FIRST AMENDMENT — STUDENT SPEECH AND VIEWPOINT DISCRIMINATION — SIXTH CIRCUIT GRANTS PRELIMINARY INJUNCTION BARRING SCHOOL POLICY REQUIRING PREFERRED PRONOUNS. — *Defending Education v. Olentangy Local School District Board of Education*, 158 F.4th 732 (6th Cir. 2025) (en banc).

While it is well established that a finding of viewpoint discrimination suffices to hold government regulation of speech unconstitutional in nonschool contexts,[1] the interaction between viewpoint discrimination and the regulation of student speech in schools remains a highly uncertain area of the law.[2] Recently, in *Defending Education v. Olentangy Local School District Board of Education*,[3] the en banc Sixth Circuit found that a school district's policy prohibiting students from misgendering their peers constituted viewpoint discrimination but reserved decision on whether the general ban on viewpoint discrimination extends to regulations of student speech in schools.[4] The court instead applied a distorted version of the test for regulating student speech from *Tinker v. Des Moines Independent Community School District*,[5] raising the evidentiary bar, to hold that the policy was likely unconstitutional.[6] By punting on the issue of whether viewpoint discrimination overrides *Tinker*, the Sixth Circuit missed an important opportunity to clarify an unsettled area of student speech doctrine.

On May 11, 2023, Parents Defending Education (PDE), "a nationwide membership organization whose members include . . . parents whose children attend [Olentangy Local School District] schools,"[7] sued the Olentangy Local School District's board and its administrators and moved for a preliminary injunction to bar three of the school district's policies from governing student conduct.[8] The policies prohibited students from "engaging in discriminatory harassment or bullying based on the personal characteristics of other students"; from using their personal devices to send threatening and humiliating messages; and from using speech that involved "'discriminatory language,' including the intentional misgendering of transgender students."[9] PDE challenged the constitutionality of the policies on First and Fourteenth Amendment grounds, arguing that the policies unconstitutionally compelled speech,

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[1] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995); Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019).

[2] *See, e.g.*, L.M. *ex rel.* Morrison v. Town of Middleborough, 145 S. Ct. 1489, 1493 & n.1 (2025) (Alito, J., dissenting from the denial of certiorari).

[3] 158 F.4th 732 (6th Cir. 2025) (en banc).

[4] *Id.* at 738.

[5] 393 U.S. 503 (1969).

[6] *Olentangy*, 158 F.4th at 738.

[7] Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 684 F. Supp. 3d 684, 693 (S.D. Ohio 2023).

[8] *See id.* at 691, 693.

[9] *Id*. at 689.

represented impermissible viewpoint-based and content-based restrictions on speech, were unconstitutionally overbroad, and infringed on parental rights.[10]

The district court denied PDE's preliminary injunction motion, holding that, although PDE likely had standing to challenge the policies, it had failed to show a likelihood of success on the merits.[11] The district court found that "[t]he challenged speech policies fit squarely within [the *Tinker*] carve-out to schoolchildren's First Amendment rights"[12] and rejected PDE's arguments that the policies otherwise violated the First Amendment.[13] The court also rejected PDE's Fourteenth Amendment claim, finding that "[t]he fundamental right of parents to direct the care, upbringing, and education" of their children does not include a right to control how a public school teaches or disciplines children.[14]

PDE appealed, and a panel of the Sixth Circuit affirmed, holding that PDE had not met its burden of showing a clear likelihood of success on the merits.[15] The full court granted rehearing en banc, vacated the panel decision, and agreed to rehear the case.[16] Before rehearing en banc was granted, the school district amended its policies to change the definition of bullying.[17] PDE altered its requested relief accordingly, seeking an injunction barring the school district "only 'from punishing students for misgendering other students' based on their honest belief that only two genders exist and that individuals cannot change their genders."[18]

The Sixth Circuit reversed and remanded.[19] Writing for an en banc court, Judge Murphy[20] held that PDE[21] was "entitled to a preliminary injunction."[22] The court first examined the school district's standing and mootness challenges, rejecting both.[23] The court held that PDE likely had associational standing and that its claims were not moot despite the amendments, as the school district could still punish students for using

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10 *Id.* at 705, 710; *Olentangy*, 158 F.4th at 740.

