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; SHANNON BISGARD, in his official capacity as Superintendent; BRITTANIA MOREY, In their official capacity as a member of the Linn Marr Community School District School Board; CLARK WEAVER, In their official capacity as a member of the Linn Marr Community School District School Board; BARRY L. BUCHHOLZ, In their official capacity as a member of the Linn Marr Community School District School Board; SONDRA NELSON, In their official capacity as a member of the Linn Marr Community School District School Board; MATT ROLLINGER, In their official capacity as a member of the Linn Marr Community School District School Board; MELISSA WALKER, In their official capacity as a member of the Linn Marr Community School District School Board; RACHEL WALL, In their official capacity as a member of the Linn Marr Community School District School Board,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Iowa, No. 1:22-cv-00078

BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Linn-Mar Community School District recently passed a policy (Policy 504.13R) that tramples on the constitutional rights of parents and students. The Policy authorizes children to make fundamentally important decisions concerning their gender identity, such as changing their name, pronouns, and participation in school activities, without *any* parental involvement. Moreover, the District prohibits school officials from "disclos[ing] information that may reveal a student's transgender status" to the student's parents unless "the student has authorized the disclosure." App.297, R. Doc. 3-11, at 45. The Policy also punishes students for expressing their sincerely held beliefs about sex and gender. Specifically, students will be punished for speech that does not "respect a student's gender identity" and for "misgendering," which is defined as "intentionally or accidentally us[ing] the incorrect name or pronouns to refer to a person." App.298, 301, R. Doc. 3-11, at 46, 49.

Appellant Parents Defending Education ("PDE") has members whose children are being harmed by the Policy. These parents want to ask the District on a regular basis whether their children have been given a gender support plan; they want to exercise their fundamental right as parents to guide their child's upbringing; and they want their children to be free to express their beliefs at school without fear of punishment. The district court below erred in denying PDE's motion to preliminarily enjoin the District from enforcing the Policy. Because this case presents important questions of law, PDE respectfully requests 30 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

As required by Eighth Circuit Rule 26.1A, Appellant Parents Defending Education certifies that it has no parent corporation and there is no publicly held corporation that owns more than 10% of its stock. Parents Defending Education further certifies the following:

1. Associations, firms, partnerships, corporations, and other artificial entities that either are related to the appellant as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the appellant's outcome in the case:

None.

2. With respect to each such entity, a description of its connection to or interest in the litigation:

Not applicable.

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JURISDICTION

The district court had jurisdiction because PDE alleges violations of the First and Fourteenth Amendments. 28 U.S.C. §§1331, 1341. This Court has jurisdiction because PDE appeals from an order denying injunctive relief. *Id.* §1292(a)(1). The district court entered that order on September 12, 2022, and PDE appealed the same day.

STATEMENT OF THE ISSUES

(1) Whether the district court erred in holding that PDE likely does not have standing to challenge Policy 504.13R. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *In re SuperValu, Inc.*, 870 F.3d 763 (8th Cir. 2017); *281 Care Comm. v. Anderson*, 638 F.3d 621(8th Cir. 2011); *FEC v. Cruz*, 142 S. Ct. 1638 (2022).

(2) Whether the district court erred in holding that Policy 504.13R does not violate parents' constitutional rights to guide the care, custody, and control of their children. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel v. Granville*, 530 U.S. 57 (2000); *Parham v. J.R.*, 442 U.S. 584 (1979).

(3) Whether the district court erred in holding that Policy 504.13R does not unconstitutionally compel speech, is not a content- and viewpoint-based regulation of protected speech, and is neither overbroad nor vague. *See West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019);

Saxe v. State Coll. Area School Dist., 240 F.3d 200, 206 (3d Cir. 2001); *United States v. Stevens*, 559 U.S. 460, 480 (2010).

(5) Whether the district court erred in holding that PDE was unlikely to satisfy the remaining preliminary-injunction criteria, even if it succeeded on the merits. *See D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019); *Rodgers*, 942 F.3d at 455-56.

STATEMENT OF THE CASE

I. The Rights of Parents to Make Decisions Concerning Gender Identity

"[T]he 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*, 530 U.S. at 65. Children are "not the mere creature of the state," *Pierce*, 268 U.S. at 535, and the "right[] … to raise one's children ha[s] been deemed essential" and one of the "basic civil rights of man," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (cleaned up). These parental rights are rooted in the "historical[] ... recogni[tion] that natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602 (citing 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190).

A child's gender identity implicates the most fundamental issues concerning the child, including the child's religion, medical care, mental health, sense of self, and more. Yet despite "extensive precedent" that parents must be involved in decisions concerning these types of issues, *Troxel*, 530 U.S. at 66 (listing cases), school districts

across the country are increasingly excluding parents from decisionmaking when gender identity is involved. "In the past few years, school districts nationwide have quietly adopted policies requiring staff to facilitate and 'affirm' gender identity transitions at school without parental notice or consent—and even in secret from parents." App.79, R. Doc. 3-10, at 6. A school district in Wisconsin, for example, recently instructed teachers that "parents are 'not entitled to know their kids' identities' and that 'this knowledge must be earned.'" App.80, R. Doc. 3-10, at 7. One mother in California "went two years without knowing her sixth grader had transitioned at school." App.465, R. Doc. 3-11, at 213. "'Basically, I was the last one to find out,'" said the mother. *Id.* "'They were all saving my kid from me.'" *Id.* The mother only made the discovery "when she took her child to the hospital one day and a doctor told her. She was stunned." *Id.*

Even though "[t]ransitioning at a young age poses special risks and complications," App.81, R. Doc. 3-10, at 8, these parental exclusion policies give ultimate decisionmaking authority to children, often with input from a teacher or school employee who displaces parents' role in the process. Under parental exclusion policies, "[e]ducators and staff," not parents, "work closely with the student to determine what changes are necessary ... to ensure their safety and well-being." App.96-97, R. Doc. 3-10, at 24-25. Often, that process is formalized in a "Gender Support Plan" created by the school for the child. *See, e.g.*, App.107, R. Doc. 3-10, at 35.

