No. 23-3630

IN THE 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-Appellee*s.

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

REPLY IN SUPPORT OF SUPPLEMENTAL EN BANC BRIEF OF PLAINTIFF-APPELLANT PARENTS DEFENDING EDUCATION

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INTRODUCTION

Though Olentangy wants to do right by the law and its students, its pronoun policies do wrong by both. Olentangy invokes Title IX. OSD-Br. (Doc.204-1) 18. But the regulation that required preferred pronouns has been vacated, *Tennessee v. Cardona*, 2025 WL 63795 (E.D. Ky.), and the government now respects students' "freedom to express the binary nature of sex," E.O. §5 (Jan. 20, 2025), perma.cc/U3NM-XY2A. Olentangy invokes state law. OSD-Br.12-13. But Ohio is here *opposing* Olentangy, States-Br. (Doc.160), and state law rejects the notion that students' stated gender identity should be uncritically affirmed, *see* O.R.C. §3319.90 (bathrooms); §3313.5320 (sports); §3313.473 (parental notice, as of Apr. 2025). Olentangy invokes *Tinker*. But it refuses to make a case under *Tinker* or this circuit's precedent. And its pronoun diktats deprive all students of *Tinker*'s lesson: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." 393 U.S. 503, 512 (1969) (cleaned up).

This Court should reverse. Olentangy should be barred from punishing students for "purposefully referring to another student by using gendered language they know is contrary to the other student's identity." Emails, R.7-2, PageID#356.

ARGUMENT

The key question for this Court, Olentangy seems to agree, is whether public schools can ban students from using non-preferred pronouns. OSD-Br.23, 2-3. Because

PDE's members want to intentionally and repeatedly use biological pronouns and Olentangy still bans that speech, the school's jurisdictional arguments are puzzling. Its merits arguments would require radical changes to the law. And the equities follow the merits.

I. The school's cursory jurisdictional arguments fail.

A. PDE likely has standing.

Associational standing requires a member with standing, germaneness, and non-individualized relief. *SFFA v. Harvard*, 600 U.S. 181, 199 (2023). The last two are conceded and met. PI-Order, R.28, PageID#820 n.1. As for the first, PDE's members have standing if they "intend to engage" in speech the Constitution "arguably protects," their speech is "arguably proscribed" by the policies, and there's a "credible threat of enforcement." *Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022). The district court found this standard satisfied. R.28, PageID#819-25; *accord* MTD-Op., R.35. Olentangy doesn't call those factual findings clearly erroneous, and it didn't even raise standing to the panel. Its perfunctory paragraph now makes no developed argument. *See* OSD-Br.7-8.

PDE's members meet the first two requirements for preenforcement standing. As the district court found based on their undisputed declarations, these students "wish to engage" in "misgendering." R.28, PageID#821. That speech is arguably protected. Panel-Maj.13; Panel-Dis.26-28, 36-51. And Olentangy's policies arguably ban it. Though Olentangy suggests misgendering must "ris[e] to the level of bullying or harassment," OSD-Br.8, that point is semantic. As the district court found based on the emails, Olentangy deems misgendering *to be* harassment "in violation of the Policies." R.28, PageID#821. It also deems misgendering "discrimination" under "the code of

conduct." Emails, R.7-2, PageID#356. And on their face, the policies arguably ban that speech. The discriminatory-language policy bans "derogatory" speech based on "transgender identity," with no required showing of targeting, bullying, or harassment. PDE-Br. (Doc.134) 4. And the harassment policies ban "severe … *or* pervasive" speech that merely "interfer[es]" with a student's education. PDE-Br.4-7. So while PDE's members don't think their speech *should be* labeled discrimination or harassment, *cf.* OSD-Br.8, their speech is chilled because the school and the policies say otherwise.

