No. 20-3289

United States Court of Appeals for the Sixth Circuit

Nicholas K. Meriwether,

Plaintiff-Appellant,

v.

The Trustees of Shawnee State University—FRANCESCA HARTOP, JOSEPH WATSON, SCOTT WILLIAMS, DAVID FURBEE, SONDRA HASH, ROBERT HOWARTH, GEORGE WHITE, AND WALLACE EDWARDS—in their official capacities; JEFFREY A. BAUER, in his official capacity; ROBERTA MILLIKEN, in her official capacity; JENNIFER PAULEY, in her official capacity; TENA PIERCE, in her official capacity; DOUGLAS SHOEMAKER, in his official capacity; and MALONDA JOHNSON, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio
Case No. 1:18-cv-00753-SJD
The Honorable Susan J. Dlott

Dr. Nicholas K. Meriwether's Answer in Opposition to Petition for Rehearing En Banc

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FRAP 35(B) COUNTER-STATEMENT

The panel held that Shawnee State University violated Dr. Meriwether's Free Speech and Free Exercise rights when it compelled him to use pronouns and titles consistent with gender identity rather than biological sex—or use no pronouns or titles at all—and by refusing to allow Dr. Meriwether to explain his views in his syllabus. 3/26/21 SlipOp.10–30. The panel applied well-settled law, creating no conflicts:

- *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006), reserved whether its official-duties test affected "speech related to scholarship or teaching." So, the panel applied this Circuit's precedent, which rejects as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." SlipOp.13 (quoting *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001)).

- This Court in *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010), held that the First Amendment did not extend to in-class speech of schoolteachers but specifically distinguished college and university professors like Dr. Meriwether. *Id.* at 343–44.

- *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005), involved a supervisor who merely asked a lecturer to communicate more clearly her class requirements; the defendant prevailed because the lecturer was *not* "required to communicate the ideas . . . of others as if they were her own." *Id.* at 595.

- *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012), was a dispute involving a university librarian whose speech "was not related to classroom instruction." *Id.* at 739. And

- *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989), *agreed* that officials cannot compel faculty "to conform to a belief and a communication to which [they do] not subscribe." *Id.* at 830.

Petitioners' additional arguments conflict with decisions of this Court and the Supreme Court. Their Petition should be denied.

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Petitioners' Statement describes a case very different than the one the panel decided. Dr. Meriwether teaches his philosophy courses at Shawnee State University Socratically, referring to students by their last names and a title (*e.g.*, "Mr." or "Ms.") or as "sir" or "ma'am." Naturally, he frequently uses pronouns. He treats all students equally by referring to them based on their biological sex.

In January 2018, Dr. Meriwether responded to a question from a male student—named "Doe" here—by saying, "Yes sir." After class, Doe told Dr. Meriwether that Doe identifies as female, demanding to be addressed with feminine pronouns and titles. When Dr. Meriwether paused to think about this, Doe became belligerent, berating Dr. Meriwether and announcing, "Then I guess this means I can call you a cunt." Promising to get Dr. Meriwether fired, Doe filed a complaint.

After thinking it over, Dr. Meriwether sought to accommodate Doe by simply using Doe's desired first or last name. University officials approved, but Doe did not. So, the officials recanted and insisted that Dr. Meriwether use preferred pronouns and titles for *every* student—or purge sexed titles and pronouns from his vocabulary entirely. Both options violate Dr. Meriwether's beliefs about human sexuality, and the latter subjects Dr. Meriwether to punishment for missteps. Dr. Meriwether respectfully declined.

Officials then issued a formal censure letter for Dr. Meriwether's employment file, finding that by using standard English pronouns, he discriminated. Officials compared Dr. Meriwether's convictions to racism, warned that future such speech on his part would prompt more punishment, and denied his grievance. To vindicate his First Amendment rights, Dr. Meriweather brought this lawsuit, but the district court dismissed all his claims. The panel reversed 3–0, holding that the University's policies were alarmingly intolerant and unconstitutional.