11 *Olentangy*, 684 F. Supp. 3d at 690, 698.

12 *Id.* at 690.

13 *Id.* at 705 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

14 *Id.* at 691 (citing Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005)).

15 Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., 109 F.4th 453, 459, 461 (6th Cir. 2024).

16 *Olentangy*, 158 F.4th at 740.

17 *Id.* at 743. The school district amended its definition of bullying to exclude "speech that might 'cause discomfort or humiliation' or amount to 'teasing.'" *Id.*

18 *Id.*

19 *Id.* at 761.

20 Chief Judge Sutton and Judges Batchelder, Griffin, Kethledge, Thapar, Bush, Larsen, Nalbandian, and Readler joined Judge Murphy's opinion.

21 In between the panel decision and the en banc rehearing, PDE changed its organization name to "Defending Education." This comment uses "PDE" throughout for consistency.

22 *Olentangy*, 158 F.4th at 741.

23 *Id.*

"biological pronouns"[24] if it determined that doing so constituted bullying or harassment.[25]

The court then addressed the likelihood of success on the merits. Because the school district justified its policies under *Tinker*,[26] the court focused on whether the school district had met the *Tinker* standard.[27] The court explained that, under *Tinker*, schools may only restrict speech if it will "cause a 'substantial disruption' *or* infringe 'the rights of others.'"[28] The court emphasized that schools bear the burden of proof under *Tinker* and "must 'reasonably forecast' that the speech will cause a disruption or violate the rights of others."[29] Nonetheless, the court explained that this evidentiary burden varies based on the type of speech such that "the closer the speech resembles political expression at the First Amendment's core, the more evidence a school must present."[30] The court concluded that the school district's ban warranted a "heavy evidentiary burden," as it constituted regulation of speech on a "sensitive topic of public concern" — namely, the debate over transgender rights.[31]

Applying the heightened evidentiary standard, the court concluded that the school district had failed to meet its burden.[32] Beginning with *Tinker*'s substantial-disruption prong, the court found that the school district had "presented no evidence" of the speech's disruptive effects and rejected its reliance on the "relaxed fighting-words doctrine that applies in the school context."[33] The court stated that the use of biological pronouns does not constitute "abusive invective"[34] as students misgender peers not to "belittle" them but because they have "no practical alternative short of expressing a viewpoint with which they might fundamentally disagree."[35] Turning to *Tinker*'s violation-of-rights prong, which the court interpreted to require the violation of "some source of positive law,"[36] the court found that the school district had "all but concede[d]" that the speech was permissible under Title IX and failed to

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[24] *E.g.*, *id.* at 738, 742. The phrase "biological pronouns" is the terminology adopted by the Sixth Circuit. Its use in this comment is descriptive rather than normative and with recognition of the fact that the term has been criticized by LGBTQ+ organizations for "fuel[ing] false narratives about transgender people." *Understanding Anti-Trans Tropes: "Biological Pronouns*," GLAAD, https://glaad.org/understanding-anti-trans-tropes-biological-pronouns [https://perma.cc/ZKG4-4U6V].

[25] *Olentangy*, 158 F.4th at 742–43.

[26] *Id.* at 747.

[27] *Id*. at 747–48.

[28] *Id.* at 748 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969)).

[29] *Id.* at 751 (quoting Barr v. Lafon, 538 F.3d 554, 565 (6th Cir. 2008)).

[30] *Id.*

[31] *Id*. at 753 (quoting Meriwether v. Hartop, 992 F.3d 492, 508 (6th Cir. 2021)).

[32] *Id.*

[33] *Id.* at 757.

[34] *Id.*

[35] *Id.* at 758.

