Case 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 United States District Court for the
Southern District of Ohio
Eastern Division

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT PARENTS DEFENDING EDUCATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae American Civil Liberties Union and American Civil Liberties Union of Ohio state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: December 18, 2024

By: /s/ Amy R. Gilbert
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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Ohio is an affiliate of the ACLU. The ACLU and its affiliates have been at the forefront of cases addressing freedom of speech, including in this Court, *see, e.g.*, *Wood v. Eubanks*, 25 F.4th 414 (6th Cir. 2022), and have represented the students in all five of the Supreme Court's seminal student free speech cases. As organizations committed both to free speech and to protecting LGBTQ students from discrimination, the ACLU and ACLU of Ohio have a strong interest in the proper resolution of this case. Clarity on, and adherence to, the governing standards is key to ensuring protections for students not only in this case, but across the Sixth Circuit.

INTRODUCTION

This case is a facial challenge to school policies that restrict young people's freedom of speech, both inside and outside of school. The legal principles governing such challenges are well-settled. Students have First Amendment rights in school and even stronger ones outside of school. In school, beyond the narrow bounds of lewd or drug-promoting speech, neither of which is at issue here, schools can punish

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

only speech that constitutes harassment that is severe or pervasive enough to create a hostile educational environment, and/or speech that would create substantial and material disruption. Outside of school, disruption cannot be a justification.

The fact that Appellants challenged the policies because their members seek to misgender their classmates neither adds to, nor subtracts from, the analysis. As with any other type of student speech, schools cannot respond with a viewpoint-based ban, or one untethered from a prediction of substantial disruption. Instead, they may discipline misgendering under facially constitutional policies—if and only if the specific instance meets the legal standard for hostile-educational-environment harassment and/or, if uttered in school, would cause substantial disruption. To the extent that the District argues that it can ban or punish any instance of misgendering, regardless of whether it crosses those lines, the District is wrong. To the extent that Appellant argues that misgendering is immune from school discipline even when it constitutes such harassment or would cause disruption, Appellant is wrong, too.

Applying the proper standard for a facial challenge, this Court should reverse the district court at a minimum with respect to the Personal Communication Device Policy (the "PCD Policy"),[2] the "discriminatory language" provision of the Code of

[2] While Appellant was seeking en banc review, the District amended the PCD Policy. Unless otherwise stated, this brief refers to the original policy. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (refusing to consider amended

Conduct (the "Discriminatory Language Ban") and, to the extent it exists, any categorical ban on misgendering.[3] In doing so, this Court should make clear that the court below erred in its application of *Tinker* to the in-school restrictions; that alone is enough to strike them down without reaching the question of whether they are also viewpoint-based. In addition, the Court should disentangle the policies that apply to speech outside of school from those that apply only in school and make clear that the former must be assessed more rigorously under *Mahanoy*.

At the same time, this Court should not embrace the view that the policies at issue compel speech, or that the First Amendment grants Appellant's members *carte blanche* to intentionally misgender their transgender classmates—nor should it grant Appellant a categorical injunction against any punishment for misgendering other students, regardless of any hostile educational environment or disruption that results.

ARGUMENT

I. On campus, the First Amendment protects students' speech and allows for discipline only in narrow circumstances.

A. The First Amendment protects students' speech in school.

Students' ability to speak—to explore ideas, to explain their thinking, to challenge views they do not like, and to make up their own minds—lies at the heart

version of school's harassment policy, which was changed "more than a year after the commencement of litigation").

[3] Amici take no position on the other challenged policies.

of any functional educational system. Not only their development but "[t]he 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." *Tinker v. Des Moines*, 393 U.S. 503, 512 (1969) (internal quotation marks and citations omitted).

As *Mahanoy* reaffirmed, the importance of protecting young people's freedom of speech carries special force when it comes to schools. As "the nurseries of democracy," they "have a strong interest in 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 Area School District v. B. L. by & through Levy*, 594 U.S. 180, 190 (2021). It is thus axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[.]" *Tinker*, 393 U.S. at 506.