These exclusionary policies are not just unconstitutional; they are harmful to both parents and children. According to Dr. Erica Anderson, a clinical psychologist who identifies as transgender and is the former president of the U.S. Professional Association for Transgender Health, "leaving parents in the dark is not the answer." App.465, R. Doc. 3-11, at 213. "'If there are issues between parents and children, they need to be addressed.'" *Id.* Such secrecy "'only postpones ... and aggravates any conflict that may exist.'" *Id.* In a world in which schools "routinely send notes home to parents about lesser matters," such as "playground tussles, missing homework, and social events," there is absolutely no justification for withholding such fundamentally important information from their parents. *Id.*

II. The First Amendment Rights of Students in Public Schools

Public-school students have First Amendment rights, and those rights do not disappear "at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Because "America's public schools are the nurseries of democracy," students must be free to express their opinions, even if their views are "unpopular." *Mahanoy Area Sch. Dist. v. B.L. by and through Levy*, 141 S. Ct. 2038, 2046 (2021). Protecting unpopular speech in public schools "ensur[es] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Despite these well-established rights, schools often seek to stamp out controversial student expression. Speech codes are the tried-and-true method of

suppressing unpopular student speech. They prohibit expression that would otherwise be constitutionally protected. App.341, R. Doc. 3-11, at 89. Speech codes punish students for undesirable categories of speech, such as "harassment," "bullying," "hate speech," and "incivility." App.340-44, R. Doc. 3-11, at 88-92. Because these policies impose vague, overbroad, content-based (and sometimes viewpoint-based) restrictions on speech, federal courts regularly strike them down. *See, e.g.*, *Speech First v. Fenves*, 979 F.3d 319, 338-39 & n.17 (5th Cir. 2020) (collecting a "consistent line of cases that have uniformly found campus speech codes unconstitutionally overbroad or vague").

Schools are increasingly adopting speech codes regarding gender identity to compel students to affirm beliefs they do not hold and that are incompatible with their deeply held convictions. So-called "preferred pronouns policies" are an increasingly used method of compelling student speech. "Preferred pronoun policies" subject students to formal discipline for referring to other students according to the pronouns that are consistent with their biological sex rather than their gender identity. Under these types of policies, a student who uses "he" or "him" when referring to a biological male who identifies as a female will be punished for "misgendering" that student. *See, e.g.*, App.363-64, R. Doc. 3-11, at 111-12. Other speech codes are written so broadly or vaguely that they effectively shut down all discussion or debate concerning transgender issues. *See, e.g.*, App.340, R. Doc. 3-11, at 88.

III. The District's Parental Exclusion and Speech Policy – Policy 504.13-R

On April 25, 2022, over fierce opposition from parents, App.319-20, 371-76, R. Doc. 3-11, at 67-68, 119-24, the Linn-Mar School Board adopted Policy 504.13-R, entitled "Administrative Regulations Regarding Transgender and Students Nonconforming to Gender Role Stereotypes." *See* App.296-302, R. Doc. 3-11, at 44-50. The Policy is designed to do three things: (1) effectuate students' "gender transition" requests; (2) keep the District's actions secret from the students' parents; and (3) punish other students who do not use a student's preferred pronouns when speaking or who voice certain opinions concerning transgender issues.

A. The District's Policy on Gender Identity Transitions

Policy 504.13-R gives "[a]ny student, regardless of how they identify," the right to meet with a school administrator or school counselor to create and implement a "Gender Support Plan." App.297, R. Doc. 3-11, at 45. A Gender Support Plan is defined as a "document that may be used to create a shared understanding about the ways in which a student's gender identity will be accounted for and supported at school." App.301, R. Doc. 3-11, at 49. When a student requests a Gender Support Plan, the school "will hold a meeting with the student within 10 school days of being notified about the request." App.297, R. Doc. 3-11, at 45. The student's parents have no right to participate in this meeting or to even know that it is happening. The Policy states that "[t]he student should agree with who is a part of the meeting, including whether their parent/guardian will participate." App.297-98, R. Doc. 3-11, at 45-46. It also

specifies that the student "will have priority of their support plan *over their parent/guardian*." App.296, R. Doc. 3-11, at 44 (emphasis added).

Students can use their Gender Support Plan to make crucial decisions about their identity, health, and education, and the District will agree to them without *any* parental involvement or notification. In particular, the student can choose to:

- Be addressed by all school employees and students by a new name. *See* App.298, R. Doc. 3-11, at 46 ("Every student has the right to be addressed by a name ... that corresponds to their gender identity.").
- Have their name changed for all "logins, email systems, student identification cards, non-legal documents such as diplomas and awards, yearbooks, and at events such as graduation." *Id.*
- Be addressed by all school employees and students by a new pronoun. *See id.* ("Every student has the right to be addressed by a ... pronoun that corresponds to their gender identity.").
- Use restrooms, locker rooms, and changing facilities that correspond to the student's gender identity. *See id.* ("With respect to restrooms, locker rooms, and/or changing facilities[,] students shall have access to facilities that correspond to their gender identity.").
- Participate in "physical education classes, intramural sports, clubs, and school events in a manner consistent with their gender identity." App.299, R. Doc. 3-11, at 47.
- Be allowed to "room with other students who share their gender identity" on overnight fieldtrips. *Id.*

While students can make these requests through a Gender Support Plan, they need not go through this process to make these requests and have them granted by the District. *See* App.297, R. Doc. 3-11, at 45.