The panel rightly held that university professors have free-speech rights in the classroom. The panel noted the Supreme Court's express reservation of the question whether the official-duties test for public employee speech applies to "speech related to scholarship or teaching." SlipOp.11 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)). And consistent with that Court's caselaw, the panel followed this Circuit's pre-*Garcetti* precedent, which rejected as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Id.* at 13 (quoting *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001)).

The panel also rejected the University's argument that sexed pronouns and titles were not a matter of public concern. "Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously. That is especially so here because

Meriwether's choices touch on gender identity—a hotly contested matter of public concern that 'often' comes up during class discussion in Meriwether's political philosophy courses." SlipOp.15 (quoting R.34, PgID1492, citing *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018)).

And, following this Court's decision in *Hardy*, the panel concluded that Dr. Meriwether's "powerful" free-speech interests outweighed the University's "weak" interest in "punishing Meriwether's speech." *Id.* at 19, 21 (applying balancing test from *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968)). In so holding, it rejected the University's reliance on Title IX, explaining that officials *admitted* that Dr. Meriwether's conduct had not created the "hostile education environment" Title IX claims require. *Id.* at 22.

On Dr. Meriwether's free-exercise claim, the panel saw ample evidence that the University was not neutral toward religion. One official said Christians like Dr. Meriwether were "motivated" by "fear" and "should be banned" from teaching courses on Christianity, SlipOp.24; another "laugh[ed]" when a union representative tried to explain Dr. Meriwether's religious beliefs, *id.* at 24; and compared those beliefs to racism, *id.* at 25. The panel comprehensively rejected all the officials' excuses for this animus. *Id.* at 28–30.

ARGUMENT

I. The panel decision does not conflict with *Garcetti*, *Evans-Marshall*, or *Johnson-Kurek*.

Petitioners say "*Garcetti* controls" and the panel erred by holding "that *Garcetti* has an academic-freedom exception that applies to universities' regulation of professors' in-class speech." Pet.3. Not so. The *Garcetti* Court "expressly declined to address whether its analysis would apply 'to a case involving speech related to scholarship or teaching.'" SlipOp.11 (quoting *Garcetti*, 547 U.S. at 425). So the panel followed this Circuit's precedent—"a teacher's in-class speech deserves constitutional protection," *Hardy*, 260 F.3d at 680—consistent with decisions of the Fourth, Fifth, and Ninth Circuits, SlipOp.13–14.

Petitioners say that the panel's decision conflicts with *Evans-Marshall v. Board of Education of Tipp City Exempted Village School District*, 624 F.3d 332 (6th Cir. 2010), which, according to Petitioners, "held that Supreme Court precedent did *not* dictate an academic-freedom exception to *Garcetti*" and denied that teachers have any right to "academic freedom." Pet.4–6. But *Evans-Marshall* addressed the free speech rights "of teachers in primary and secondary schools." 624 F.3d at 334. The Court specifically "distinguished college and university professors and made clear that [its] holding was limited to schoolteachers," SlipOp.13 n.1 (citing 624 F.3d at 343–44), and emphasized that "academic freedom" is for "university" "teachers who are also researchers or scholars," 624 F.3d at 344.

Petitioners make a similarly mistaken argument about *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590 (6th Cir. 2005), which involved a lecturer who claimed she was unconstitutionally denied a class to teach. Pet.5. This Court held merely that the lecturer's First Amendment rights to free speech and academic freedom were not implicated when a supervisor required the lecturer to communicate more clearly to her students her class requirements. 423 F.3d at 593–95. The university prevailed because, unlike here, the lecturer was *not* "required to communicate the ideas or evaluations of others as if they were her own." *Id.* at 595. "She was not even told . . . what the requirements for completing the class should be." *Id.*

After mistaking *Garcetti*'s scope and this Circuit's precedents, Petitioners conclude that if "a professor can challenge a university's content-based restrictions on in-class education, then the university's academic freedom is dead." Pet.6. But Petitioners have it backward. As the panel correctly explained, if "professors lack[ ] free-speech protections when teaching," then a "university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.'" SlipOp.14. Public-university professors must have free-speech protection for higher education to survive and thrive.

II. The panel decision does not conflict with *Savage* or *Parate*.

Petitioners next claim that the "panel's expansive understanding of academic freedom is irreconcilable with *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012)," and *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). Pet.7–10. This, too, is mistaken.