[36] *Id.* at 750.

offer any evidence that the speech would qualify as bullying or harassment under Ohio law.[37]

The court also undertook a viewpoint discrimination analysis. Finding that the school district had not only entered the policy debate but also taken a side — that is, had targeted the use of biological pronouns as improper while allowing the use of preferred pronouns — the court held that the school district had discriminated based on viewpoint.[38] The court noted its precedent might warrant extending to student expression governed by *Tinker* the categorical viewpoint discrimination ban that operates in other contexts, such that a school could not justify viewpoint discrimination under *Tinker* even upon "show[ing] that the forbidden speech would cause a substantial disruption."[39] However, the court opted to reserve this question "for another day,"[40] as it found the school district failed to meet *Tinker*'s evidentiary burden.[41]

Judge Batchelder wrote a concurring opinion in which she agreed that the school district failed to satisfy *Tinker* but disagreed with applying *Tinker* to viewpoint discrimination claims,[42] asserting that it is a "bedrock principle . . . that a school may not engage in viewpoint discrimination when it regulates student speech."[43]

Judge Kethledge concurred to criticize modern free speech doctrine as incoherent,[44] highlighting disagreement among circuit courts as to whether schools can discriminate based on viewpoint when student speech causes substantial disruption,[45] and to urge reliance on historical analogues.[46]

Judges Thapar and Nalbandian concurred to assert that the school district's policies were invalid because they discriminated based on viewpoint, arguing that "even the 'special characteristics' of public schools can't justify viewpoint discrimination on a matter of public concern."[47]

Judge Bush concurred to argue that an examination of history and tradition indicated that the regulation was invalid while "eliminat[ing] the need to weigh in on the scope of *Tinker*" as was done by the other concurrences.[48]

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[37] *Id.* at 759.
[38] *Id.* at 754–55.
[39] *Id.* at 756.
[40] *Id.*
[41] *Id.* at 757.
[42] *Id.* at 761 (Batchelder, J., concurring).
[43] *Id.* at 762 (quoting L.M. *ex rel.* Morrison v. Town of Middleborough, 145 S. Ct. 1489, 1492 (2025) (Alito, J., dissenting from the denial of certiorari)).
[44] *Id.* at 764–65 (Kethledge, J., concurring).
[45] *Id.* at 765.
[46] *Id.*
[47] *Id.* at 769 (Thapar & Nalbandian, JJ., concurring).
[48] *Id.* at 777 (Bush, J., concurring).

Judge Stranch wrote the sole dissenting opinion.[49] She agreed with the majority's decision to leave undecided "the question of how the categorical ban on viewpoint discrimination interacts with *Tinker*," noting that "[t]he Supreme Court . . . has never held that where *Tinker* is satisfied, the First Amendment's categorical prohibition on viewpoint discrimination also applies."[50] However, she disagreed with the majority's finding of probable viewpoint discrimination,[51] asserted that the school district's forecast of disruption *was* reasonable under *Tinker*,[52] and criticized the majority's "'political' sliding scale approach" as unsupported by precedent.[53]

Together with the various concurrences and dissent, the *Olentangy* majority's analysis exemplifies judicial confusion regarding the interaction of viewpoint discrimination doctrine with *Tinker*'s test for student speech. By raising the standard of proof required under *Tinker*, the majority fell into a pattern of lower courts contorting *Tinker* to avoid deciding its interaction with viewpoint discrimination, missing an important opportunity to resolve incoherence in student speech doctrine. Instead of skirting the issue, the Sixth Circuit should have clarified that *Tinker* permits viewpoint discrimination in the student speech context in order to align the doctrine with precedent and recognize the deference traditionally afforded to schools.