B. The District's Exclusion of Parents from Gender-Identity Decisions

The Policy prevents parents from having any knowledge or control over their child's decisions involving gender identity. According to the Policy, "[a]ny student in seventh grade or older will have priority of their support plan over their parent/guardian," and parents have no right to know about or be "a part of the meeting" to develop a Gender Support Plan. App.296-97, R. Doc. 3-11, at 44-45. Many decisions regarding a student's gender identity will be made "regardless of age" and regardless of whether the District has the parent's consent. App.298, R. Doc. 3-11, at 46.

Importantly, the District will not tell parents whether their child has requested or been given a Gender Support Plan, whether the child has made requests or actions have been taken concerning their gender identity, or whether it has any other information that would reveal the child's "transgender status." App.296-98, R. Doc. 3-11, at 44-46. Specifically, the District "shall not disclose information that may reveal a student's transgender status to others including ... parents ... unless legally required to do so (such as national standardized testing, drivers permits, transcripts, etc.), or unless the student has authorized such disclosure." App.297, R. Doc. 3-11, at 45; *see also id.* (Students "have a right to privacy which includes the right to keep one's transgender status private at school."); *id.* ("School staff should always check with the student first before contacting their parent/guardian."). Indeed, the Policy openly encourages

children to deceive their parents by hiding the name and pronouns that they are using at school. *See id.* ("School staff should ask the student what name and pronouns they would like school officials to use in communications with their family.").

The Policy further requires that a student's Gender Support Plan and "all written records related to student meetings concerning their gender identity and/or gender transition" must be maintained in a "temporary file" that shall be "maintained by the school counselor." App.300, R. Doc. 3-11, at 48. The Policy defines "gender identity" and gender "transition" broadly to include a host of important information about a child, including "social, medical, and/or legal" information concerning any transition. App.301-02, R. Doc. 3-11, at 49-50. These "temporary" records "will only be accessible to staff members that the student has authorized in advance to do so." App.300, R. Doc. 3-11, at 48.

C. The District's Punishment of Disfavored Speech

In addition to eliminating parental rights, the Policy requires students to use other students' preferred pronouns when speaking and prohibits a vast array of protected speech. Under the Policy, "[a]n intentional and/or persistent refusal by ... students to respect a student's gender identity is a violation of school board policies 103.1 Anti-Bullying and Harassment, 104.1 Equal Educational Opportunity, and 104.3 Prohibition of Discrimination and/or Harassment based on Sex Per Title IX." App.298, R. Doc. 3-11, at 46. The Policy also prohibits "[r]epeated or intentional misgendering." App.301, R. Doc. 3-11, at 49. The Policy defines "misgendering" as

"intentionally or accidentally us[ing] the incorrect name or pronouns to refer to a person." *Id.* Potential disciplinary sanctions for violating these provisions "include suspension and expulsion." App.368, R. Doc. 3-11, at 116.

IV. PDE and This Litigation

PDE is a nationwide, grassroots membership organization whose mission is to prevent the politicization of K-12 education, including government attempts to coopt parental rights and to silence students who express opposing views. App.70, R. Doc. 3-9, at 1, ¶¶3-4. PDE furthers this mission through network and coalition building, disclosure of harmful school policies, advocacy, and, if necessary, litigation. App.70, R. Doc. 3-9, at 1, ¶5. PDE has members who are harmed by the Policy, including Parents A, B, C, D, E, F, and G. *See* App.39-69, R. Docs. 3-2 through 3-8; App.70-71, R. Doc. 3-9, at 1-2, ¶¶6-7.

Parent A's child recently completed the sixth grade at a Linn-Mar elementary school and was supposed to enroll in a Linn-Mar middle school this fall. App.40, 42, R. Doc. 3-2, at 2 & 4, ¶¶4, 13. Parent A's child is on the autism spectrum and has a sensory processing disability. App.40, R. Doc. 3-2, at 2, ¶5. Parent A has devoted "significant resources to therapy services to help [their] child understand sex-specific differences." *Id.* Still, Parent A's child "sometimes makes statements that could lead an outside observer to believe that [their] child is confused about their gender identity or expressing a 'gender-fluid' or 'non-binary' identity." *Id.* Parent A wants to ask the District on a regular basis whether their child has requested or been given a Gender

Support Plan, whether their child has made requests or actions have been taken concerning the child's gender identity, and whether the District has any other information that would reveal their child's "transgender status." App.41, R. Doc. 3-2, at 3, ¶9. Parent A wants to receive this information without seeking "permission" from their child. *Id.* Under the Policy, however, the District will withhold this information from Parent A. App.296-98, R. Doc. 3-11, at 44-46. Indeed, Parent A "repeatedly expressed [these] concerns to Linn-Mar officials and requested confirmation that the school district will not assign [their] child a Gender Support Plan or take any other gender identity-related actions without informing [Parent A] and obtaining [Parent A's] consent." App.42, R. Doc. 3-2, at 4, ¶12. But the District refused to provide those assurances. *Id.*

Parent A believes there is a substantial risk that their child will receive a Gender Support Plan or other gender "affirming" actions from District officials. App.41, R. Doc. 3-2, at 3, ¶8. Scientific studies reinforce Parent A's conclusions. *See* App.273-76, 285, 402, 449-54, R. Doc. 3-11, at 21-24, 33, 150, 197-202; App.215, R. Doc. 3-10, at 143. When this happens, Parent A wants to exercise their "fundamental right as a parent to guide their child's upbringing and to help their child navigate any issues that might arise regarding their perception of their gender identity." App.41, R. Doc. 3-2, at 3, ¶10. This is especially important for Parent A because strong parent-child relationships are critical for the development of children with autism. *See* App.389, 395, R. Doc. 3-11, at 137, 143. To avoid the harms caused by the Policy, Parent A was forced to withdraw

their child from enrollment in the Linn-Mar middle school the child was scheduled to attend. App.42, R. Doc. 3-2, at 4, ¶13. "The existence and enforcement of the Policy was the primary factor motivating [Parent A's] decision." *Id.* If the Policy is rescinded, Parent A will enroll their child in a Linn-Mar middle school in the upcoming year. *Id.*

