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-Appellees.

On Appeal from the
United States District Court for
the Southern District of Ohio

Brief *Amicus Curiae* of The LONANG Institute in Support of Plaintiff-Appellant and Reversal

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DISCLOSURE STATEMENT

The *amicus curiae* herein, The LONANG Institute, through its undersigned counsel, submits this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). The LONANG Institute is an educational organization, not a subsidiary or affiliate of a publicly owned corporation and has no financial interest in the outcome of this case.

s/Kerry Lee Morgan

Kerry Lee Morgan

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INTEREST OF *AMICUS CURIAE*[1]

The LONANG Institute is an educational and research organization, dedicated, *inter alia*, to the correct construction and application of law including its Constitutional articulation limiting the power of civil government.

STATEMENT OF THE CASE

Parents of schoolchildren challenge on First Amendment free-speech grounds, the Olentangy Local School District's policies that prohibit and punish the intentional use of non-preferred pronouns. The school district's policies include an Anti-Harassment Policy, a Personal Communication Devices Policy, and its Code of Conduct, all of which aim to prevent harassment and bullying by compelling student speech. The United States District Court for the Southern District of Ohio denied plaintiffs' motion for a preliminary injunction to block enforcement of these policies finding no likelihood of success on the merits of their First Amendment claims or irreparable harm. The United States Court of Appeals for the Sixth Circuit affirmed.

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[1] This *amicus* brief is accompanied by a motion for leave to file. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

The appellate court applied *Tinker v. Des Moines Independent Community School District*, which only permits regulation of speech that has a likelihood of causing substantial disruption to school activities or would invade the rights of others. The court also held that the school's policies did not unconstitutionally compel speech and that concerns over the psychological harm which transgender students might experience was a sufficient educational purpose to justify enforcement of the school's policies. The decision of the court, however, was vacated as per sixth circuit rule when *en banc* review was granted.

SUMMARY OF ARGUMENT

The appeals court panel majority incorrectly applied the *Tinker v. Des Moines* test for restricting student speech. Speculative psychological harm from pronoun use was erroneously given controlling legal status rather than merely evidentiary weight. Nor does such harm meet *Tinker's* "material disruption" threshold. The school district's policies improperly compel speech by requiring all students to use preferred pronouns against their beliefs, religious or otherwise.

Several Supreme Court cases already control the outcome here, including *West Virginia v. Barnette* (prohibiting compelled speech in schools), *Abington v. Schempp* (requiring government neutrality on religion), and *303 Creative v. Elenis*

(prioritizing free speech over anti-discrimination laws). These precedents should take precedence over a singular *Tinker* analysis.

The school policies as applied violate students' free speech and religious freedom rights by compelling them to express views contrary to their beliefs, religious or otherwise. The Constitution's protections override the school district's use of compulsion to further its anti-discrimination and anti-bullying objectives. The *en banc* court should reverse the district court's denial of a preliminary injunction and remand to enjoin the school's mandatory policies.

ARGUMENT

I. *BARNETTE*, *SCHEMPP*, AND *303 CREATIVE*, NOT *TINKER*, CONTROL THE OUTCOME OF THIS CASE.

A. The Panel's Invocation of Psychological Harm Does Not Satisfy The *Tinker* Threshold of Material Disruption Under Any Scenario.

The Sixth circuit panel majority framed the dispute within the context of *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 356 (6th Cir. 2023) and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).[1] Eliminating indecent or vulgar speech, speech promoting illegal drug

[1] As the district court recognized, because the proposed speech at issue in this case is not lewd, does not involve illegal drug use, and is not school sponsored, it leaves the material disruption test announced in *Tinker*. In *Tinker*, the Court found that "the record [did] not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with

use, and speech in a school sponsored event, the court was left with *Tinker's* material and substantial disruption test.[2] The majority then purported to apply the test and found students whose preferred pronouns are not used were harmed, while the harm to students who are forced to use other's preferred pronouns was a result of their mere "preference."[3] From this harm, the majority extrapolates to the conclusion that the possibility of non-preferred pronoun use, psychologically harms transgender students and must therefore invariably, one day, in the future, *ipso facto,* "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." *Parents Defending Educ. v. Olentangy Local Sch.*

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school activities" from the wearing of the armbands, "and no disturbances or disorders on the school premises in fact occurred." Id. at 514. Nor was there any evidence that the armbands intruded upon the rights of other students. Id. at 508. The Court held that suspension of the students violated the First Amendment.

[2] "Under *Tinker,* a school policy may prohibit speech ... only where officials have a reasonable basis to believe that the speech will either substantially disrupt school activities or interfere with the rights of others." 109 F.4th at 463.