As the Supreme Court has yet to opine expressly on "the relationship between viewpoint discrimination and student speech,"[54] lower courts remain divided.[55] *Tinker* itself only mentioned the word "viewpoint" once in the context of requiring state actors to demonstrate "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" in order "to justify prohibition of a particular expression of opinion."[56] It was not until *Rosenberger v. Rector & Visitors of University of Virginia*[57] that the Supreme Court solidified viewpoint discrimination as "an egregious form of content discrimination."[58] Since then, circuit courts have split on the doctrine's interaction with *Tinker*.[59] While the Sixth and Eleventh Circuits have held that regulations of student speech must avoid discriminating on

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[49] Judges Moore, Clay, Davis, Mathis, Bloomekatz, and Ritz joined Judge Stranch's opinion.
[50] *Id.* at 801 (Stranch, J., dissenting).
[51] *Id.* at 808.
[52] *Id.* at 812.
[53] *Id.* at 813.
[54] Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 443 (4th Cir. 2013).
[55] *See id.*
[56] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).
[57] 515 U.S. 819 (1995).
[58] *Id.* at 829.
[59] *See Hardwick*, 711 F.3d at 443.

viewpoint,[60] the Fifth, Eighth, and Ninth Circuits have instead decided that the "special First Amendment context" of public schools "admits of no categorical prohibition on viewpoint discrimination."[61] Because of doctrinal confusion, other lower courts have opted to employ a viewpoint-discrimination-avoidance pseudocanon and avoid the issue altogether, distorting the *Tinker* standard in the process. In *L.M. ex rel. Morrison v. Town of Middleborough*,[62] for example, the First Circuit relegated petitioner's viewpoint discrimination argument to a brief footnote discussion,[63] crafting instead "a novel and permissive test" for assessing material disruption to decide the case under *Tinker*.[64]

Olentangy is another example of courts departing from precedent and distorting *Tinker* to avoid addressing its interaction with viewpoint discrimination. Declining to "resolve [the] question" of *Tinker*'s relationship with viewpoint discrimination,[65] the court invalidated the school district's regulation via a novel sliding-scale application of *Tinker*, under which the evidentiary burden increases the more the speech in question "resembles political expression at the First Amendment's core."[66] This sliding-scale approach deviates sharply from circuit precedent, calling for a higher "quantum of evidence"[67] to prohibit political speech than "what has been required under *Tinker*'s 'uniform ground rules.'"[68] Indeed, the Sixth Circuit has previously acknowledged that school officials will sometimes be unable "to offer any 'proof' beyond common-sense conclusions based on human experience."[69] And, only six months prior to *Olentangy*, in *C.S. ex rel. Stroub v. McCrumb*,[70] the Sixth Circuit applied a lenient standard of proof under *Tinker* to uphold a school regulation of speech concerning gun advocacy[71] —

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60 *See* Barr v. Lafon, 538 F.3d 554, 570–71 (6th Cir. 2008); Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022). *Barr* may no longer be binding Sixth Circuit precedent on the issue. *See Olentangy*, 158 F.4th at 756 ("*Barr* also seemed to use a narrow definition of viewpoint discrimination that sits in tension with the Supreme Court's broader view . . . .").

61 *Hardwick*, 711 F.3d at 443 (quoting Morgan v. Swanson, 659 F.3d 359, 379 (5th Cir. 2011) (en banc)).

62 103 F.4th 854 (1st Cir. 2024).

63 *Id.* at 886 n.11 ("[W]e do not read *Tinker* or any other Supreme Court . . . student-speech decision to require 'positive messages' be prohibited if a 'negative' message is regulable because it materially disrupts or invades others' rights.").

64 L.M. *ex rel.* Morrison v. Town of Middleborough, 145 S. Ct. 1489, 1495 (2025) (Alito, J., dissenting from the denial of certiorari).

65 *Olentangy*, 158 F.4th at 757.

66 *Id.* at 751.

67 *Id.* at 803 (Stranch, J., dissenting).

68 *Id.* at 804. *Compare id.* at 751 (majority opinion) (using sliding scale and higher evidentiary burden), *with* Lowery v. Euverard, 497 F.3d 584, 594 (6th Cir. 2007) (applying prior standard).

69 *Lowery*, 497 F.3d at 594.

70 135 F.4th 1056 (6th Cir. 2025).