The children of Parents B and C attend Linn-Mar High School. App.44, R. Doc. 3-3, at 1, ¶4; App.49, R. Doc. 3-4, at 1, ¶4. Parents B and C want to ask the District on a regular basis whether their children have requested or been given a Gender Support Plan, whether their children have made requests or actions have been taken concerning their children's gender identity, and whether the District has any other information that would reveal their children's "transgender status." App.45-46, R. Doc. 3-3, at 2-3, ¶8; App.51, R. Doc. 3-4, at 3, ¶10. Parents B and C want to receive this information without asking for their children's "permission." App.45-46, R. Doc. 3-3, at 2-3, ¶8; App.51, R. Doc. 3-4, at 3, ¶10. Under the Policy, however, the District will withhold this information from Parents B and C. App.296-98, R. Doc. 3-11, at 44-46. In addition, Parents B and C believe there is a substantial risk that their children will receive a Gender Support Plan or other gender "affirming" actions from District officials. App.45, R. Doc. 3-3, at 2, ¶¶5-7; App.50, R. Doc. 3-4, at 2, ¶¶6-9. Scientific studies reinforce their conclusions based on the unique medical and social situations of their children. *See* App.438, R. Doc. 3-11, at 186; App.230, R. Doc. 3-10, at 158; App.262, R. Doc. 3-11, at 10. When this happens, Parents B and C want to "exercise [their] fundamental right[s]" to guide "[their children's] upbringing[s]" and help them

"navigate any issues that might arise regarding [their] perception of [their] gender identit[ies]." App.46, R. Doc. 3-3, at 3, ¶9; App.52, Doc. 3-4, at 4, ¶11. Under the Policy, however, the Parents' roles "will be displaced by Linn-Mar administrators" who do not know their children as well as they do. App.46, R. Doc. 3-3, at 3, ¶9; App.52, Doc. 3-4, at 4, ¶12.

The children of Parents D, E, F, and G believe that people are either male or female and that a person cannot "transition" from one sex to another. App.55, R. Doc. 3-5, at 2, ¶6; App.59, R. Doc. 3-6, at 2, ¶5; App.63, R. Doc. 3-7, at 2, ¶5; App.67, R. Doc. 3-8, at 2, ¶6. Their children do not want to be forced to affirm that a biological male is a female, or vice versa. App.55, R. Doc. 3-5, at 2, ¶6; App.67, R. Doc. 3-8, at 2, ¶6; *see also* App.59, R. Doc. 3-6, at 2, ¶7; App.63, R. Doc. 3-7, at 2, ¶7. When issues involving gender identity arise (for example, in class or during school sponsored activities), their children want to speak about those topics and state their beliefs that biological sex is immutable. *E.g.*, App.67, R. Doc. 3-8, at 2, ¶¶7-8. Under the Policy, however, their children can be punished merely for expressing an opinion about the nature of biological sex, declining to use another student's "preferred pronouns," or simply for expressing discomfort about sharing bathrooms or locker rooms with students or teachers of the opposite sex. App.298, R. Doc. 3-11, at 46; App.55, R. Doc. 3-5, at 2, ¶9; App.59, R. Doc. 3-6, at 2, ¶6; App.63, R. Doc. 3-7, at 2, ¶6; App.67, R. Doc. 3-8, at 2, ¶8. As a result, their children remain silent in school environments or

avoid using sex-specific pronouns altogether. App.55, R. Doc. 3-5, at 2, ¶7; App.68, R. Doc. 3-8, at 3, ¶9.

V. District Court Proceedings

On August 2, 2022, PDE sued the District and District officials, alleging that Policy 504.13R violates (1) parents' Fourteenth Amendment rights to direct the care, custody, and control of their children; and (2) students' First and Fourteenth Amendment rights by compelling speech, regulating speech based on content and viewpoint, and imposing overbroad and vague restrictions on speech. App.9-38, R. Doc. 1, at 1-30. PDE filed suit on behalf of its members whose children attend or want to attend schools in the District, including Parents A, B, C, D, E, F, and G. App.11, R. Doc. 1, at 3, ¶¶8-9; App.18-28, R. Doc. 1, at 10-20, ¶¶42-102. PDE then moved for a preliminary injunction, asking the district court to bar the defendants from enforcing the Policy during the litigation. The district court held oral argument on September 6.

The district court denied PDE's motion.[1] The district court held that PDE likely had no standing because the Policy had never been applied to PDE's members' children and PDE's injuries were not "certainly impending." Add.15-20. Despite Supreme Court precedent, the district court never analyzed whether there was a "substantial risk" that the Policy would harm PDE's members. *Susan B. Anthony*, 573 U.S. at 158. The court also found that Parent A lacked standing because "the harm of being 'forced' out of the

[1] The district court denied PDE's motion on September 12 in a short order. App.502-12, R. Doc. 28. It issued a supplemental opinion on September 20. Add.1-28.

school district" by the Policy was "self-inflicted." Add.20. The district court further believed that PDE's injures were not redressable because "Iowa has several statutes prohibiting similar conduct as the Policy prohibits." Add.20.

On the merits of PDE's Fourteenth Amendment claim, the district court agreed that the Policy raised "legitimate concerns about whether [the District] could, or would fail to disclose to, or conceal information from, parents about their children's gender identity." Add.21. Yet the court found that PDE was unlikely to succeed on the merits of its claim because PDE had not shown that there was "certain, impending action" that the District would soon take under the Policy to interfere with PDE's members' rights. Add.21.