[3] The Panel majority's view is that the District Court reached "the common-sense conclusion that the dehumanizing and humiliating effects of non-preferred pronouns could create a substantial 'disrupt[ion] [to] the educational process' justifying restricting the use of those pronouns." *Parents Defending Educ*. at 464. But see *N.J. v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022) ("[T]here's no "generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students," citing *Zamecnik v. Indian Prairie Sch. Dist. # 204*, 636 F.3d 874, 877 (7th Cir. 2011)).

Dist. Bd. of Educ., 109 F.4th 453, 489 (6th Cir. 2024) (citing *Tinker,* 393 U.S. at 513). *vacated* at 2024 U.S. App. LEXIS 27759, *1.

The dissent on the other hand, concludes that the "First Amendment's protection 'must include the protection of unpopular ideas.'" Citing *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021). That protection "includes students' expression of their views on gender through the use of biological pronouns instead of individually selected ones." 109 F.4th at 476.

The majority's deferential leap from psychological harm to substantial and material interference with school activities is not well reasoned even in the context of a preliminary injunction which the majority uses to defeat the "significant likelihood of prevailing on the merits" element, thereby affirming denial of plaintiff's injunctive relief.

Indeed, where will the majority stop with its psychological harm analysis? Imagine the school district stating that all students must only use preferred accolades when referring to their school football team? The school district would define those accolades such as "great", "super", or "the best" and state that all students must use these accolades when referring to members of its football team. The policy could also prohibit all other references to the team such as "rotten," "losers," and "no good." The district could obtain affidavits of its football playing

students that when they hear other students, parents and coaches calling them nonpreferred accolades in the hallway, at games or online, that it causes them psychological harm. Perhaps they can obtain a psychologist to publish an article which could be cited by a court as authoritative?

In addition, consistent with the majority's theory of the case, the school district need not demonstrate any actual disturbance or material disruption exists or wait until a Friday night football game to break out into actual nonpreferred accolades. The school district could also add additional policy flourishes which state that praising opposing teams is likewise worthy of prohibition because of its reverse psychological effect.[4]

B. Contrary To *Tinker's* "Regulation of Speech" Prong, The District's Policies Invade The Rights *Of All Students* To Use Biological Pronouns.

What Amicus finds disturbing, however, beyond the foregoing analogy, is the near exclusive focus on "material disruption" and disregard of *Tinker's* second

[4] *See* L. Fisher and L. Dzikus, Bullying in Sport and Performance Psychology, Oxford Research Encyclopedia (April 26, 2017) "Athlete Maltreatment" is a recognized form of psychological bullying. The school district could easily adopt a "preferred accolades" speech policy pursuant to its antibullying policy to prohibit athlete maltreatment by coaches, parents, spectators, and viewer comments worldwide after reviewing game highlights on the internet.

prong, "regulation of speech that invades others' rights," as mechanically referenced in footnote 1 of the majority panel opinion.

Evaluating this case under that prong we must first ask what is the regulation of speech at issue? The answer is the school district has adopted three policies which according to the school district require students to use preferred pronouns. The policies apply to *all students*, not just those who object.

Thus, the school district's policies either individually or collectively compel student speech. For example, a student, religious or otherwise, pursuant to the school district's compulsion-based policies, must refer to a biologically male transgender student as "she." The compelled student is prohibited by the policy from expressing a contrary opinion. The compelled student is prohibited from expressing the viewpoint that a biologically male transgender student should be referred to as "he." That opinion is *verboten.*

Likewise, a student pursuant to the school district's compulsion policy must refer to a biological female transgender student as "he." The compelled student is prohibited from expressing his or her viewpoint that the biologically female transgender student should be referred to as "she."

All students, transgender or not, are barred by the school from providing *any opinion or viewpoint* regarding the actual biological gender of any insistent

student. A transgender student must refer to other transgender students according to their preferred pronouns and is not free to refer to those students according to their actual biological gender. So too for non-transgender students. The speech of all students is censored.

The panel majority claim that students can use the student's actual name in lieu of preferred pronoun as reasonable "win-win," fails to appreciate or address the compulsion actually involved. In effect, the school district is saying students can't use their own pronouns, but they are free to use the student's name. This pre-existing option, however, does not minimize the fact that all students are still compelled not to use a transgender student's biological classification. For instance, if a biologically male transgender students given name is John Smith, but that student now wishes to be called Khloe Kardashian, plaintiffs' students would still be compelled by the district's policies to address the transgender student using an obvious female name. Thus, the compromise is a sham. In essence, the school district's compulsory options are: 1) use the biological male transgender students preferred female pronouns, or 2) use the biological male transgender students' preferred female first or last name. This is no choice at all.

Finally, the effect of the school's policies as applied is harmful. Transgender students are grouped together as *per se* victims, while non-transgender students are

grouped together as *per se* violators. In both cases, however, these *per se* groupings deny each *individual student* their own freedom of speech on this issue. Freedom of speech is the freedom of *each individual*, without regard to their group affiliation or the school district's inimical *per se* classifications.

