No. 22-2927

In the United States Court of Appeals for the Eighth Circuit

PARENTS DEFENDING EDUCATION,

Plaintiff-Appellant

v.

LINN-MAR COMMUNITY SCHOOL DISTRICT, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Iowa, Cedar Rapids Division,
Case No. 22-cv-78-CJW-MAR

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF long has been an advocate for our nation's youth receiving an effective education from elementary school through high school and

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—other than *amicus curiae* and its counsel—contributed money that was intended to fund preparing or submitting the brief.

beyond. Parents' right to control, or at least oversee, their children's education is essential for education to be effective. Until recently, ALF's education-related activities have focused almost exclusively on parents' ability to choose a public, charter, private, parochial, or home school that best aligns with their children's needs and family's values. For example, ALF publishes a series of state-specific charter school labor law guides, *Leveling the Playing Field*, which help charter school leaders navigate public employee union organizing, collective bargaining, and work rules that often stifle the educational innovations that charter schools can bring to public education. *See also* Virginia Gentles, *The Case for Education Freedom and Protecting Charter Schools*, Atlantic Legal Foundation Annual Report (2021) at 22-25.[2]

The Greek philosopher Epictetus declared that "only the educated are free." But unfortunately, as this case illustrates, the advent of the "woke" movement has infected many aspects of American life, including public school education. This pernicious assault on American education, endorsed and implemented by misguided school boards, administrators,

[2] Available at https://atlanticlegal.org/wp-content/uploads/2022/04/ALF-Annual-Report-2021.pdf.

and teachers, has indoctrinated boys and girls with self-doubt about who they are, and in a way that undermines parents' right and ability to superintend their children's upbringing. *See, e.g.*, Pete Hegseth & David Goodwin, *Battle for the American Mind* 10 (2022) ("Stories for kids with good life lessons are no longer good enough; the pages must contain an agenda. Maybe your sixth or seventh grader will encounter the 'gender unicorn' instead—a widely used Barney look-alike purple unicorn who explains concepts like gender identity, gender expression, and sexual attraction.").

Appellee Linn-Mar Community School District's Administrative Regulation 504.13-R, titled "Administrative Regulations Regarding Transgender and Students Nonconforming to Gender Role Stereotypes" (the "gender identity policy") purports "to expeditiously address the needs of transgender students, gender-expansive students, nonbinary, gender nonconforming students, and students questioning their gender." Policy at 1 (R. Doc. 3-11 at 44; App. 296).[3] The school district's radical gender identity policy—which facilitates the "woke" indoctrination of

[3] Available at http://policy.linnmar.k12.ia.us/policy/50413-r-administrative-regulations-regarding-transgender-and-students-nonconforming-gender.

children about subjects such as "gender fluidity"—significantly abridges parents' right to be involved in their children's upbringing and education. Regardless of parents' wishes, *or even knowledge*, the policy affords young teenage (and perhaps preteen) students the authority to choose their own "names/pronouns, restroom and locker facilities, overnight accommodations on school trips, and participation in activities," and how to "dress in accordance with their gender identity." Policy at 1, 4 (R. Doc. 3-11 at 44, 47; App. 296, 299). This policy demolishes parental rights on an extraordinarily sensitive subject. Along with similar policies being adopted—over parents' strong objections—by a growing number of school districts throughout the United States, the gender identity policy at issue here threatens to erode the educational and social fabric of the nation.

For this reason, ALF is compelled to file this amicus brief. Our brief is intended to inform the Court's review by highlighting the deeply rooted jurisprudential history of parents' sacrosanct right to oversee their children's upbringing and education.

SUMMARY OF ARGUMENT

This case is about far more than the divisive issue of schools actively encouraging the nation's children to question their own genders. As the district court recognized here, parents enjoy "the fundamental right of child rearing"—the natural and legal right "to make decisions directed toward the care, custody, and control of their children." (R. Doc. 38 at 21; App. 535) (citing *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972)). Indeed, "[t]he liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

The panel should keep this fundamental parental liberty interest and right clearly and continuously in view when addressing the question of whether to reverse the district court's denial of Appellant's motion for a preliminary injunction that would enjoin Appellees' ill-conceived gender identity policy. Appellees' policy blatantly conflicts with parents' right to control the upbringing of their children, including the manner in which their sons and daughters present themselves to, and interact with, administrators, counselors, teachers, and other students while attending

school. At the very least, parents have the right to know whether their son or daughter assumes a drastically different identity during the school day. As Appellant's brief explains, however, the school district's gender identity policy not only allows a child to conceal this vital information from his or her parents, but also to exclude them from any involvement in, or even knowledge of, the development or implementation of his or her individualized, school-approved, "Gender Support Plan." *See* Br. of Appellant at 6-9, 29-30.