On the merits of PDE's challenge to the Policy's speech restrictions, the court recognized that the Policy "arguably places students in the position that they cannot fully express themselves or their beliefs." Add.23. Yet the court upheld the Policy. The Policy did not compel speech because students "do not have to refer to other students by names or pronouns" and can simply "use the universal word 'they'" to refer to another person. Add.21. The Policy was not content- or viewpoint-based because it "applies to misuse of any student's name or pronouns, including those who identify as cisgender." Add.22. The Policy was not overbroad because the District did not "intend[] to discipline accidental misuse, jokes, or opinions related to gender identity" and had not yet "applied" it that way. Add.24-25. And the Policy was not unconstitutionally vague because "it appears 'respect' means students and staff members must use a

student's preferred name and pronouns when speaking to or about them at school." Add.25.

Finally, the district court held that PDE could not satisfy the remaining preliminary factors. PDE could not show irreparable harm because the Policy had not yet denied the parents their constitutional rights, and if their children were punished for their speech, "that discipline would be subject to review and could be reversed." Add.12. The court also found that the balance of harms and public interest weighed against an injunction because enjoining the Policy would "prevent the school from disciplining ... harassment and bullying under various Title IX and Iowa civil rights-related provisions." Add.14. PDE timely appealed. *See* App.513-14, 543-44, R. Docs. 29 & 42.

STANDARD OF REVIEW

The Court "review[s] a district court's ultimate ruling on a preliminary injunction for abuse of discretion" and "its underlying legal conclusions de novo." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013). Whether a plaintiff has Article III standing is a legal conclusion that is reviewed de novo. *Rodgers*, 942 F.3d at 454. And while appellate courts ordinarily review factual findings for clear error, "First Amendment issues are not ordinary." *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009). As such, courts review the "core facts that determine a First Amendment free speech issue" de novo. *Id.* at 1205; *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First

Amendment issues we have repeatedly held that an appellate court has an obligation to 'to make an independent examination of the whole record.'").

A plaintiff seeking a preliminary injunction must establish four factors showing such relief is warranted: "(1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest." *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020) (internal quotation marks omitted). "While 'no single factor is determinative,' the probability of success factor is the most significant." *Id.*

SUMMARY OF ARGUMENT

The district court committed a litany of legal errors throughout its opinion. It applied the wrong test for standing, refusing to analyze whether there was a "substantial risk" that the Policy would harm PDE's members. *Susan B. Anthony*, 573 U.S. at 158. It found that Parent A lost standing by withdrawing their child from the school district because of the Policy, even though the Supreme Court has "never recognized a rule" that "injuries that a party purposely incurs" are insufficient to show standing. *Cruz*, 142 S. Ct. at 1647. It found that PDE lacked standing to challenge the Policy's speech restrictions because its members' children have not yet "been disciplined under the Policy," Add.18, even though "a plaintiff need not have been actually prosecuted or threatened with prosecution" to "establish injury in fact for a First Amendment challenge," *281 Care*, 638 F.3d at 627. It found that the Policy was not content-based

because it "applies to misuse of any student's name or pronouns," Add.23, even though a law is content-based when (as here) it "regulates speech based on 'the topic discussed or the idea or message expressed,'" *Rodgers*, 942 F.3d at 456. It found that any punishment PDE's members' children received for their speech was not irreparable because the punishment "would be subject to review and could be reversed," Add.12, even though "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And it held that the balance-of-harms and public-interest factors do not "merge when the defendant is a government actor," Add.12, even though "[t]he balance-of-harms and public-interest factors 'merge when the Government' ... 'is the nonmoving party,'" *Eggers v. Evnen*, 48 F.4th 561, 564-65 (8th Cir. 2022).

The district court should have granted PDE's preliminary-injunction motion. The Policy is facially unconstitutional, and PDE has standing to challenge it. The Policy deprives PDE's members of their constitutional interests in the "care, custody, and control of their children," *Troxel*, 530 U.S. at 65, and the Policy punishes PDE's members' children for expressing their deeply held beliefs. And because the Policy likely violates the constitutional rights of PDE's members, the remaining preliminary-injunction factors are readily satisfied. *See Rodgers*, 942 F.3d at 456. This Court should enter a preliminary injunction itself, or at least reverse and remand with instructions for the district court to grant that relief.

ARGUMENT

I. PDE is likely to succeed on the merits.

A. PDE likely has standing.

An association suing on behalf of its members has standing when "its members would otherwise have standing to sue in their own right," the "interests it seeks to protect are germane to the organization's purpose," and "neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Only the first *Hunt* requirement is at issue.[2] As parents, PDE's members "have standing to sue when practices and policies of a school threaten their rights and interests and those of their children." *Liddell v. Special Admin. Bd.*, 894 F.3d 959, 965-66 (8th Cir. 2018). In addition, because standing "'must be supported with the manner and degree of evidence required at the successive stages of the litigation,'" PDE must show "[a]t the preliminary injunction stage … only that each element of standing is *likely* to obtain in the case at hand." *Fenves*, 979 F.3d at 329-30 (emphasis added) (quoting *Lujan v. Def's of Wildlife*, 504 U.S. 555, 561 (1992)) (cleaned up).

[2] PDE meets the other *Hunt* requirements: the lawsuit furthers PDE's mission, App.70, R. Doc. 3-9, at 1, ¶¶3-4, and it does not require participation of individual members because PDE seeks only declaratory and injunctive relief, *see Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1022 (8th Cir. 2012).

1. PDE's members are injured by the Policy's parental-exclusion restrictions.

Throughout its opinion, the district court repeatedly stated that PDE lacked standing unless PDE showed that its injuries were "certainly impending." Add.15-20. That is not the law. PDE must show that an "injury is 'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony*, 573 U.S. at 158 (emphasis added); *see also In re SuperValu, Inc.*, 870 F.3d 763, 769 n.3 (8th Cir. 2017) (refusing to "apply only the 'certainly impending' formulation of the future injury test" because "[t]he Supreme Court has at least twice indicated that both the 'certainly impending' and 'substantial risk' standards are applicable in future injury cases"); *Attias v. Carefirst, Inc.*, 865 F.3d 620, 626-27 (D.C. Cir. 2017) ("[A] plaintiff can establish standing by satisfying *either* the 'certainly impending' test *or* the 'substantial risk' test.").