PDE's members also face a credible threat of enforcement. Though the school's *lawyers* say no student has been punished for "intentiona[l] misgender[ing]," OSD-Br.8, Olentangy submitted no "evidence" of nonenforcement. *Speech First v. Fenves*, 979 F.3d 319, 335-37 & n.14 (5th Cir. 2020). And "past enforcement is not necessary." *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1025-27 (6th Cir. 2024). No "discipline against students" occurs, after all, when "speech has already been chilled." *Speech First v. Schlissel*, 939 F.3d 756, 766 (6th Cir. 2019). And here, the district court found that Olentangy's policies are chilling students from using non-preferred pronouns—the "'most important'" factor for a credible threat. R.28, PageID#821. The school's emails formally opine that this speech violates the policies. PageID#821; *see Boone Cnty. GOP v. Wallace*, 116 F.4th 586, 595 (6th Cir. 2024). Olentangy both "refus[es] to disavow" that position, *id.* at 596; PageID#821, and "vigorously" defends its legality, *Online Merchants Guild v. Cameron*, 995 F.3d 540, 551 (6th Cir. 2021). And the threat is exacerbated

because anyone, including "students" and "third parties," can easily report violations and initiate complaints. R.7-1, PageID#126, 217-22, 200-01; *see Fischer*, 52 F.4th at 308.

B. Nothing is moot.

Though Olentangy says PDE's challenge to the original policies is "moot," the school admits that the parties' dispute about pronouns remains "left" for this Court. OSD-Br.23. Immaterial amendments to challenged policies moot nothing. *Ne. Fla. Chapter of AGCA v. Jacksonville*, 508 U.S. 656, 662 (1993). And Olentangy never denies that its amendments are immaterial. PDE-Br.9-10. As the district court found and Olentangy concedes, each of the original policies bans non-preferred pronouns. R.28, PageID#821; Panel-Maj.18. Olentangy made no changes to the Board's operative definitions of "harassment." *Compare* R.7-1, PageID#121, *with* App'x.61; *see Olentangy Schs., Bd. of Educ. 9.26.24*, at 1:44:58-45:03, YouTube, bit.ly/42yM07b (admitting the harassment definition was "not changed"). And it made no changes at all to the code's ban on "discriminatory language." *Compare* R.7-1, PageID#150, *with* App'x.15.[1]

[1] Olentangy says its changes to the Board policies "effectively changed" the code of conduct, since the code says to consult "'the current'" version of any Board policies "'referenced herein.'" OSD-Br.5-6. Olentangy is not claiming that the code's ban on "discriminatory language" has been changed. That argument would be forfeited: The school never raised it when opposing rehearing and discusses it now only in two background sentences. *Golden v. Columbus*, 404 F.3d 950, 962 n.10 (6th Cir. 2005). And it would be wrong. The quoted language means only that, when the code incorporates Board policies by reference, it incorporates the most recent version. App'x.7. But the discriminatory-language policy incorporates no Board policy (explicitly or implicitly), is a standalone offense, and remains intact today. App'x.15; *see* R.7-1, PageID#136 (code violations independently punishable).

Because all agree that PDE's tailored request for a preliminary injunction is live, this Court shouldn't decide whether PDE's challenges to the original policies are moot. It's unnecessary, since the current policies still illegally ban non-preferred pronouns. *Jacksonville*, 508 U.S. at 662. And PDE can challenge the original policies under the voluntary-cessation exception. Olentangy hasn't come close to carrying its "'heavy'" burden of proving mootness. *Schlissel*, 939 F.3d at 767. Though it says the new policies were approved by the Board, it never says (let alone gives sworn testimony) that "it does not intend to reenact" the originals. *Id.* at 769. It never concedes that the originals were overbroad, and it defended them through several rounds of litigation. *Knox v. SEIU*, 567 U.S. 298, 307 (2012). Its amendments were also "designed to insulate [the panel's] decision." *Id.* The Board, acting on advice of "legal counsel" in response to this case, invoked its emergency procedures to bypass public comment and rush these changes through before its opposition to rehearing was due. *See Bd. Mtg.* at 1:47:37-49:15.

II. The bans on non-preferred pronouns violate the First Amendment.

A. Viewpoint discrimination

Olentangy doesn't explain why its pronoun policies are not viewpoint discriminatory. They are—on their face, by design, and under *Meriwether*. PDE-Br.16-17. Olentangy doesn't ask this Court to overrule *Meriwether*, or claim that viewpoint discrimination means something different for K-12 schools. Under a long line of circuit precedent *about K-12 schools*, viewpoint discrimination is fatal. PDE-Br.16. Per those cases, "schools' regulation of student speech must be consistent with both the *Tinker* standard and *Rosenberger*'s prohibition on viewpoint discrimination." *Barr v. Lafon*, 538 F.3d 554,

571 (6th Cir. 2008) (discussing *Castorina v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 543 (6th Cir. 2001)). Nothing about that rule is limited to "clothing"; contra Olentangy, the Constitution doesn't protect students' t-shirts more than their actual words. OSD-Br.15-16.

