

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 U.S. District Court for the Southern District of Ohio,
No. 2:23-cv-01595 (Hon. Algenon Marbley)

**BRIEF OF *AMICI CURIAE* JEWISH COALITION FOR RELIGIOUS
LIBERTY, AMERICAN HINDU COALITION, AND ISLAM AND
RELIGIOUS FREEDOM ACTION TEAM IN SUPPORT OF APPELLANTS
AND URGING REVERSAL**

Sue Ghosh Stricklett
American Hindu Coalition
42618 Trade West Drive
Sterling, VA 20166
(301) 785-1041
sueghosh@stricklettgroup.com
Counsel for American Hindu Coalition

Jeffrey C. Mateer
David J. Hacker
Keisha T. Russell
First Liberty Institute
2001 W. Plano Parkway, Ste 1600
Plano, TX 75075
jmateer@firstliberty.org
dhacker@firstliberty.org
krussell@firstliberty.org

Kayla A. Toney
Counsel of Record
First Liberty Institute
1331 Pennsylvania Ave. NW, Ste 1410
Washington, DC 20004
(202) 918-1554
ktoney@firstliberty.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), and 6th Cir. R. 26.1, there is no parent corporation or publicly held corporation that owns 10% or more of stock of any *amici curiae* described herein.

/s/ Kayla A. Toney

Kayla A. Toney
Counsel of Record
First Liberty Institute
1331 Pennsylvania Ave. NW, Ste 1410
Washington, DC 20004
ktoney@firstliberty.org

December 12, 2024

Counsel for Amicus Curiae

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INTERESTS OF *AMICI CURIAE*¹

The Jewish Coalition for Religious Liberty (JCRL) is a cross-denominational organization of Jewish rabbis, lawyers, and professionals committed to defending religious liberty. Representing a minority faith that adheres to practices that many may not know or understand, JCRL has an interest in ensuring that government actors cannot evaluate the validity of religious objectors' sincerely held beliefs, and that parents' and students' First Amendment free exercise rights are protected.

The American Hindu Coalition (AHC) is an apolitical national advocacy organization representing Hindus, Buddhists, Jains, Sikhs, and related members of minority religions that frequently face discrimination in public schools, as their religious beliefs are unfamiliar to many. For Hindus, pursuing high-quality education is a core religious practice toward enlightenment. AHC seeks to defend religious parents and children against discriminatory practices in public schools, and to protect students' and parents' First Amendment rights to freely exercise their religion and not be compelled to act against their beliefs.

The Islam and Religious Freedom Action Team (IRF) of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks deeper

¹ No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief.

understanding of Islamic teachings, and protects Muslims’ religious freedom. The IRF supports religious freedom by translating resources by Muslims, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and a minority, and partnering with the Institute’s other teams. The IRF seeks to protect parents’ ability to raise their children according to their sincere religious beliefs.

INTRODUCTION

Suppressing religious expression in public schools “would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been ‘part of learning how to live in a pluralistic society.’” *Kennedy v. Bremerton School District*, 597 U.S. 507, 541 (2022). Yet under the panel opinion, a Muslim student will be disciplined if she objects to sharing a restroom with a biological male. Jewish students learning Torah commandments at home will be compelled to use classmates’ preferred pronouns against their faith, or face discipline for “harassment.” And Hindu children with no choice but public school will face pressure to affirm concepts about gender conflicting with their beliefs. The First Amendment robustly protects religious exercise, including students’ ability to speak or remain silent according to their faith. *Amici* urge this Court to reverse the panel decision so that Olentangy’s speech code does not harm religious families.

ARGUMENT

I. The District’s speech code violates the First Amendment by compelling students to use pronouns that conflict with their beliefs.

The Supreme Court has long rejected the “‘modified heckler’s veto, in which . . . religious activity can be proscribed’ based on ‘perceptions’ or ‘discomfort.’” *Kennedy*, 597 U.S. at 534, 514 (citation omitted). Drawing on *West Virginia v. Barnette*, 319 U.S. 624 (1943), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held in *303 Creative v. Elenis* that “the First Amendment protects an individual’s right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply ‘misguided,’ and likely to cause ‘anguish’ or ‘incalculable grief.’” 600 U.S. 570, 586 (2023) (citations omitted). And “the government may not compel a person to speak its own preferred messages.” *Id.* (citing *Tinker v. Des Moines*, 393 U.S. 503, 505–06 (1969)).