Regardless, PDE satisfies both the "certainly impending" test and the "substantial risk" test. PDE has shown at least two specific injuries-in-fact. *First*, PDE's members want to ask the District on a regular basis whether their children have been given a Gender Support Plan or the school has taken any other actions to effectuate their child's gender transition. App.41, R. Doc. 3-2, at 3, ¶9; App.45-46, R. Doc. 3-3, at 2-3, ¶8; App.51, R. Doc. 3-4, at 3, ¶10. And they want to receive this information without asking for their child's "permission." App.41, R. Doc. 3-2, at 3, ¶9; App.45-46, R. Doc. 3-3, at 2-3, ¶8; App.51, R. Doc. 3-4, at 3, ¶10. But the Policy prohibits the District from providing this information. App.296-98, R. Doc. 3-11, at 44-46.

The district court found no injury because "no one has been denied information related to their child's gender identity or Gender Support Plan" and it was "speculative" that "the information would be hidden or denied when parents ask." Add.19-20. But PDE was "not required to wait for an injury to occur in order to satisfy Article III standing requirements." *Jibril v. Mayorka*, 20 F.4th 804, 817 (D.C. Cir. 2021). And this injury is not "speculative" because the Policy *on its face* prohibits the District from providing this information to PDE's members. App.296-98, R. Doc. 3-11, at 44-46. Under the Policy, the District "shall not disclose information that may reveal a student's transgender status to others including ... parents ... unless legally required to do so (such as national standardized testing, drivers permits, transcripts, etc.), or unless the student has authorized such disclosure." App.297, R. Doc. 3-11, at 45. Moreover, even if PDE's members had asked for such information and District officials had provided it in violation of the Policy, that would not have eliminated PDE's injuries. PDE's members want to ask for this information "on a regular basis" throughout the school year. App.41, R. Doc. 3-2, at 3, ¶9; App.45-46, R. Doc. 3-3, at 2-3, ¶8; App.51, R. Doc. 3-4, at 3, ¶10. PDE would still have "no guarantee that the [District] might not tomorrow bring its [enforcement] more in line with the [Policy's] plain language." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999).

Second, PDE's members want to exercise their "fundamental right as a parent to guide their child's upbringing and to help [their] child navigate any issues that might arise regarding [their] perception of their gender identity." App.41, R. Doc. 3-2, at 3,

¶10; App.46, R. Doc. 3-3, at 3, ¶9; App.51, R. Doc. 3-4, at 3, ¶11. But the Policy prohibits PDE's members from being involved in these decisions or being notified without the "permission" of their children. Parents A, B, and C all declared that there is a "substantial risk" that their children will receive a Gender Support Plan or other gender-specific treatment from District officials without their knowledge. App.40-41, R. Doc. 3-2, at 2-3, ¶¶8, 11; App.45, R. Doc. 3-3, at 2, ¶¶5-7, 10; App.50, R. Doc. 3-4, at 2, ¶¶5-9, 14. Their conclusions are based on their own understanding of their children, *id.*, and are further reinforced by substantial scientific research, *supra* 11-12. Indeed, because of these fears, Parent A already withdrew their child from the District middle school their child was slated to attend and Parent B attempted to enroll their child in a neighboring school district. App.42, R. Doc. 3-2, at 4, ¶¶12-13; App.47, R. Doc. 3-3, at 4, ¶13.

The district court incorrectly concluded that PDE's injuries require "speculative assumptions." Add.19-20. As explained above, there is a substantial risk that PDE's members children "will express a desire for or indicate by mistake a desire for a plan" and do so "without parental consent." Add.19-20; *supra* 10-13. And the Policy *requires* students to "be given a [gender support] plan" when one is requested and to keep the information "hidden or denied when parents ask." Add.19-20; *see also* App.296-97, R. Doc. 3-11, at 44-45. There is "no doubt that [PDE] has done enough at [the preliminary-injunction] stage to establish" standing. *Jones v. Jegley*, 947 F.3d 1100, 1104

(8th Cir. 2020); *see also In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016) (standing when plaintiff "reasonably fears" an injury).

The district court found that Parent A lacks standing because Parent A "has freely withdrawn their child from the school district" and "the harm of being 'forced' out of the school district is self-inflicted." Add.20. That too is not the law. The Supreme Court has "never recognized a rule" that "injuries that a party purposely incurs" cannot show Article III standing. *Cruz*, 142 S. Ct. at 1647. That is because "an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *Id.* Here, Parent A was forced to withdraw their child from their Linn-Mar middle school because of the Policy (injury and causation), and if the Policy is rescinded or enjoined, Parent A will enroll their child in the middle school the following year (redressability). App.42, R. Doc. 3-2, at 4, ¶¶12-13. Parent A has standing.

2. PDE is injured by the Policy's restrictions on student speech.

"To establish injury in fact for a First Amendment challenge to a state [provision], a plaintiff need not have been actually prosecuted or threatened with prosecution." *281 Care*, 638 F.3d at 627. Rather, "the plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." *Id.* "Self-censorship can itself constitute injury

in fact." *Id.* "Reasonable chill exists when a plaintiff shows an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution." *Id.* (cleaned up).