Though Olentangy now says this Court's precedents misread *Tinker*, OSD-Br.15-16, that argument fails. Higher courts don't overrule precedent without a clear request from a party and briefing on the stare-decisis factors. *Barr v. AAPC*, 591 U.S. 610, 621 n.5 (2020) (lead op.). Olentangy offers neither. This Court's precedents have protected K-12 students for a quarter-century. Though some circuits think *Tinker* allows viewpoint discrimination, OSD-Br.15, others agree that viewpoint discrimination is separately barred, *e.g.*, *Holloman v. Harland*, 370 F.3d 1252, 1279-80 (11th Cir. 2004). The latter better harmonizes *Tinker* with more recent precedents, which draw ever-harder lines against viewpoint discrimination. *See id.* at 1279-82; *Barr*, 538 F.3d at 570-71. *Tinker* itself requires speech restrictions to be "necessary" to prevent disruption, 393 U.S. at 511, but viewpoint discrimination is never necessary, *Holloman*, 370 F.3d at 1279-80.

B. Compelled speech

Even if *Tinker* let schools discriminate by viewpoint, not even Olentangy claims that *Tinker* lets schools compel speech. It does not. PDE-Br.18-19; Panel-Maj.12; Panel-Dis.36. West Virginia couldn't force students to say the pledge by claiming that their refusal disrupted other students. *See W.Va. BOE v. Barnette*, 319 U.S. 624, 640-42, 635-36 & n.16 (1943). And while *Meriwether* distinguishes "'the in-class curricular speech of teachers'" in K-12 schools, this case doesn't involve teachers or their curricular speech.

992 F.3d 492, 504 n.1 (6th Cir. 2021). Students are not employees, Panel-Dis.38; HLLI-Br. (Doc.143) 5-9, and Olentangy bans misgendering everywhere, Panel-Maj.12 n.6.

Olentangy's pronoun policies compel speech. Though the school repeats that students can use no pronouns, OSD-Br.17, it responds to none of PDE's arguments against this faux compromise, PDE-Br.19. And besides, Olentangy offered only to "discuss" this option with students who have "religious" objections. Emails, R.7-2, PageID#355. Students want to use biological pronouns for non-religious reasons too. *E.g.*, D-Decl., R.7-6, PageID#387; C-Decl., R.7-5, PageID#378.

C. *Tinker*

Despite spending most of its brief arguing that *Tinker* is a defense to everything, Olentangy spends no time justifying its failure of proof under *Tinker*. Even if Olentangy were right that "the *burden is on PDE* to show that OLSD failed to meet its burden," OSD-Br.23, PDE did that: It proved that non-preferred pronouns are protected speech, and it argued that Olentangy failed to submit any "evidence" that its bans are "necessary" to prevent substantial disruption, *Tinker*, 393 U.S. at 511, 513; *see* PDE-Br.13-15. Without evidence, courts cannot assess whether Olentangy's "forecast" of substantial disruption was "reasonable"—or even whether it *made* a forecast. OSD-Br.23. And the question is what *the school* forecast *at the time* it banned non-preferred pronouns. *Norris v. Cape Elizabeth S.D.*, 969 F.3d 12, 25-28 (1st Cir. 2020). That question can't be answered with post-hoc research by the district court, Panel-Dis.34, 51; or by misreading PDE's declarations, Panel-Dis.33.