B. Schools may regulate on-campus student speech in limited circumstances.

Schools may prescribe and control student speech only within "fundamental constitutional safeguards." *Id.* at 507, 513. This includes a ban on viewpoint-based discrimination in school policies. *See, e.g., Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.,* 246 F.3d 536, 540 (6th Cir. 2001). In addition, a school "must be able to show that its action was caused by more than a mere desire to avoid the discomfort . . . that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. A

school can meet this burden by showing that the speech would cause a "substantial disruption of or material interference with school activities." *Id.* at 513–14.

School officials can also respond to "student speech [that] . . . involves serious or severe harassment" of teachers or students. *Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 358 (6th Cir. 2023) (citing *Mahanoy*, 594 U.S. at 189).[4] This Court has already held that such harassment can lead to discipline in the university setting, *see Meriwether*, 992 F.3d at 511, and off campus, *see Kutchinski*, 69 F.4th at 358. So, too, can schools punish such speech in the K-12 school environment, where schools bear obligations to "protect everyone on [their] premises" and to offer educational opportunities to all students. *Kutchinski*, 69 F.4th at 358 (quoting *Mahanoy*, 594 U.S. at 201 (Alito, J., concurring)).[5]

A ban on speech that is more specific than simply "no disruptive speech or clothing" can pass muster under these rules, *see Barr v. Lafon*, 538 F.3d 554, 557

[4] Such harassment includes verbal or written conduct that is objectively and subjectively severe or pervasive enough to create an abusive educational environment or interfere with or limit an educational opportunity. *See Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021) (recognizing that speech that "denie[s a student] any educational benefits" or "inhibit[s a student's] education or ability to succeed in the classroom" is not immunized by the First Amendment).

[5] To the extent the District is arguing that banning misgendering that creates a hostile educational environment is constitutional because it necessarily satisfies *Tinker, see* ECF 126 pp. 7–8, the Court need not reach that question because such speech can be regulated separate and apart from *Tinker*. *See Kutchinski*, 69 F.4th at 358; *Meriwether*, 992 F.3d at 511.

(6th Cir. 2008) (considering ban specifically on Confederate flags, pursuant to policy that, on its face, prohibited all disruptive clothing)—but only if it is viewpoint-neutral and justified by "a well-founded expectation of disruption," typically "based on past incidents arising out of similar speech[.]" *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001); *see also Barr*, 538 F.3d at 565 (looking to "whether the banned conduct would likely trigger disturbances such as those experienced in the past").

C. The PCD Policy and Discriminatory Language Ban fail these tests.

By their plain text, neither the Discriminatory Language Ban nor the PCD Policy is limited to speech that would cause a substantial disruption or in fact creates a hostile environment. Indeed, the panel majority and dissent agreed on this point.[6] The Discriminatory Language Ban reaches all "verbal or written comments," including "jokes," that are "derogatory towards an individual or group based on" certain personal characteristics. By its text, jokes about boys, girls, Catholics, or British people are all forbidden. Poking fun at a teacher for being bad at technology

[6] The majority recognized that the PCD Policy's plain text could allow discipline for "disparaging a politician's political beliefs, or a text sent that could embarrass someone[.]" Maj.Op. p. 20. It noted that the Discriminatory Language Ban "contains no severity requirement and does not tie its prohibitions to *Tinker*"; as a result, it "appears to permit the District to punish some speech . . . that it may not, such as jokes about a politician's age that are unlikely to be disruptive." *Id.* p. 22. Similarly, the dissent recognized that the policies' "sweeping" scope includes "prohibit[ing] derogatory jokes [the District] does not like." Dissent p. 52.

because of her age can lead to discipline. And a joke that begins, "a priest, a rabbi, and an imam walked into a restaurant" is banned, almost no matter how it ends. The PCD Policy, which additionally precludes transmitting material "that can be construed" as "disparagement of others" based upon characteristics including "political beliefs" reaches any criticism of socialists, communists, or fascists.