These bedrock speech protections extend to students in myriad contexts. In *Tinker*, which the panel applied incorrectly to limit students’ speech rights, the Supreme Court held: “in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression . . . our Constitution says we must take this risk.” 393 U.S. at 508; *see also Healy v. James*, 408 U.S. 169, 189–90 (1972) (unsubstantiated fear of “disruption” was not valid reason for denying recognition to student club). This Court upheld similar principles

in *Ward v. Polite*, finding “the most aggressive form of viewpoint discrimination” is “compelling an individual ‘to utter what is not in [her] mind’ and indeed what she might find deeply offensive—and the Court has enforced that prohibition, too, in the public school setting.” 667 F.3d 727, 733 (6th Cir. 2012) (quoting *Barnette*, 319 U.S. at 634).

The panel opinion flouted these constitutional principles, permitting the District to discipline students based on content and viewpoint of their speech. While acknowledging that religious students have “‘deeply held beliefs’ about the immutability of sex,” Maj.Op.13, the court disrespected those beliefs by forcing students into a Hobson’s choice: either don’t refer to classmates at all, or use classmates’ first names – *even if conflicting with biological sex*. Maj.Op.14. If biologically female Jenny identifies as male Tom, a Muslim student will have the same conscientious objection to referring to this classmate either as “Tom” or “he.” Both words communicate that biological sex can change, and both force the Muslim student to contradict his beliefs. First names carry gender-specific connotations, so this “compromise” is still coercive and does not “respect[] both sides’ deeply held beliefs.” Maj.Op.14. Since compelling an adult to speak messages that violate her faith violates the Free Speech Clause (*303 Creative*), how much more when minors face the coercive atmosphere of school administrators controlling their grades, records, and college admissions. This Court should ensure that students do not “shed

their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506.

II. The District’s Policy substantially burdens the religious exercise of many different faith groups.

Dozens of world religions have asserted for millennia that sex is an objective, binary category that cannot be changed by self-perception or medical intervention. The Catholic Church, the Orthodox Church, and most Protestant denominations (including but not limited to the Anglican Church, Assemblies of God, the Church of God in Christ, the Lutheran Church, the Presbyterian Church in America, and Southern Baptists) believe the Bible’s teaching that God created humans male and female in His image, and that this cannot be changed based on perceived gender identity.²

Sacred texts that define beliefs on marriage, sexuality, chastity, and sex as binary include not only the Catholic Catechism³ and the Bible, but also the Quran,⁴

² For a complete list of sources, see First Liberty Institute, *Public Comment on Section 1557 NPRM* (Oct. 3, 2022), at 4-9, <https://perma.cc/97NU-VCMZ> (detailing religious beliefs of 20 faith groups on sex and gender).

³ Catholic Catechism, No. 2361, <https://www.usccb.org/sites/default/files/flipbooks/catechism/569/#zoom=z>.

⁴ *Marriage in Islam*, Why Islam? Facts About Islam (March 5, 2015), <https://www.whyislam.org/social-issues/marriage-in-islam/>; *Women are the Twin Halves of Men*, Observer News Service, (March 9, 2017), <https://kashmirobsrver.net/2017/03/09/women-are-the-twin-halves-of-men/>.

Hadith,⁵ the Torah,⁶ and the Book of Mormon.⁷ The First Amendment also protects individuals outside a specific religious tradition who hold sincere religious beliefs about sexuality, marriage, and gender. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

A. Traditional Jewish Beliefs about Sex and Gender

For millions of Jewish Americans who follow traditional *halachic* teaching dating back three millennia, the Torah is clear that humans were divinely created as distinctly male and female.⁸ Observant Jews are careful to follow the specific commands of the Torah and Talmud regarding sexual purity and holiness. Differences between the biological sexes are fundamental to Jewish religious worship. For example, traditional Jewish synagogues separate men and women during prayers, and affectionately touching a nonrelative member of the opposite sex

⁵ Dr. Sikiru Gbena Eniola, *An Islamic Perspective of Sex and Sexuality: A Lesson for Contemporary Muslims*, 12 IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 2 (May-Jun. 2013), at 2028, <https://www.iosrjournals.org/iosr-jhss/papers/Vol12-issue2/C01222028.pdf>

⁶ *Issues in Jewish Ethics: Homosexuality*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/homosexuality-in-judaism>.

⁷ The Church of Jesus Christ of Latter-Day Saints, *Chastity, Chaste*, <https://www.churchofjesuschrist.org/study/scriptures/tg/chastity?lang=eng>.