Even if Olentangy had submitted the district court's research about the harms of non-preferred pronouns, that evidence wouldn't satisfy *Tinker*. (And this Court should say so, since future schools won't repeat Olentangy's "election not to submit evidence on substantial disruption." OSD-Br.21.) PDE's members want to respectfully and calmly use biological pronouns. *E.g.*, A-Decl., R.7-3, PageID#363-64. Unlike bullying a boy by falsely calling him a girl, OSD-Br.1-2, using pronouns that embrace biology over gender identity expresses a viewpoint on a matter of public concern, *Meriwether*, 992 F.3d at 506; *see Mahanoy A.S.D. v. B.L.*, 594 U.S. 180, 205 (2021) (Alito, J., concurring) (speech on matters of public concern is "almost always beyond the regulatory authority of a public school"). Olentangy can't ban that viewpoint because some students react to it unreasonably. *Zamecnik v. Indian Prairie S.D.*, 636 F.3d 874, 879 (7th Cir. 2011). Substantial disruption is not a reasonable response to hearing an "unpopular viewpoint." *Tinker*, 393 U.S. at 509. Otherwise a school could ban students from *using* preferred pronouns too. *Meriwether*, 992 F.3d at 506.

The district court's reasoning would have the federal judiciary take a side in the ongoing "debates over this issue." *L.W. v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023); *see* Panel-Dis.43-44. Non-preferred pronouns are not "'dehumanizing,'" for example, unless gender identity both exists and is essential to what makes someone human. OSD-Br.13. Olentangy can promote that view through its own speech, or support students who are hurt by non-preferred pronouns; but it has no evidence that banning dissent is

"necessary" to prevent disruption. *Tinker*, 393 U.S. at 511. It's not even sufficient. According to Olentangy, the school will descend into "chaos" if students must hear pronouns that match their biology. OSD-Br.22. But the school will be fine if students must use the facilities that match their biology. *See* O.R.C. §3319.90. And the school will be fine if students must hear viewpoints like "transgender females are really males." OSD-Br.14. Such inconsistent positions fail under *Tinker*. 393 U.S. at 510.

Other than "substantial disruption" under *Tinker*, OSD-Br.4, Olentangy has no defense. It cites cases about *Tinker*'s "rights of others" prong. OSD-Br.11. But that prong is likely limited to "'tortious speech.'" Panel-Dis.51 n.10; *accord Kuhlmeier v. Hazelwood S.D.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260 (1988). Whatever it means, it "certainly" doesn't let schools ban speech because it's "offensive to some listener." *Saxe v. State Coll. Area S.D.*, 240 F.3d 200, 217 (3d Cir. 2001); *accord PDE v. Linn Mar*, 83 F.4th 658, 667 (8th Cir. 2023); FIRE-Br. (Doc.60) 9-14. Students have no right to be free from speech they deem "disparaging," "derogatory," "deeply offensive," or even "directed" at them. *Saxe*, 240 F.3d at 206, 217.[2]

[2] Some of Olentangy's amici compare non-preferred pronouns to students speaking lewdly about sex or promoting drugs. Karlan-Br. (Doc.214). PDE's members are not speaking lewdly or promoting drugs. *See Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (distinguishing that speech from "commenting on any political or social issue"). And amici cannot assert new defenses that a party fails to argue. *Self-Ins. Inst. of Am. v. Snyder*, 827 F.3d 549, 560 (6th Cir. 2016).

D. Overbreadth

Olentangy agrees with PDE on the key question "left" for this Court to decide: whether the school can constitutionally enforce the ban on non-preferred pronouns revealed in its emails. PDE-Br.23-24, 9; OSD-Br.10, 23. If the answer is no, then Olentangy agrees that the policies can be held facially unconstitutional to that extent. PDE-Br.2, 10, 24; OSD-Br.3. And Olentangy seems to prefer a preliminary injunction that bars it from punishing students for using non-preferred pronouns, rather than one that bars it from enforcing the challenged policies at all. PDE-Br.24, 10; OSD-Br.25. This Court could enter that narrower injunction without reaching overbreadth, except to hold that the district court's reasoning on pronouns "g[o]t wrong at least one significant input into the facial analysis." *Moody v. NetChoice*, 603 U.S. 707, 744 (2024).

But this Court could enjoin the policies in full. Olentangy responds to none of the cross-cutting defects that make them overbroad. It ignores that, by requiring the speech to be negative toward a protected class, every application discriminates by viewpoint. PDE-Br.22; *see Iancu v. Brunetti*, 588 U.S. 388, 395, 398-99 (2019). It ignores that—given the school's many other policies that ban conduct, unprotected speech, and disruption—the policies' *main* function is covering protected speech. PDE-Br.23. And it ignores that none of the policies have guardrails that ensure narrow tailoring, like requiring a disruption that's substantial or a reaction that's objectively reasonable. *Zamecnik*, 636 F.3d at 879; *see* PDE-Br.22. That K-12 schools have more authority to regulate speech under *Tinker* doesn't justify policies that make little attempt to adhere to

Tinker. *Cf.* OSD-Br.18 (citing *Sypniewski v. Warren Hills*, 307 F.3d 243 (3d Cir. 2002)).

