not just the identity of the speakers here (students rather than employees) that makes this an easy case after *Meriwether*. It is also the fact that the policies compel speech with no temporal or geographic limitation. *Mahanoy* provides three reasons that schools have diminished authority to regulate student speech off campus. *First*, off campus a school "will rarely stand *in loco parentis*." 141 S. Ct. 2038, 2046. Thus, allowing schools to dictate what students must or must not say off campus may invade the parental sphere of authority. *Second*, from the student's perspective, a regulation that extends off campus allows no outlet for certain speech at all; it covers "the full 24-hour day." *Id. Third*, as "nurseries of democracy," schools should cultivate (or at least not obliterate) the marketplace of ideas, and that includes teaching young people that they can and should participate in it. *Id.*; *accord Barnette*, 318 U.S. at 637.

Mahanoy did not invent the on-campus/off-campus distinction either. As this Court had recognized, schools have no authority to invade the private zone of a student's life "as the price for obtaining a degree." *Ward*, 667 F.3d at 738 (citing *Barnette*, 319 U.S. at 642); *cf. also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 218 (2013) (government conditions go too far when they "go[] beyond defining the limits of the federally funded program to defining the recipient"). Likewise, before *Mahanoy*, it was already well-established that a school's special authority to restrict vulgar speech ended at the campus gates. *Morse v. Frederick*, 551 U.S. 393, 405 (2007); *B.L.*, 964 F.3d at 181. In the end, because off-campus speech is typically not curricular or school sponsored, a school is less likely to have a legitimate pedagogical interest in regulating

it. *Ward*, 667 F.3d at 734; *see also Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 674 (7th Cir. 2008) (reasoning that school rule against "derogatory comments" "probably would not wash if it were extended to students when they are outside of the school, where students who would be hurt by the remarks could avoid exposure to them").

In sum, when students step foot on school campus, they surrender only the minimum sliver of their First Amendments necessary to allow the school to exercise its authority in providing education and physical safety. When students step off campus and the school's responsibility to provide either diminishes, students are returned their full First Amendment rights. Olentangy and the district court failed to grasp this fundamental concept.

Conclusion

For these reasons, this Court should grant the petition for rehearing.

Dated: September 3, 2024

Respectfully submitted,

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Certificate of Compliance of Fed. R. App. P. 32(g)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft Word 2019.

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Executed on September 3, 2024.

/s/ Adam E. Schulman
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Proof of Service

I hereby certify that on September 3, 2024, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

Executed on September 3, 2024.

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