PDE satisfies those elements. The children of PDE's members want to engage in speech that is "arguably affected with a constitutional interest," *Susan B. Anthony*, 573 U.S. at 161 (cleaned up); *e.g.*, App.55, R. Doc. 3-5, at 2, ¶¶6-7; App.67, R. Doc. 3-8, at 2, ¶¶6-8. Their speech is "arguably proscribed" by the Policy. *Susan B. Anthony*, 573 U.S. at 162. And there is a "substantial" threat of the District enforcing the policy, *Susan B. Anthony*, 573 U.S. at 164, because the Policy is "recently enacted" and there is no "compelling contrary evidence" that the Policy will not be enforced, *Fenves*, 979 F.3d at 335 (cleaned up). PDE plainly has standing. *See id.* at 330-38 (standing to bring pre-enforcement challenge a university policy prohibiting "hostile or offensive" speech); *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120-22 (11th Cir. 2022) (similar).

In finding that PDE lacked standing, the district court again applied the wrong standard. It found that PDE lacked an injury in fact because PDE does not allege that any of its members children "ha[ve] been disciplined under the Policy" or "ha[ve] been disciplined for the misuse or failure to respect another child's preferred name or pronouns." Add.18. But PDE brings a *pre-enforcement* challenge to a government policy. This Court has "repeatedly rejected the argument that a plaintiff must risk prosecution before challenging a statute under the First Amendment." *Jones*, 947 F.3d at 1104. "Self-censorship can constitute an injury in fact for a free-speech claim when a plaintiff

reasonably decides to chill her speech in light of the challenged [provision]." *Id.* at 1103 (cleaned up).[3]

The district court puzzlingly found that PDE's members did not state "with sufficient specificity ... what their children might say" that will cause them to be "discipline[d] under the Policy." Add.19. Not so. One student, for example wants to "state [their] belief that biological sex is immutable," "refer[] to another student according to their biological sex rather than their gender identity," "disagree[] with another student's assertion about whether they are male or female," "stat[e] that a biological male who identifies as female should not be allowed to compete in women's sports," and "express[] discomfort about sharing bathrooms with teachers or students of the opposite biological sex." *E.g.*, App.67, R. Doc. 3-8, at 2, ¶¶7-8. This student also "do[es] not want to be forced to affirm that a biological male is actually a female, or vice versa," or "call someone a 'he' or a 'she' (or to use some other form of 'preferred pronouns') that contradict [the student's] deeply held beliefs." App.55, R. Doc. 3-5, at 2, ¶6. The Policy, "on [its] face, prohibit[s]" these expressions. *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006). PDE has standing to challenge the Policy's speech restrictions.

[3] *Turkish Coalition of America v. Bruininks*, 678 F.3d 617 (8th Cir. 2012), is inapposite. There, the plaintiff lacked standing because the defendant had no "ability whatsoever" to punish the student and it was wholly "speculative" that the student could be harmed through other means. *Id.* at 622. Here, PDE challenges a government regulation that plainly states that students will be punished for violating its speech prohibitions.

3. PDE's injuries are caused by the Policy and redressable by a favorable decision from this Court.

Because the Policy injures PDE's members, causation and redressability are readily satisfied. The Policy causes PDE's members' injuries, as explained above, and these injuries are redressable by a decision enjoining the District from enforcing the Policy. *See Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) ("Causation and redressability typically overlap as two sides of a causation coin. After all, if a government action causes an injury, enjoining the action usually will redress that injury." (cleaned up)); *Vitolo v. Guzman*, 999 F.3d 353, 359 (6th Cir. 2021).

The district court found that even if the Policy injured PDE's members these injuries were not redressable because "Iowa has several statutes prohibiting similar conduct as the Policy prohibits." Add.20 (citing Iowa Code §§280.28, 216.9). As an initial matter, the Constitution is "the supreme Law of the Land." U.S. Const. art. VI. If the District is enjoined from doing something because it violates the Constitution, the District cannot rely on another state statute to continue doing the same unconstitutional actions. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015); *see also, e.g.*, *Hollis v. Lynch*, 827 F.3d 436, 442 (5th Cir. 2016) (rejecting the argument that the plaintiff lacked standing due to a state law because "if we were to hold Section 922(o), a federal law, unconstitutional on Second Amendment grounds, it is likely that Section 46.05, a state law, would also be unconstitutional").

Regardless, nothing in Iowa state law requires the District to take the actions challenged in the Policy. Iowa Code §280.28 prohibits "harassment" and "bullying," which requires, among other things, a showing of an "objectively hostile school environment" and "substantial[]" harms to the student. Iowa Code §280.28(2)(b). The Policy's speech prohibitions, by contrast, are far broader and contain no similar limitations, punishing students simply for failing "to respect a student's gender identity" or "misgendering." App.298, 301, R. Doc. 3-11, at 46, 49. Likewise, Iowa Code §216.9 states that "[i]t is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in any program or activity." Iowa Code §216.9(1). But this general law prohibiting schools from discriminating based on gender identity obviously does not require schools to withhold information from a child's parents regarding gender identity or punish students for "misgendering" or "disrespectful" expressions. PDE has standing.

B. The Policy likely violates parents' Fourteenth Amendment rights.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Amendment "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel*, 530 U.S. at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Among these unenumerated rights are those that are "deeply rooted in this Nation's

history and tradition" and "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (cleaned up).

The "liberty 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*, 530 U.S. at 65. Nearly 100 years ago, the Supreme Court held that the "liberty" protected by the Fourteenth Amendment includes the right of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer*, 262 U.S. at 399, 401. Two years later, the Court held that the "liberty of parents and guardian" includes the right "to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. As the Court explained, "[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.

Again and again, the Supreme Court has affirmed the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66 (listing cases). Simply put, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing 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.*

Policy 504.13-R violates parents' constitutional rights. The Policy deprives parents of their right to know what actions the District is taking with regards to fundamentally important decisions about their children. PDE's members want to ask on a regular basis whether their children have requested or been given a Gender Support Plan, whether their children have made requests or actions have been taken concerning their children's gender identity, and whether the District has any other information that would reveal their children's "transgender status." Yet the Policy *prohibits* the District from telling parents this information. App.296-98, R. Doc. 3-11, at 44-46. It is impossible for parents to direct the "care, custody, and control of their children" when the government deliberately withholds critical information from them.