⁸ *Genesis* 1:27; Chaim Rapoport, *Judaism and Homosexuality: An Alternate Rabbinic View*, 13 HAKIRAH, THE FLATBUSH JOURNAL OF JEWISH LAW AND THOUGHT 29, 30 (citing Sanhedrin 58a (expounding on *Genesis* 2:24) and Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 9:5), <https://hakirah.org/Vol13Rapoport.pdf>, at 32.

is prohibited.⁹ While men and women are equally obligated to obey the negative commandments (such as do not steal), women are exempt from many positive time-bound commandments.¹⁰ This is because God created men and women with different biological roles and abilities, and that “[a]s the primary creators and nurturers of human life, women more closely resemble God than men do.”¹¹ Distinctions between the sexes also factor into eligibility to perform communal roles such as counting for a quorum or leading prayers. The Torah does not recognize the possibility of changing a person’s God-given sex or gender. If Jewish community members could change their sex or gender, this would not only disrupt their own religious practice but also the community’s religious life.

B. Hindu Beliefs about Sex and Gender

Hindu scripture, culture, and values emphasize marriage and child-rearing as essential to *Dharma* (religious or moral duties). Both the vow and institution of marriage, which is heterosexual only, are defined and sanctioned by divine

⁹ Jordana Birnbaum, *Shomer Negiah, the Prohibition on Touching*, My Jewish Learning, <https://rb.gy/0tlj3>.

¹⁰ *Women and Mitzvot*, AISH (May 23, 2013), <https://aish.com/women-mitzvot/>.

¹¹ *Id.*; Yehuda Shurpin, *Why Are Women Exempt From Certain Mitzvahs?*, Chabad.org, https://www.chabad.org/library/article_cdo/aid/4407982/jewish/Why-Are-Women-Exempt-From-Certain-Mitzvahs.htm.

authority.¹² Hindu teaching makes clear that men and women have distinct identities and roles, and that that sexual behavior can only align with *dharma* or righteous living within heterosexual marriage.¹³ For Hindus, child-rearing is a parent’s highest righteous (*Dharmic*) duty, with distinct roles for mother and father. “Parents are indeed the first guru . . . [t]he child’s deepest impressions come from what the parents do and say.”¹⁴ Hindu legal texts (*Dharmaśāstras*) dating back two millennia provide detailed instructions regarding the rights and responsibilities of both parents in child-rearing. Hindus believe that a parent’s sacred rights and responsibilities in child-rearing must be protected against government infringement.

C. Muslim Beliefs about Sex and Gender

Islamic sacred teaching makes clear that men and women are two distinct biological sexes with important differences. Both Shi’ah and Sunni Muslims hold to

¹² See, e.g., *Dharma Sastra*, Vol. 6 Manu Sanskrit, Chapter III, pp. 80-93, <https://archive.org/details/dharmasastra-with-english-translation-mn-dutt-6-vols-20-smritis/Dharma%20Sastra%20Vol%206%20Manu%20Sanskrit/page/80/mode/2up>.

¹³ “Gender and Sexuality,” *Religion Library: Hinduism*, PATHEOS, <https://www.patheos.com/library/hinduism/ethics-morality-community/gender-and-sexuality>.

¹⁴ *Raising Children as Good Hindus*, HINDUISM TODAY (Apr. 1, 2021), <https://www.hinduismtoday.com/magazine/apr-may-jun-2021/raising-children-as-good-hindus/>; see also *Āyurveda* (Hindu medical text describing mother’s vital role in her child’s physical and psychological development).

the Quran’s teaching: “O Mankind! We created you all from a male and a female,”¹⁵ and “all human beings, whether male or female, are descended from Adam and Eve.”¹⁶ Muslims’ belief that sex is binary, fixed, and immutable is closely linked to the creation narrative and has important implications for worship. “Men and women in Islam have different roles, responsibilities, and accountabilities, as they differ in anatomy, physiology, and psychology.”¹⁷ Muslims must observe decency (*ih̄tisham*), which prevents Muslim females from sharing restrooms with biological males, modesty (*hijab*), which includes dress and behavior, and seclusion (*khalwa*), which means an unrelated, unmarried man and woman cannot be alone together.¹⁸ In worship, men and women sit separately to reduce distractions and protect modesty. The obligation to attend Friday prayers applies to men but not women;

¹⁵ *Surah Al-Hujurat* 49:13.

¹⁶ *Surah An-Nisa* 4:1; see also Ani Amelia Zainuddin, et al, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, NATIONAL LIBRARY OF MEDICINE (April 21, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5272885/>; *Marriage in Islam*, *supra* note 4.

¹⁷ Zainuddin, *supra* note 16.

¹⁸ See, e.g., *Surah Nur* 24:31 (describing concept of *hijab*); MARWAN IBRAHIM AL-KAYSI, MORALS AND MANNERS IN ISLAM: A GUIDE TO ISLAMIC ADAB 60-61 (1986) (describing restroom obligations); Fatwa No. 88708, “Sisters object to barrier between them and men in the mosque,” *Islamweb.net* (Sept. 29, 2004), <https://www.islamweb.net/en/fatwa/88708/sisters-object-to-barrier-between-them-and-men-in-the-mosque>.