In *Savage*, this Court emphasized that a university *librarian* could not invoke the *Garcetti* exclusion because making a book recommendation for a committee formed to choose a book to be assigned to all incoming freshmen "was not related to classroom instruction and was only loosely, if at all, related to academic scholarship," the carveout the Supreme Court identified in *Garcetti*. 665 F.3d at 739. That's a far different factual setting than in-class teaching, and there is nothing "irreconcilable" between *Savage* and the decision here.

Parate, which Petitioners did not reference anywhere in their merits briefing, supports Dr. Meriwether. *Parate* involved a professor's claim that he was unconstitutionally forced to change a student's grade. And this Court concluded that by forcing the professor to do so, the defendant officials "unconstitutionally compelled Parate's speech." 868 F.2d at 830. So, the Court reversed and remanded a dismissal order, directing the district court to "determine damages and whether Parate was discharged due to the exercise of his First Amendment right to academic freedom." *Id.* at 833.

Failing to identify any true conflict with *Savage* or *Parate*, Petitioners pivot and castigate the panel for "insist[ing] that the Fourth, Fifth, and Ninth Circuits have recognized 'academic freedom' claims." Pet.9 (citing SlipOp.13). But the panel correctly joined these Circuits in holding that *Garcetti* left open the question whether public-university professors have free-speech rights in teaching and scholarship. SlipOp.13–14; *accord Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) ("The plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play."); *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007) (*Garcetti* "explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching"); *Buchanan v. Alexander*, 919 F.3d 847, 852 (5th Cir. 2019) ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. Accordingly, classroom discussion is protected activity.") (cleaned up); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) ("if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court").

In sum, the panel created no circuit conflict. It is Petitioners who urge the *en banc* Court to do so.

III. The panel's "public concern" holding is consistent with *Janus*.

Petitioners attack the panel for holding that the subject of gender identity is a matter of public concern, Pet.10–13, even while Petitioners' *amici* say it is undeniably so. In so doing, Petitioners forget that the Supreme Court has already held that gender identity is a "sensitive" topic but "undoubtedly" a "matter[ ] of profound value and concern to the public." *Janus*, 138 S. Ct. at 2476 (cleaned up).

Petitioners try to minimize the public import of sexed titles and pronouns in the classroom by claiming that their purpose "is merely to alert a private citizen that she was being called upon to answer a question." Pet.10. But that's not so. As Dr. Meriwether alleged—and that must be assumed true at this stage—gender identity "'often' comes up during class discussion in Meriwether's political philosophy course." SlipOp.15 (quoting R.34, PgID.1492). And the University did far more than simply prohibit Dr. Meriwether's use of sexed-based pronouns and titles. "By forbidding Meriwether from describing his views on gender identity even in his syllabus, [it] silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion." *Id.*

Of course, gender identity's profound public importance stretches far beyond a philosophy class. As Dr. Meriwether's *amici* explained, sex- versus identity-based titles and pronouns "concern[ ] a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." Profs.Br.1. Science and medicine depend on a rigorous recognition of sex as binary, innate,

and immutable. Dr. Paul R. McHugh, M.D., *et al.* Br.7–15. Deliberately obfuscating or outright hiding that reality causes harm. *Id.* at 19–20; *accord* Women's Liberation Front Br.11–26. Accordingly, it matters a great deal whether we identify each other with reference to biological fact or subjective profession.

Petitioners accuse Dr. Meriwether of intending "not to convey any social opinions, but [only] to disclose that Doe is a transgender woman to other students." Pet.11. But as their very first classroom interaction makes clear, Dr. Meriwether never intended to or did disclose anything about Doe. Doe was the *only* one demanding public disclosure—by commanding the University to compel Dr. Meriwether to use pronouns and titles that would make obvious Doe's transgender status.

Petitioners suggest that the panel's rule would allow "a professor who believes that women should not pursue higher education or certain careers could call men by their surnames and refer to all women by their first names." Pet.13. But there is no evidence that any such professor exists, and if one did, the *Pickering* balancing test would look very different (*see* Part IV, below). And if Petitioners are correct in their legal analysis, then the University could, if it chose, *compel* a professor to discriminate between men and women. The panel correctly rejected such a result.