The alarming manner in which the gender identity policy's parental exclusion provisions unabashedly abrogate parental rights clashes with the centuries-old tenet of Anglo-American law that parents are best suited to make decisions concerning the upbringing and education of their children. As emphasized in the *Troxel* plurality opinion, 530 U.S. at 65-66, the Supreme Court repeatedly has upheld parents' right to control their children's upbringing, including their education. This amicus brief highlights some of these Supreme Court cases and the American and English common law in which they are rooted.

ARGUMENT

The School District's Gender Identity Policy Abrogates Fundamental Parental Rights

A. The Supreme Court long has recognized parents' right to control the upbringing and education of their children

In various contexts, the Supreme Court has repeatedly recognized "the fundamental interest of parents . . . to guide the . . . education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.*

For example, in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), the Court recognized that the Fourteenth Amendment affords parents the right to oversee and control the upbringing and education of their children, explaining that "it is the natural duty of the parent to give his children education suitable to their station in life."

The Court reaffirmed this parental right a short time later, holding that parents have the right "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925). *Pierce* emphasized that "[t]he child is not the mere creature of the state; those

who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id*. at 535.

Five decades after *Meyer* and *Pierce*, the Court held that the Fourteenth Amendment creates a presumption that a parent is competent in educating and caring for a child, and that the burden lies on a State to prove otherwise. *See Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley* the Court invalidated an Illinois statute providing that upon the death of a mother, children of unwed fathers automatically became wards of the State. *Id*. at 646-47, 649. The Court held that the state law's presumption that unwed fathers were inherently unfit to raise their children violated basic due process and parental rights. *See id*. at 651 ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment.")

Several years later, the Court recognized the logical implications of this constitutional presumption of competency when it held that parents can commit their child to a mental facility against his or her will, so long as the child (through a legal representative) is afforded an opportunity to present evidence to rebut the presumption. *See Parham v. J.R.*, 442 U.S.

584 (1979). "Our jurisprudence," the Court wrote, "historically has reflected Western civilization concepts of the family as a unit *with broad parental authority over minor children*." *Id.* at 602 (emphasis added). The Court explained that "[t]he law's concept of the family rests on a presumption that *parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions*." *Id.* at 602 (emphasis added). "More important," the Court continued, "historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* (citing 1 William Blackstone, *Commentaries on the Laws of England* *447 (1765-1769); 2 Joseph Kent, *Commentaries on American Law* *190 (1826-1830)). In other words, "[t]he statist notion that governmental power should supersede parental authority . . . is repugnant to American tradition." *Id.* at 603.

Notably, in *Parham* Justice Stewart wrote a concurring opinion that is even more emphatic about parents' rights and responsibilities with regard to their children, even when it comes to difficult decisions about their psychological well being. "For centuries," he wrote, "it has been a canon of the common law that parents speak for their minor

children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it." *Id.* at 621 (Stewart, J., concurring in the judgment). The state law at issue in *Parham*, he continued, correctly presumed that parents act in their children's best interests, even when parents "make decisions for their minor children that deprive the children of liberty." *Id.* at 624. "In the case of parents, the presumption[] [is] grounded in a statutory embodiment of long-established principles of the common law." *Id.* at 623.

The Supreme Court most recently addressed parental rights in *Troxel*. There, the Court invalidated application of a state statute that allowed, over a parent's objections, nonparental visitation rights with children, provided that a trial court has determined by a preponderance of evidence that the children would benefit from such visitations. *See* 530 U.S. at 67-75. In *Troxel* the trial court had awarded visitation rights to paternal grandparents (whose son had committed suicide) over the strong objection of the children's natural mother. *Id.* at 60-63. The Supreme Court explained that "[m]ore than 75 years ago, in *Meyer* . . . we held that the 'liberty' protected by the Due Process Clause includes

the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'" *Id.* at 65.