71 *See id.* at 1067. The Sixth Circuit affirmed that school officials did not violate the First Amendment by requiring a third-grade student to remove a baseball hat displaying an image of an AR-15-style rifle and the phrase "COME AND TAKE IT." *Id.* at 1059, 1061.

speech that is "paradigmatically 'political.'"[72] In order to avoid deciding the question of viewpoint discrimination's interaction with *Tinker*, then, the Sixth Circuit in *Olentangy* and other courts have contorted precedent in their applications of *Tinker*, highlighting the "pressing need for clarification" of the doctrine.[73]

While guidance is ultimately required from the Supreme Court, the Sixth Circuit missed an opportunity to clarify how *Tinker* fits with viewpoint discrimination. Instead of punting on the issue, the *Olentangy* court had three options to resolve the doctrinal incoherence: (1) extend the categorical ban on viewpoint discrimination to student speech in schools,[74] (2) clarify that *Tinker* can sometimes permit viewpoint discrimination,[75] or (3) characterize regulation of disruptive speech under *Tinker* as viewpoint neutral.[76] The Sixth Circuit should have opted for the second approach, clarifying that *Tinker* permits at least some viewpoint discrimination in the context of making a disruption argument.

Extending a categorical ban on viewpoint discrimination to student speech governed by *Tinker* might seem attractive since it would align with the Supreme Court's recent emphasis on absolute viewpoint neutrality.[77] Indeed, as part of "an increasingly absolutist approach to speech rights" taken by members of the Court,[78] content and viewpoint neutrality have "emerged as the bedrock principle[s] of the First Amendment."[79] However, while the absolutist approach has been praised as "relatively firm ground in the sometimes confusing world of constitutional speech doctrine,"[80] it has also been criticized by scholars for

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[72] *Olentangy*, 158 F.4th at 803 (Stranch, J., dissenting).

[73] L.M. *ex rel.* Morrison v. Town of Middleborough, 145 S. Ct. 1489, 1493 (2025) (Alito, J., dissenting from the denial of certiorari).

[74] *See* Barr v. Lafon, 538 F.3d 554, 571 (6th Cir. 2008); Speech First, Inc. v. Cartwright, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022).

[75] *See* Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 443 (4th Cir. 2013) (discussing standards applied in the Fifth, Eighth, and Ninth Circuits).

[76] This approach would permit an extension of the ban on viewpoint discrimination to student speech while still permitting student speech regulations by categorizing them as viewpoint neutral and akin to time, place, and manner or secondary-effects restrictions. *Cf. Olentangy*, 158 F.4th at 808 (Stranch, J., dissenting) ("[A]lthough school officials may not silence viewpoints based on offensiveness, schools may . . . regulate *how* potentially offensive viewpoints are expressed by limiting the disruptive means of expressing those viewpoints.").

[77] Although the Supreme Court has suggested that schools may engage in some viewpoint discrimination, *see* Morse v. Frederick, 551 U.S. 393, 409 (2007), at least two Justices have expressed their belief in "the bedrock principle that a school may not engage in viewpoint discrimination when it regulates student speech," *Morrison*, 145 S. Ct. at 1492 (Alito, J., dissenting from the denial of certiorari).

[78] Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 924 (2022) (describing emergence of modern absolutist approach in the 1940s).

[79] *Id.* at 943; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992) (applying content discrimination to categories of speech outside the First Amendment); Matal v. Tam, 582 U.S. 218, 243 (2017) (opinion of Alito, J.) (stating that "[g]iving offense is a viewpoint"); Iancu v. Brunetti, 139 S. Ct. 2294, 2299 (2019) (suggesting that vulgarity is a viewpoint).

[80] John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 575 (2009).

"justifying a nearly constant expansion of the First Amendment."[81] Here, an absolutist approach would undermine the *Tinker* test and deviate further from precedent.