C. *Barnette, Schempp*, and *303 Creative* Already Control the Outcome of This Case.

Students are also compelled by the school district to assume biology is not controlling and that individual preferences which are "made-up thing, imaginary or make believe," should control their speech. This compulsion is contrary to their clearly stated religious views that God as the Creator created only two genders, male and female.

Recall where we have come from. Over 60 years ago the Supreme Court observed in *Abington School District v. Schempp*, 374 U.S. 203 (1963), which struck down mandatory Bible reading and recitation of the Lord's prayer, that government must nevertheless "maintain strict neutrality, neither aiding nor opposing religion. Id. at 225. Even before that decision, Justice Black wrote in in *Everson v. Board of Education*, 330 U.S. 1 (1947) that the Constitution "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Id. at 18.

Over 80 years ago in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) the Court was even clearer. The panel majority cites to this case, but not the critical analogous facts of the case. It neglects to mention that West Virginia sought to compel the children of Jehovah Witnesses "to express views at odds with their faith as Jehovah's Witnesses." That should ring a bell. In the instant case, the school district seeks to compel children of religious parents to express views at odds with their faith as Christians. Amicus sees no distinction. The Court held that such compulsion "transcends constitutional limitations on their power." 319 U. S. at 642. Moreover, such compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Id. That same, premise, reasoning and outcome control here.

As far as the Constitution's commands to school districts and its officials go according to *Schempp,* the school district is constitutionally forbidden from being an adversary of religion, from handicapping religion, and from opposing religion. Yet all that remains of these lofty constitutional prohibitions in the opinion of the panel's majority, is a meaningless gesture that the school district is willing to talk about it *by email.* "[T]he District clarified that it was happy to discuss accommodations to avoid using pronouns where such use would contradict a student's religious beliefs." *Parents Defending Educ.* at 459.

While the school district and panel majority make much about the projected "psychological harm" that could be experienced by transgender students when called by their biological pronouns, the *en banc* court should not be overly surprised or impressed by this approach. Recall in *Schempp* that 10 verses were selected from the Bible to be read without comment or discussion each morning to the students. Students were also required to recite the Lord's Prayer. Plaintiff objected on religious grounds that such readings and mandatory recitations violated the Constitution.

In support of their claim, plaintiffs introduced the testimony of Dr. Solomon Grayzel. Dr. Grayzel stated that if portions of the New Testament were read without explanation they could be "psychologically harmful to the child and had caused a divisive force within the social media of the school." 374 U.S. at 209. Moreover, the court referenced multiple psychological studies in footnote 69. These studies illustrate the immense psychological pressure on religious students to *conform* to the school district's secular normative expectations. The studies purport to demonstrate the "susceptibility of school children to peer-group pressures, especially where important group norms and values are involved." Id. at 290 n.69.

While such research favors appellants position far more than the school district's position because it is appellants children who are being pressured *by the school's policies* to conform *or else*, such studies whether in *Schempp* or the instant case, are ultimately a sideshow to the constitutional issue of district compulsion at stake.

Upon reflective examination, it becomes easy to see the parallel universe between *Schempp* and the instant case. In *Schempp* the court noted Grayzel's "psychological harm" and its "divisive force" effect on education. In the instant case, the panel majority noted the "psychological harm" that could be present and projected its "substantial disruption." Both courts are reading from the same "psychological harm" playbook.

The *Schempp* court, however, stopped short by simply noting such harm, but did not rely upon it as a basis for its legal decision. Rather it decided the case on the basis of the commands of the Constitution holding that the compulsion at issue "require[s] religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners, . . . Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to

take alarm at the first experiment on our liberties.'" 374 U.S. at 224-25. It should be plain to see that the school district's inflexible commitment to strict enforcement of its policies is a raging torrent.

Therefore, the instant case is not a battle over who is, will, or can be harmed more psychologically than others by speech. There is no balancing of psychological harm and certainly the desired object of a government-controlled education cannot be to inflict psychological harm *equally across the board* to all students whether transgender and biologically identified. The *Schempp* court already did all the balancing that was necessary striking down the school's policy simply because it violated the Constitution. The Constitution protects the speech, religious or otherwise, of every child and no school district can trample that freedom underfoot through its policies.

While resolution of this case according to the foregoing principles is straightforward and this court should have no difficulty as *Schempp* and *Barnette* are controlling, yet there is still a tension between freedom of speech, and the school district's anti-discrimination and anti-bullying *anti-speech* policies. All these policies impair speech in one manner or another. That is the nature of the beast. But why reinvent the wheel?