IV. The panel's *Pickering* analysis was correct.

Petitioners criticize the panel's balancing of interests under *Pickering*, 391 U.S. 563. Pet.13–16. In so doing, they ignore the panel's reliance on this Court's controlling decision in *Hardy*, which held that the First Amendment interest in a professor's use of offensive sex- and race-related terms outweighed any public-university interest in enforcing non-discrimination polices. 260 F.3d at 681–82; SlipOp.16–22. Again, it is Petitioners who urge the Court to create a conflict with precedent.

Petitioners say that Title IX *requires* public universities to ignore sex-based differences in education based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). That's incorrect. *Bostock* distinguished situations where First Amendment rights are at stake—such as Dr. Meriwether's "free exercise" rights. *Id.* at 1753–54. And *Bostock* rejected the claim that it would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 1753.[1]

Moreover, *Bostock* is inapplicable because Dr. Meriwether did not "discriminat[e]" against Doe. 20 U.S.C. § 1681(a). The "normal definition of discrimination is differential treatment," specifically "less favorable treatment." *Jackson*, 544 U.S. at 174 (cleaned up). Acknowledging differences among the sexes is not less favorable treatment. *E.g.*, *United*

[1] *Bostock*'s caution was warranted, because Title VII and Title IX are "vastly different statute[s]." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Among many other things, unlike Title VII, Title IX gives numerous examples of permissible classifications based solely on binary sex. *E.g.*, 20 U.S.C. § 1681(a)(8) (emphasizing the binary nature of sex); *id.* § 1681(a)(2) (same); SlipOp.20 n.4 (citing 20 U.S.C. § 1686 and 34 C.F.R. § 106.37(c)).

States v. Virginia, 518 U.S. 515, 550 n.19 (1996) (public college's admission of women would "undoubtedly require alterations" in accommodations to account for sex). Consider a public university that prohibits a female swimmer from competing on the school swim team because she refuses to cover her top. Under Petitioners' view, this would surely be a Title IX violation. But Title IX *allows* recognition of sex-based differences. *E.g.*, 34 C.F.R. § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*.") (emphasis added). The panel rightly concluded that the University's Title IX interest "is not implicated." SlipOp.22.

V. The panel's Free Exercise holding is consistent with *Masterpiece Cakeshop*.

Lastly, Petitioners accuse the panel of holding "that a university's adherence to principles of religious neutrality created an inference of religious hostility." Pet.16. But that's not what the panel said.

The panel noted that Dr. Meriwether's Department Chair—whom the Complaint alleges participated in the investigation and discipline—opined that "religion 'oppresses students' and said that even its 'presence' at universities is 'counterproductive.'" SlipOp.23–24 (quoting R.34, PgID.1473). "In her view, 'Christian doctrines . . . should not be taught'" and "Christian professors 'should be banned' from teaching courses on Christianity—knowing that Meriwether had done so for decades." *Id.* (quoting same). "Neutral and non-hostile? As alleged, no." *Id.*

After the University disciplined Dr. Meriwether, a union representative tried to present Dr. Meriwether's grievance to the Provost. The Provost "repeatedly interrupted the union representative and made clear that he would not discuss the 'academic freedom and religious discrimination' aspects of the case." SlipOp.24 (quoting R.34-24, PgID.1780). When the representative "tried to explain Meriwether's religious beliefs and the teachings of his church," the Provost "responded with open laughter" and became "'so uncooperative' that the union representative 'was not able to present the grievance' at all." *Id.* (quoting R.34, PgID.1489). When reviewing the grievance, the University's Director of Labor Relations "piled on," comparing Dr. Meriwether's convictions disfavorably with "religiously motivated racism or sexism." SlipOp.25.