The Sixth Circuit should have instead adhered to existing jurisprudence and *Tinker*'s purpose by recognizing that *Tinker* permits some form of viewpoint discrimination. First, precedent supports permitting some viewpoint discrimination under *Tinker*. Most notably, as acknowledged by the *Olentangy* majority, the Supreme Court in *Morse v. Frederick*[82] "seemed to suggest that schools may engage in some viewpoint discrimination (for example, by allowing students to discourage drug use but not promote it)."[83] Other circuit courts have interpreted precedent accordingly. *Middleborough*, for instance, did "not read *Tinker* . . . to require 'positive messages' be prohibited if a 'negative' message is regulable because it materially disrupts or invades others' rights."[84] Second, permitting viewpoint discrimination under *Tinker* properly recognizes the deference *Tinker* intended to afford schools given the unique context of the public elementary and secondary school environments.[85] *Tinker*'s substantial-disruption test "is something of a constitutional anomaly" for a reason.[86] Charged with maintaining safe learning environments, schools must have "the latitude necessary to act *in loco parentis* and regulate speech that 'would undermine the school's basic educational mission.'"[87] Misgendering speech undermines schools' missions in part because its underlying view of gender ideology necessitates "stigmatization [that] prevents . . . adjustment and, ultimately, the ability to learn in school."[88] Of course, as with all First Amendment doctrine, the political flip side of permitting viewpoint discrimination under *Tinker* must be considered — scholars are right to be concerned that permitting viewpoint discrimination might enable schools to ban diversity, equity, and inclusion or gender ideology speech for materially

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[81] Campbell, *supra* note 78, at 944.

[82] 551 U.S. 393 (2007).

[83] *Olentangy*, 158 F.4th at 756.

[84] 103 F.4th 854, 886 n.11 (1st Cir. 2024).

[85] *Cf. id.* at 883 n.9 ("We see no reason . . . to be . . . the first court to import recent decisions that clearly did not contemplate the special characteristics of the public-school setting into that setting.").

[86] Taylor, *supra* note 80, at 578; *cf.* Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 198 (2007) (arguing that denying that *Tinker* "tacitly permits" viewpoint discrimination "does not square with the Court's departures from generally-applicable free speech doctrine in the unique context of public elementary and secondary schools").

[87] *Olentangy*, 158 F.4th at 795 (Stranch, J., dissenting) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684–85 (1986)).

[88] Kellam Conover, Note, *Protecting the Children: When Can Schools Restrict Harmful Student Speech?*, 26 STAN. L. & POL'Y REV. 349, 372 (2015) (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988); Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954)).

disrupting school operations, for instance.[89] Nonetheless, the second approach remains the most doctrinally coherent.

Although the third option of defining the regulation of disruptive conduct as viewpoint neutral under *Tinker* is perhaps the most doctrinally conservative, it is also incoherent. In the *Olentangy* context, unlike with secondary effects or time, place, and manner restrictions, the disruption being regulated flows directly from the speech's meaning. Thus, as misgendering speech is disruptive not just for the manner in which it is expressed — such as volume or timing — but also for its underlying stigmatizing view of gender ideology,[90] defining the regulation as viewpoint neutral amounts to an exercise in doctrinal gymnastics that sidesteps the First Amendment's core prohibition on viewpoint discrimination in the nonschool context.

In sum, the Sixth Circuit should have recognized that *Tinker* permits some form of viewpoint discrimination. This approach best aligns with precedent and *Tinker*'s deference to schools, clarifies the doctrine, and avoids further contortions of *Tinker*'s evidentiary standard.

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[89] *See, e.g.*, Sonja A. Starr & Genevieve Lakier, *The Constitution and the War on DEI* 62–63 (Univ. Chi. L. Sch., Pub. L. & Legal Theory Rsch. Paper, Paper No. 25-35, 2025).

[90] *See, e.g.*, Brief of GLBTQ Legal Advocates & Defenders and Lambda Legal Defense and Education Fund, Inc. as Amici Curiae Supporting Defendant-Appellees at 10, *Olentangy*, 158 F.4th 732 (No. 23-3630) ("Misgendering has long been a tool of harassment . . . against those who are . . . gender nonconforming . . . .").