After citing its precedents beginning with *Meyer*, the Court observed in *Troxel* that "[i]n light of this extensive precedent, it cannot be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66. Given this long line of cases, the Court held the statute at issue "unconstitutionally infringes on that fundamental parental right." *Id.* at 67.

Justice Souter's separate opinion in *Troxel* strongly endorsed the importance of parental rights, observing that such rights would be undermined if the trial court's visitation ruling were upheld. *Id.* at 75-79 (Souter, J., concurring in the judgment). Quoting *Meyer*, Justice Souter explained that "[a]s we first acknowledged in *Meyer*, the right of parents to 'bring up children,' 262 U.S., at 399, and '*to control the education of their own*' is protected by the Constitution, *id.*, at 401." *Troxel*, 530 U.S. at 77 (emphasis added). He further indicated that "[t]he strength of a parent's interest in controlling a child's associates is as

obvious as the influence of personal associations on the development of the child's social and moral character." *Id*. at 78.

Justice Stevens, in his dissenting opinion in *Troxel*, conceded that his "colleagues [were] of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment." *Id*. at 86-87 (Stevens, J., dissenting). There is "no doubt that *parents have a fundamental liberty interest in caring for and guiding their children*, and a corresponding privacy interest . . . in doing so *without undue interference* of strangers to them and to their child." *Id*. at 87 (emphasis added).

B. English and American common law undergird the Supreme Court's long history of jurisprudence recognizing parental rights

Both English and American common law long ago recognized the right of parents to raise and educate their children in the manner they believe to be the most appropriate. This historical background played an important role in development of the Supreme Court's jurisprudence on parental rights.

The English common law could not have been clearer that parents have an inviolate right to oversee the upbringing and education of their children. "Indeed, not only did the common law not interfere with the parental right and duty, it enforced the parents' educational wishes against unwilling children." S. Erine Walton, *The Fundamental Right to Homeschool: A Historical Response to Professor Bartholet*, 25 Tex. Rev. L. & Pol. 377, 403 (2021).

For example, in *Hall v. Hall*, (1749) 26 Eng. Rep. 1213, a child's legal guardian petitioned the Court of Chancery to send the child back to school at Eton after he had refused to return, demanding instead that he be schooled by a private tutor. Concluding that the child's "guardian was the proper judge at what school to place him," the court granted the petition. *Id.*; *see also Tremain's Case*, (1718) 93 Eng. Rep. 452 (granting guardian's petition to compel child to return to school at Cambridge despite child's desire to attend Oxford).

Renowned British jurist William Blackstone was emphatic about the rights parents possess. He wrote that one of their most important rights and duties is "that of giving [their children] an education suitable to their station in life: a duty pointed out by reason, and of far the greatest

importance of any." William Blackstone, *supra* *438. Blackstone's views relied on the work of jurist and political philosopher Samuel Pufendorf. *See id*. While Pufendorf recognized that parents could delegate the responsibility of educating their children to others, he too was adamant that parents retain full responsibility for, and oversight of, their children's education. *See* Samuel Pufendorf, *The Whole Duty of Man According to the Law of Nature* 274 (Andrew Tooke trans., 4th ed. 1716).

John Locke, one of the most influential political philosophers of the founding generation, was no less firm in maintaining that parents have ultimate authority over their children's upbringing and education. "The well Educating of . . . Children," he wrote, "is so much the Duty and Concern of Parents, and the Welfare and prosperity of the Nation so much depends on it, that I would have every one lay it seriously to heart . . . ." John Locke, *Some Thoughts Concerning Education* lxiii (1693) (Cambridge Univ. Press ed. 1880).

This English common-law tradition of recognizing parental rights continued in the United States, even prior to the Supreme Court's opinion in *Meyer*. During the Nineteenth Century and thereafter, state courts were virtually unanimous in holding, for example, that the parents are

presumed capable of caring for and educating their children, and that state authorities carry the burden of proving otherwise. This is essentially the same presumption that the Supreme Court subsequently adopted in *Stanley* and *Parham*, *supra*.