As for the University's alleged disciplinary basis, it "was a moving target." SlipOp.26. Officials initially claimed that Dr. Meriwether created a hostile educational environment. *Id.* Later, they "conceded that Meriwether had never created a hostile environment" and claimed the case was about disparate treatment. *Id.* But at oral argument, the University changed position again. *Id.*

The University's policy was also a "moving target." SlipOp.27. The University initially agreed to accept Dr. Meriwether's compromise to "address Doe using Doe's last name and refrain from using pronouns to address Doe." *Id.* Then, the University recanted and "demanded that

Meriwether use Doe's preferred pronouns." *Id.* "Now the university claims that its policy does not permit *any* religious accommodations." *Id.* And its Title IX investigation raised "several red flags" too. *Id.*

In sum, the University's policy, process, and behaviors were anything but neutral and generally applicable. Dr. Meriwether adequately alleged that it subtly departed from neutrality on matters of religion. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

VI. No one questions the distress transgender youth experience, but doctors and scientists hotly debate its causes and treatments.

While many transgender youth experience distress, its causes and cures are vigorously debated. Petitioners' *amici* tell only one side of the story and cannot change the well-settled law the panel applied.

Amici begin with harassment statistics. *E.g.*, Nat'l Med. & Mental Health Orgs. Br. ("Med.Br.") 3, 7–8; Trevor Proj., *et al.* Br.6–7. But their sources admit these come from surveys that did not use a representative sample and thus are unreliable.[2] Nor did the surveys define "harassment," leaving respondents to supply their own subjective definitions, not the legal one. Other sources use small samples (*e.g.*, five students). Med.Br.7 n.18. Many statistics lack a frame of reference. For

[2] *E.g.*, Jamie M. Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 13–14 (2011) ("not appropriate to generalize the[se] findings . . . because it [is] not a random sample"); Sandy E. James, *et al.*, *The Report of the 2015 U.S. Transgender Survey* 26 (2016) (same).

example, some say 39% of people have experienced sexual harassment.[3] Without minimizing any mistreatment, this suggests transgender students are not as targeted as *amici* imply.

Regardless, universities already protect against real harassment, as opposed to mere exposure to divergent opinions. As *amici's* sources show, transgender students engage in activism and campus protests more than twice as often as their peers;[4] they can and do invoke these protections. Yet after months of investigating, the University found no evidence Dr. Meriwether mistreated Doe (aside from this speech dispute). So these statistics do not undermine the panel's opinion.

Next, *amici* baselessly and outrageously assert that Dr. Meriwether's speech causes suicides. Med.Br.4, 8–11, Trevor Proj. Br.3–6. Their "evidence" is rhetoric, not science. First, they exaggerate their support. Their "multiple studies," Med.Br.4, 8–9, amount to one article that analyzes the other's data.[5] They highlight a survey of freshman that the article cited in the prior sentence also analyzed.[6] Trevor Proj. Br.6n.9–10. Another source is an editorial. Med.Br.10n.28. Another addresses only preferred names, which Dr. Meriwether offered to use.

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[3] Jonathan Shaw, *Campus Survey: Sexual Assault, Harassment Remain Serious Problems*, HARV. MAG. (Oct. 15, 2019), https://bit.ly/3x8IcXj.

[4] Ellen Bara Stolzenberg & Bryce Hughes, *The Experiences of Incoming Transgender College Students: New Data on Gender Identity*, LIBERAL EDUC. 41 (Spring 2017).

[5] Jody Herman, *et al.*, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults* 2 (2014) (analyzing *Injustice at Every Turn* data).

[6] Maren Greathouse, *et al.*, *Queer-Spectrum and Trans-Spectrum Student Experiences in American Higher Education*, 20–21 (2018).

Med.Br.4n.6; Trevor Proj. Br.5 n.5 Second, *amici* again rely on sources that use convenience samples, often small ones.[7] Med.Br.6–7n.14–15, 18; Med.Br.10–11n.31. Third, *amici* ignore the psychiatric issues that afflict transgender youth,[8] and never provide comparable statistics from those with similar challenges.[9]

Any link between pronouns and suicides (or attempts) is rank speculation. According to *amici's* own sources, suicide attempts are *higher* (1) among those who advertise their transgender status rather than hide it, and (2) among those who "received transition-related health care" versus those who "did not want it."[10] According to Swedish researchers, ten years after surgery, transgender individuals were over five times more likely to attempt suicide and nineteen times more likely to commit it than the population, *rates that are higher than for those who don't have surgery*.[11] Just as there is no reliable evidence that

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[7] *E.g.*, Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 846 (2015) ("the sample sizes are frequently small"); Amaya Perez-Brumer, *Individual-and Structural-Level Risk Factors for Suicide Attempts among Transgender Adults*, 41(3) BEHAV. MED. 164, at 2 (2015) (questioning 41% suicide attempt statistic as "estimates based on . . . convenience samples").