To the extent that it exists, a categorical ban on misgendering, regardless of context, intent, or impact, also goes too far. Such a policy would reach saying "hey guys" to girls, or referring to a female friend as a "bro." And while, as noted above, a school need not always wait for actual disruption before it may prohibit a specific subset of disruptive speech, here, the District did not even try to satisfy *Tinker*.[7] Because these policies fail *Tinker*, the Court need not reach the independent question of whether they are also unconstitutionally viewpoint-based.[8]

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[7] The Court should not hold that any particular speech is disruptive as a matter of "common sense." While "common-sense conclusions" may be available when it comes to "abstract concepts" like "team morale and unity" in school athletics, which "are not susceptible to quantifiable measurement," *Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007), the same is not true for restrictions tied to more typical, and quantifiable, in-school disruptions. Courts regularly deal in quantifying—and requiring evidence of—such disruption. *See, e.g., Barr*, 538 F.3d at 554, 565–66, 566 n. 6 (looking to history of racial tension, including threats and fights); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 674 (7th Cir. 2008) (considering "decline in . . . test scores" and "upsurge in truancy").

[8] In addition, while it should not change the outcome, Amici agree with the District that the policies do not compel speech. Consistent with the policies, a student could refer to a classmate as "that kid" or "that student"; they could say "my friend";

D. The Policies are Subject to Facial Invalidation

Though all of the judges agreed that the policies reach protected speech, they also erroneously agreed that the policies survive facial challenge because some of their applications, and even terms, could be constitutional. Maj.Op. pp. 19–22, Dissent pp. 51–53. Under that logic, a school could ban obscenity, defamation, and true threats, and then tack on "any speech about politics" or "statements that the sky is blue," without having to face a facial challenge because the unprotected categories outnumber the protected ones.

That is not how overbreadth works. *See, e.g., Saxe*, 240 F.3d at 217 (even where one prohibition "may satisfy the *Tinker* standard," policy is nevertheless overbroad if its second prohibition does not); *Parents Defending Education v. Linn Mar Community Sch. Dist.*, 83 F.4th 658, 668–69 (8th Cir. 2023) (policy that prohibited "refusal . . . to respect a student's gender identity" violated First Amendment because, "[e]ven assuming . . . the District could dictate a student's use of names and pronouns, the plain meaning of the policy is not so limited").

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they could use the classmate's first name, last name, or nickname; or they could refrain from using a name or pronoun altogether. *See Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038, n. 33 (9th Cir. 2010) (option not to speak does not amount to compulsion). The District explicitly offered an accommodation for any student who feared contravening their religious beliefs. Unwillingness to conform one's speech to the available options does not result in compelled speech. *Wilkins v. Daniels*, 744 F.3d 409, 415–16 (6th Cir. 2014).

In the public-school setting, the overbreadth doctrine must be read in conjunction with *Tinker's* demanding standard: the school "must . . . satisfy the *Tinker* test by showing that the Policy's restrictions are necessary to prevent substantial disruption[.]" *Saxe*, 240 F.3d at 216. For example, a dress code may be upheld where it prohibits clothes that "would 'cause disruption,'" *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 441 (4th Cir. 2013), but a "disruption requirement" cannot be "read . . . into" such a policy to save it. *Newsom ex rel. Newsom v. Albermarle County School Board*, 354 F.3d 249, 260 n. 8 (4th Cir. 2003). To hold otherwise would erase *Tinker*'s requirement that schools must forecast a substantial disruption before banning otherwise protected speech.

Because the Discriminatory Language Ban, the PCD Policy, and, to the extent it exists, any categorical ban on misgendering are not tied to disruption or hostile-environment harassment, the universe of their applications to otherwise protected expression "is practically limitless," *id.* at 260, and the policies are subject to facial invalidation—even at the preliminary injunction stage, *id.* at 259 (finding "no evidence [of foreseeable disruption] . . . through the preliminary injunction stage"), and in a pre-enforcement challenge, *see Saxe*, 240 F.3d at 217 (preliminarily enjoining overbroad policy in pre-enforcement case).

II. Policies that govern speech outside of the school environment have to be scrutinized more closely than those that govern speech in school.

The PCD Policy regulates not only "in-school speech," but also students' use of "web-enabled" devices outside of school. It reaches a young person's efforts to keep up to date with the news; engage with friends, elected officials, or their community; and explore their own identities outside of school. Similarly, if not limited to the school, a categorical prohibition on misgendering could apply when students speak to their parents at dinner, write in their diaries at night, or ask mentors for advice. Policies that extend this far cannot survive merely under *Tinker* review.