The *en banc* court should recall this path has already been trod in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). In that case the Supreme Court addressed the relationship between anti-discrimination laws and policies, and the Free Speech Clause. In a 6–3 decision, the Court held that the state of Colorado could not compel a website designer to speak the state's ideological message, a message the plaintiff did not believe or desire to provide. Colorado used its nondiscrimination law to force the plaintiff to give deference to marriages she opposed. Colorado also used its laws to compel her affirmation to "excis[e] certain ideas or viewpoints from the public dialogue" (*Turner Broad. Sys. v. FCC*, 512 U. S. 622, 642 (1994)), by eliminating dissenting ideas about marriage.

In addressing this mandatory prohibition on speaking her own message and its mandatory compulsion on speaking the state's approved message (which are no different conceptually than the mandates and prohibitions in the instant case), the Supreme Court first recognized that no public accommodations law is immune from the demands of the Constitution. In other words, as applied here, none of the school's anti-bullying, anti-harassment, control of personal devices, and code of conduct policies are superior to the Constitution and must yield to prohibitions on governmental action.

Second, the Supreme Court held that "public accommodations statutes can sweep too broadly when deployed to compel speech," and these types of statutes did "not justify such a severe intrusion on ... rights to freedom of expressive association," and therefore could not be "applied to expressive activity" to compel speech. 600 U.S. at 592. The court concluded that "what was true in those cases must hold true here. When a state public accommodations law and the Constitution collide, there can be no question which must prevail." Id. Indeed, let us hope the Constitution prevails in such a collision.

It may be objected that the public-school setting changes everything and that *Tinker* is the only controlling case. Not so. This matter has already been settled by *Barnette*. The new variable of an anti-harassment or other school policy may appear to complicate the legal analysis, but it doesn't change the legal authority of the Constitution to limit the school. The modern introduction of anti-harassment policies is simply another version of state coercion. Its application is equally coercive as the mandatory Pledge of Allegiance struck down in *Barnette,* or the mandatory prayer struck down in *Schempp*. The district's anti-harassment and pronoun policy is just another, though modern, school district contrivance to abridge free speech. It holds no greater pedagogical purpose in education than either the pledge or the prayer.

At the end of the day the Supreme Court has already held that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642.

The panel majority pretends the dispute is simply a battle between two different ideas about gender to be resolved by application of *Tinker's* substantial and material harm test. They miss the school district's omnipresent underlying use of force and coercion against religious students. They don't see that implementing the policies compels students to *recant* their opinions and *confess* the official line.[5]

While the appellants can certainly prevail applying *Tinker's* substantial and material harm test or by demonstrating the district's policies substantially interfere with student speech rights, the appellants also enjoy the protections *Barnette*, *Schempp*, and *303 Creative* provide in favor of the Constitution, indeed in favor of their Constitutional rights. *303 Creative* has already addressed the intersection of free speech and anti-harassment or anti-discrimination laws and vindicated the

[5] The school district's policies are more akin to the Edict of Worms, May 1521, which compelled Martin Luther to recant his views and confess the official "religiously correct" government approved doctrines of his day. *See* https://famous-trials.com/luther/299-edict

superiority of the Constitution. It affirmed that a state's anti-harassment objectives must yield to the Constitution's clear prohibitions.

So too here. This court *en banc* should follow suit in the context of a government-controlled school. The well-worn argument that the school board must have broad (meaning arguably unlimited) discretion in pursuing educational and pedagogical objectives falls short. Indeed, why can't the government school be satisfied with its current level of censorship and compulsion? After all, it already controls the time of day when students must be present, prescribes the curriculum to which students must be forcibly exposed, regulates and selects the teachers by whom students are forcibly lectured, and compels through truancy laws the number of days, months, and years students must be in attendance.

Leviathan should be satisfied, but it is not. Must it also now invade with legal impunity, the human "sphere of intellect and spirit" reducing students to robots who think and say exactly and only say exactly, the state's pre-determined and pre-programmed confession of secular faith, embedding it into their souls 180 days a year for twelve consecutive years by the school district's full-time, paid professional functionaries? Amicus thinks this pound of mental flesh goes too far simply because it tramples down the Constitution.

CONCLUSION

For the foregoing reasons, the district court's denial of a preliminary injunction should be reversed and the school district's policy directed to be enjoined on remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of The LONANG Institute, in Support of Plaintiff-Appellant and Reversal complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 18 pages, and 3858 words, excluding the parts of the brief exempted by Rule 32(f).

2. 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 using Microsoft Word, version 16, in 14-point New Times Roman.

/s/ *Kerry Lee Morgan*
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Counsel for *Amicus*

Dated: December 18, 2024

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of LONANG Institute, in Support of Plaintiff-Appellant and Reversal, was made, this 18th day of December, 2024, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/Kerry Lee Morgan
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