[8] L. Edwards-Leeper, *et al.*, *Psychological Profile of the First Sample of Transgender Youth Presenting for Medical Intervention in a U.S. Pediatric Gender Clinic*, 4(3) PSYCHOL. OF SEX. ORIENTATION & GENDER DIVERSITY 374, 375 (2017); Am. Psychol. Ass'n, *supra* note 7, at 842.

[9] Michael Biggs, *Suicide by Trans-Identified Children in England and Wales*, TRANSGENDER TREND (Oct. 9, 2018), https://bit.ly/35uavnh (transgenderism elevates suicide risks by a factor of 13, anorexia by 18–31, depression by 20, and autism by 8).

[10] Herman, *supra* note 5, at 8–9.

[11] Cecilia Dhejne, *et al.*, *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6(2)

surgery or hormones improve mental health and reduce suicide in individuals who identify as transgender,[12] equally there is no reliable evidence that compelling or censoring speech will do so.

Last, *amici* invoke professional associations—to no avail. One source is merely a printed continuing education class. Med.Br.12n.37. The American Psychological Association recognizes social transitioning has pros and cons and does *not* mandate identity-based terms.[13] The National Education Association's position is unsurprising, as Intervenors' counsel wrote it. Med.Br.11n.33. And Dr. James Cantor rebutted the American Academy of Pediatrics (which the American Medical Association echoes), noting the Academy wrongly conflates gender identity and sexual orientation, "gave readers exactly the reverse of what was contained in its sources," and advocates positions "far in excess of mainstream practice and medical consensus."[14]

PLOS ONE 5 tbl.2 (2011), https://bit.ly/35x3geE.

[12] Nat'l Inst. for Health & Care Excellence, *Evidence Review: Gonadotrophin Releasing Hormone Analogues for Children and Adolescents with Gender Dysphoria*, 45 (2020), https://bit.ly/2SREJ10 ("reported impact on . . . depression, anger and anxiety . . . suggest little change with GnRH analogues from baseline to follow-up."); Ctr. for Medicare & Medicaid Servs., *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery*, 48 (2016), https://go.cms.gov/35FaL39 ("[T]here is not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes"); Richard Bränström, *et al.*, *Correction to Bränström and Pachankis*, 177 AM. J. PSYCHIATRY 734, 734 (2020), https://bit.ly/2SKLJMZ ("results demonstrated no advantage of surgery in relation to subsequent mood or anxiety disorder-related health care visits or prescriptions or hospitalizations following suicide attempts.").

[13] Am. Psychol. Ass'n, *supra* note 7, at 833, 840, 843.

[14] James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 2–3, 5–6, J. SEX. & MARITAL

Considering these facts, it is time for open debate about both science and philosophy relating to transgender identity and treatment—not censorship. The panel's decision rightly respects free speech and enables scientific debate.

CONCLUSION AND REQUESTED RELIEF

The panel's well-reasoned opinion comes nowhere close to the "most compelling circumstances" necessary for en banc review. *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of en banc review). The Court should deny the Petition.

June 22, 2021

/s/ John J. Bursch

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THERAPY (2020), https://bit.ly/35wmXDd.

RULE 32(G)(1) CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 40(B)(1) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 6th Cir. R. 32(b), this document contains 3,873 words according to the word count function of Microsoft Word 365.

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CERTIFICATE OF SERVICE

Under FED. R. APP. P. 31 and 6th Cir. R. 31, I hereby certify that on June 22, 2021, a digital copy of the brief was filed electronically with the Court using the its electronic filing system, which automatically sends an electronic notification to all attorneys of record.

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