Though these policies fail under in-school rules, this Court should make clear that their application to speech outside of school is subject to even more exacting scrutiny—and that they additionally and separately fail for this reason. Imposing the correct standard should not change the outcome here, but it may in other cases.

"[F]rom the student speaker's perspective," applying in-school rules across "the full 24-hour day" would mean a young person could never say anything unpopular or disruptive. *Mahanoy*, 594 U.S. at 189. From the school's perspective, the school itself has a "strong interest" in teaching students that "[o]ur representative democracy only works if we protect the . . . free exchange [of ideas]." *Id*. at 190. And, from the parent's perspective, "off-campus speech will normally fall within the[ir] . . . zone [of] responsibility," *id.* at 189, where they "can[ ] protect, guide, and discipline the[ir children]." *Kutchinski*, 69 F.4th at 350 (quoting *Mahanoy,* 594 U.S.

at 189). As this Court has already recognized, these "features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." *Id*. (quoting *Mahanoy*, 594 U.S. at 190).

Pursuant to *Mahanoy*, courts must subject off-campus speech restrictions to more rigorous scrutiny than *Tinker*'s foreseeable disruption standard in two ways.[9] First, they must ask whether the interest the school asserts can grant a school "license to regulate [off-campus] student speech" at all. *Mahanoy*, 594 U.S. at 188. For example, outside of school, "[s]chools generally cannot regulate 'speech that is not . . . directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern[.]'" *Kutchinski*, 69 F.4th at 357 (quoting *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring). But they retain their interests in stopping "serious or severe bullying or harassment targeting particular individuals." *Mahanoy*, 594 U.S. at 188; *Kutchinski*, 69 F.4th at 358. The same may be true for "threats aimed at teachers or other students," "failure to follow rules concerning lessons," and "breaches of school security devices." *Mahanoy*, 594 U.S. at 188.

Second, even if the interest is valid, a court must determine whether the regulation will in fact address it. *Id.* at 191–93. For example, where the interest is

[9] To the extent that the *Kutchinski* panel's holding was premised on the speech's "potential to cause[ ] substantial disruption at [school]," 69 F.4th at 359, this Court should clarify that courts cannot look to *Tinker* outside of the school environment.

preventing hostile-environment harassment, the policy must in fact be narrowly tailored to addressing such harassment, not merely foreseeable disruption.[10]

The original PCD Policy, the new Policy's prohibition on speech that "has the effect of materially disrupting classwork or the order of the school," and any categorical ban on using nonpreferred pronouns outside of school all fail this test.

CONCLUSION

For the foregoing reasons, the ACLU and ACLU of Ohio urge this Court to reverse the district court's decision at minimum with respect to the Discriminatory Language Ban and the PCD Policy. To the extent that it exists, any categorical ban on the use of students' non-preferred pronouns should also be preliminarily enjoined. But, to the extent that Appellant seeks an order that exempts misgendering from punishment under facially constitutional policies, even when it constitutes harassment that creates a hostile educational environment and/or, if uttered in school, would cause substantial disruption, no such injunction should be granted.

[10] *Mahanoy* refused to "deny the off-campus applicability of *Tinker*'s highly general statement about the nature of a school's special interests," 594 U.S. at 189, and that is no surprise. Some subset of the school's "highly general" interest in preventing disruption *is* implicated by the examples of off-campus behavior the Court provided: bullying, harassment, threats, cheating, and unsecured school devices. But that does not mean that the general interest in preventing disruption, on its own, can authorize punishment for off-campus speech, or that *Tinker*'s standard governs whenever a more precise interest is implicated. At an absolute minimum, actual—not merely foreseeable—disruption must be required.

Respectfully submitted,

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Dated: December 18, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief of Amici Curiae complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1) it contains 3,187 words and is 12 pages long.

I further certify 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 this brief has been prepared in a proportionally spaced typeface with 14-point Times New Roman font in Microsoft Word.

Dated: December 18, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2024, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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