In *O'Connell v. Turner*, 55 Ill. 280 (1870), the State committed a child to what was tantamount to a precursor of a juvenile detention center. The State did so without any finding that his parents were unable to care for him. *Id*. at 281-82, 284-85. The father petitioned to have his son returned to his custody. Agreeing with the parent, the Illinois Supreme Court was adamant that "[t]he parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it, is a principle of natural law." *Id*. at 284. The court concluded that the Illinois law that provided for the child's commitment made it far too easy to disrupt the parent-child relationship. *See id*. "Before any abridgment of the right, gross misconduct or almost total fitness of the part of the parent, should be clearly provided." *Id*. at 284-85. The court thus ordered the child returned to his father. *Id*. at 287-88.

While *Turner* did not directly involve a dispute between a parent and a school, its holding and rationale are nevertheless relevant to the

present case because of the burden of proof that it enunciated. *Turner* explicitly rejected the notion that a parent can be presumed to be incompetent or incapable of educating and caring for his or her child. Instead, a presumption of competency must attach to the parents in all disputes between them and a school over a particular policy or teaching matter. *Id.* at 284-85; *accord Mill v. Brown*, 88 P. 609 (Utah 1907).

The Wisconsin Supreme Court applied this presumption in the educational context in *Morrow v. Wood*, 35 Wis. 59 (1874). There, a father enrolled his son in a public school. *Id.* at 60. While generally agreeing with the teacher's proposed curriculum, the father disagreed with the teacher's decision to have his son study geography. *Id.* After the father directed his son to refuse to study that subject, his teacher inflicted corporal punishment. *Id.* at 62-63. The state supreme court rejected the notion that "upon an irreconcilable difference of views between the parent and teacher as to what studies the child shall pursue, the authority of the teacher is paramount and controlling." *Id.* at 63. It observed that normally, a parent has the "exclusive right to govern and control the conduct of his minor children." *Id.* at 64. The court also emphasized that by electing to send the child to public school, the parent

did not relinquish his ability to have a say in what the student was to learn. *Id.* at 65. "The parent is quite as likely to make a wise and judicious selection as the teacher . . . ." *Id.* at 66.

The Nebraska Supreme Court echoed this language in *Sheibley v. School District No. 1*, 48 N.W. 393 (Neb. 1891). There, the court noted that a parent is presumed to be acting in the best interests of the child. *Id.* at 395. "[W]ho is to determine what studies [the student in question] shall pursue in school—a teacher, who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as well best promote the happiness of the child?" *Id.* It accordingly concluded that a parent's right to determine a child's course of studies prevailed over that of a teacher. *Id.*

C. The gender identity policy's abrogation of parental rights should inform this Court's preliminary injunction analysis

It is difficult to imagine a "woke" gender identity policy that more radically departs from the Supreme Court's and common law's jurisprudence on parental rights than the policy at issue here. The school district's highly controversial policy *literally* deprives parents of their

ability to make informed decisions—or any decisions at all—about the incredibly sensitive subject of their own children's gender identity.

The policy enables a seventh-grade (i.e., 12 or 13 year-old) or older child to arrive at a Linn-Mar school each morning, *and without the knowledge, much less approval, of his or her parents*, choose to be called by a different name, to be referred to by the opposite gender's pronouns, to use the opposite gender's bathroom, to wear the opposite gender's clothing, to play on the opposite gender's intramural sports teams, and to undress and shower in the opposite gender's locker room—all this, and more, with the support, if not active encouragement, of school officials and teachers. And because the policy empowers a gullible child to direct school officials and teachers to keep his or her parents in the dark, there is no opportunity for oblivious parents to object to their child's gender-related choices, consult with qualified professionals or school officials, or provide parental guidance to what the school district's policy describes as transgender, gender-expansive, nonbinary, gender-nonconforming, or gender-questioning children. The Court should not allow this abhorrent policy to remain in effect.

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction enjoining enforcement of the school district's gender identity policy.

Respectfully submitted,

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November 9, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(a)(5) because it contains **3,539** words, excluding those parts exempted by Fed. R. App. P. 32(f).

I certify that 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 is written in proportionally spaced, 14-point Century Schoolbook font using Microsoft 365 Word.

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Dated: November 9, 2022

/s/ Lawrence S. Ebner
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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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