16traditionally a woman's prayer is more rewarded at home.¹⁹ Islamic teaching does not recognize alternate gender identities, because even when someone changes appearance via hormones or surgery, there is no biological change at the cellular level so "the rulings of that [biological] sex continue to apply."²⁰ Islamic teaching also forbids imitation of the opposite sex.²¹ The District's rule requiring students, through pronouns, to describe males as females or females as males, forces the Muslim student to choose between obedience to God and obedience to the state.

III. The panel opinion disproportionately impacts families from minority faith backgrounds.

Children in minority religious traditions face great pressure to conform to school administrators' orthodoxy. A Muslim student wearing a hijab or a Jewish student wearing a yarmulke will experience additional pressure because their appearance demonstrates religious beliefs that will attract the ire of administrators.

For the most part, America has been a welcoming home allowing Jewish people to flourish. Unfortunately, anti-Semitism has recently spread, especially toward Orthodox Jews adhering to traditional Torah values. *See, e.g., Frankel v.*

¹⁹ Zainuddin, *supra* note 16.

²⁰ *Male, Female, or Other: Ruling of a Transgender Post Sex Change Procedures*, AMERICAN FIQH ACADEMY (May 2, 2017), <http://fiqhacademy.com/res03/>.

²¹ Ahmad Ibn Hajar al-Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari*, Beirut: Dar al-Ma`rifah (1980). Vol. 9, p. 336, <https://shamela.ws/book/1673/5425>.

Regents of Univ. of California, No. 2:24-CV-04702-MCS-PD, 2024 WL 3811250, at *3 (C.D. Cal. Aug. 13, 2024) (ordering UCLA to stop allowing and assisting antisemitic agitators to ban Jewish students from portions of campus); *Hertzel v. Logger's Run*, No. 9:24-cv-80640 (S.D. Fla. filed May 17, 2024) (rabbi faced vandalism and violent threats for hosting in-home religious gatherings).

As an unwelcome minority in many communities, Muslims frequently face hostility from government officials who do not afford them the same presumption of good faith that other religious groups may enjoy. *See, e.g.*, ASMA UDDIN, WHEN ISLAM IS NOT A RELIGION: INSIDE AMERICA'S FIGHT FOR RELIGIOUS FREEDOM 116–117 (2019); *see also Islamic Soc'y of Basking Ridge v. Twp. of Bernards*, 226 F. Supp. 3d 320, 327–28 (D.N.J. 2016) (documenting property destruction and hostility following proposal to build local Mosque).

Further, parental rights do not evaporate when parents send their children to public school. *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J., concurring). “Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school.” *Morse*, 551 U.S. at 424; *see also Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1222 (S.D. Cal. 2023) (“[f]amilies in middle or lower socio-economic circumstances have no such options” of private or homeschooling). Minority faith adherents have even fewer options. A Muslim family may choose Catholic school in order to avoid speech codes like the

District's, but that would cause another conflict as the student would learn a different faith at school. Some Jewish parents send their children to religious schools, but large geographical areas lack Jewish day schools altogether. The Hindu-American community lacks educational alternatives and also faces racial and religious discrimination limiting school choice. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 218 L.Ed.2d 71 (Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari) (recognizing overt discrimination against Asian-American students applying to magnet school, 75% of whom were Hindu-American).

“America’s public schools are the nurseries of democracy,” which “only works if we protect the ‘marketplace of ideas.’” *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 190 (2021). Here, families from diverse religious backgrounds are uniting to express opposition to the District’s speech code. The Court should heed their concerns and protect constitutional rights.

CONCLUSION

The Court should reverse the panel decision.

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Respectfully submitted,

Sue Ghosh Stricklett
American Hindu Coalition
42618 Trade West Drive
Sterling, VA 20166
(301) 785-1041
sueghosh@stricklettgroup.com

Counsel for American Hindu Coalition

/s/ Kayla A. Toney

Kayla A. Toney
Counsel of Record
First Liberty Institute
1331 Pennsylvania Ave. NW, Ste 1410
Washington, DC 20004
(202) 918-1554
ktoney@firstliberty.org

Jeffrey C. Mateer
David J. Hacker
Keisha T. Russell
First Liberty Institute
2001 West Plano Parkway, Ste 1600
Plano, TX 75075
(972) 941-4444

Counsel for Amici Curiae

CERTIFICATES OF COMPLIANCE

I, Kayla A. Toney, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2582 words, excluding the parts of the brief exempted by Fed. R. App. P. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14.

December 12, 2024

/s/ Kayla A. Toney

Kayla A. Toney

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties.

December 12, 2024

/s/ Kayla A. Toney

Kayla A. Toney