Olentangy never asks for a limiting construction. Though its lawyers claim the school wouldn't apply these policies to "student speech disapproving of gender identity," OSD-Br.3, those evidence-free "representations of … counsel" are not rooted in the policies' "text," *Dambrot v. CMU*, 55 F.3d 1177, 1183 (6th Cir. 1995). The policies *do* cover that speech, since Olentangy admits they're broad enough to cover the mere intentional use of non-preferred pronouns. Nearly identical policies have been used to punish not only pronouns, *e.g.*, *Meriwether*, 992 F.3d at 507-11, but also the silent expression of controversial views like "There Are Only Two Genders," *L.M. v. Middleborough*, 103 F.4th 854, 860 (1st Cir. 2024). Olentangy's discriminatory-language policy is particularly egregious: Its "applications to otherwise protected expression" are "'practically limitless.'" ACLU-Br. (Doc.156) 6-7, 9; *see* PDE-Br.20-22.

The school's analogies to "state" and "federal" definitions of harassment only prove the problem. OSD-Br.14, 18. Even if compliance with statutes were a defense under the Constitution, *but see 303 Creative v. Elenis*, 600 U.S. 570, 592 (2023), these statutes don't help because Olentangy's policies exceed them, *see Saxe*, 240 F.3d at 217. Though Ohio has a viewpoint-neutral definition of harassment, O.R.C. §3313.666, Olentangy's Board policies and its discriminatory-language policy do *not* use that definition, *see* PDE-Br.5-7, 20-22. And all its policies are broader, add viewpoint discrimination, and—apparently unlike Ohio's statute, *see* States-Br.4-10—cover non-preferred pronouns. *E.g.*, App'x.8, 23. As for federal law, Olentangy has a *separate* policy that bans

the sex-based conduct covered by Title IX, adopting verbatim the Supreme Court's definition of harassment from *Davis*. PDE-Br.23; *see* App'x.73-87 (Policy 2266). Contra Olentangy, the Supreme Court crafted that definition with the First Amendment in mind, ensuring it covered only unprotected harassing conduct. *Alabama v. U.S. Sec'y of Educ.*, 2024 WL 3981994, at *5-6 (11th Cir.). Policies that blow past those limits impose viewpoint-based bans on too much protected speech. *Id.* at *6.

III. PDE is entitled to a preliminary injunction.

The other factors follow the merits in First Amendment cases, PDE-Br.23, and Olentangy offers no reason why this case is the exception. It doesn't defend the panel's invocation of delay, forfeiting the issue a fourth time. PDE-Br.25. Though it says no student will be imminently punished, OSD-Br.24, the irreparable injury is chilled speech—an injury that's "present" and "ongoing," *G&V Lounge v. MLCC*, 23 F.3d 1071, 1076-78 (6th Cir. 1994). Olentangy's argument would mean that courts can never enter preliminary injunctions in preenforcement cases. *But see*, *e.g.*, *Sisters for Life v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 409 (6th Cir. 2022). Olentangy further concedes that, if PDE is likely to prevail, then the other factors "'merge'" and favor an injunction. OSD-Br.24. It never explains why an injunction would be a "free pass" for bullying and harassment, OSD-Br.22, or stop Olentangy from punishing anything other than protected speech, PDE-Br.23-24; OSBA-Br. (Doc.207) 11-12. The ultimate *parens patriae* of Ohio's children—the State of Ohio—is here supporting that relief. States-Br.11.

CONCLUSION

This Court should reverse.

Respectfully submitted,

Dated: February 5, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's briefing letter because its body does not exceed 12 pages. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: February 5, 2025 */s/ Cameron T. Norris*

CERTIFICATE OF SERVICE

I e-filed this brief with the Court, which will email everyone requiring notice.

Dated: February 5, 2025 */s/ Cameron T. Norris*