The Policy also deprives parents of the right to have any input or control over fundamental decisions concerning gender identity. Under the Policy, the parent has no control over how the District treats their child. Without *any* parental input, the District can (1) require all employees and students to address the child by a new name; (2) require all employees and students to address the child through a new pronoun; (3) have the child's name changed on numerous government documents, including identification cards, yearbooks, and diplomas; (4) allow the child to use the restrooms, locker rooms, and changing facilities that correspond with the child's gender identity; (5) allow the child to participate in physical education classes, intramural sports, clubs, and other events that correspond with the child's gender identity; and (6) allow the child to room with other students who share the child's gender identity. App.298-99, R. Doc.

3-11, at 46-47. These are *fundamental decisions* implementing the most basic questions about a child's life, including issues of religion, medical care, mental and emotional well-being, the child's sense of self, and more. *See Kanuszewski v. Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 411 (6th Cir. 2019) ("Just as it represents a harm to parents when the state denies them their right to direct the education and religious upbringing of their children, it represents a harm when the state denies parents the right to direct the medical care of their children.").

The district court recognized that the Policy raised "legitimate concerns about whether [the District] could, or would fail to disclose to, or conceal information from, parents about their children's gender identity." Add.21. Yet the court found that PDE was unlikely to succeed on the merits of its claim solely because PDE had not shown that there was "any certain, impending action taken under the Policy that will interfere with [PDE's members'] right[s]." Add.21. But as explained above, PDE need not show a "certain, impending" harm to have standing to challenge the Policy, *see Susan B. Anthony*, 573 U.S. at 158, and it satisfies this requirement in any event, *supra* 20-23.

The district court could not defend the Policy because it is indefensible. The government must afford a "presumption of validity" to parental decisions unless there is clear evidence to the contrary. *Troxel*, 530 U.S. at 67. As "long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*

at 68-69; *see also Ricard v. USD 475 Geary Cnty.*, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (envisioning a "particularized and substantiated concern that disclosure to a parent could lead to child abuse, neglect, or other *illegal* conduct"). But "[s]imply because the decision of a parent is not agreeable to a child … does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603.

Here, the District "not only fail[s] to presume" that parents will "act in the best interest of their children, [it] assume[s] the exact opposite." *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003). The District has no right to deprive parents of this critical information and control concerning their children. Indeed, the District requires parental notification and consent before taking actions that pale in importance. *See, e.g.*, App.307, R. Doc. 3-11, at 55 (requiring a "signed and dated authorization from the parent/legal guardian" before a student can receive a "standard dose acetaminophen or ibuprofen"); App.304, R. Doc. 3-11, at 52 (requiring parental notification "as soon as possible" when "a student becomes ill ... at school or a school-sponsored activity"); App.313, R. Doc. 3-11, at 61 (requiring parents to "be informed about the risk of [school-sponsored] activit[ies]").

Importantly, in its brief below, the District never claimed that the Policy could survive strict scrutiny. *Kanuszewski*, 927 F.3d at 419; *see also Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (applying strict scrutiny). For good reason: the District has no compelling interest in "withholding or concealing [this information] from the parents

of minor children." *Ricard*, 2022 WL 1471372, at *8. And while there could be a "particularized and substantiated concern that disclosure to a parent could lead to child abuse, neglect, or some other *illegal* conduct," *id.*, the Policy is not remotely tailored to address these circumstances. The Policy "directly contravene[s] the traditional presumption that a fit parent will act in the best interest of his or her child," and it "fail[s] to provide any protection for [parents'] fundamental constitutional right to make decisions concerning the rearing of [their] own [children]." *Troxel*, 530 U.S. at 69-70. The Policy violates the Fourteenth Amendment.

C. The Policy likely violates the First and Fourteenth Amendments.

Besides violating parents' rights, the Policy also unconstitutionally compels student speech, regulates student speech based on content and viewpoint, and is overbroad and vague.

Compelled Speech. The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). "[T]he latter is perhaps the more sacred of the two rights." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). "After all, the 'choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control.'" *Id.* (alteration in original) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000)).

The Policy is no different from the one requiring schoolchildren to pledge allegiance to the flag in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Like the Board in *Barnette*, the District is requiring students to affirmatively declare statements that they believe to be false and affirm ideologies with which they deeply disagree. The children of Parents D-G believe that biological sex is inherent and immutable. App.55, R. Doc. 3-5, at 2, ¶6; App.59, R. Doc. 3-6, at 2, ¶5; App.63, R. Doc. 3-7, at 2, ¶5; App.67, R. Doc. 3-8, at 2, ¶6. They "bear no ill will" towards other students, but they do not want to be forced to "affirm" that a biologically male student is actually a female—or vice versa—or that another student is neither male nor female. *E.g.*, App.55, R. Doc. 3-5, at 2, ¶6; App.67, R. Doc. 3-8, at 2, ¶6. Yet that is exactly what the Policy requires. *See* App.298, 301, R. Doc. 3-11, at 46, 49.

Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021), is directly on point. There, the Sixth Circuit held that a similar "preferred pronoun" requirement was "anathema to the principles underlying the First Amendment." *Id.* at 510. "Indeed, the premise that gender identity is an idea 'embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.'" *Id.* (quoting *Dale*, 530 U.S. at 660). The District cannot force the children of Parents D-G to "mouth support" for beliefs they do not hold. *Janus*, 138 S. Ct. at 2463.

The district court held that the Policy did not unconstitutionally compel speech because the Policy does not literally "require[] students to speak to other specific

students or do so using their names or pronouns." Add.22. But the compelled-speech doctrine is not so easily avoided. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (state cannot require message on license plates, even though no one is required to drive); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 575-76 (1995) (parade organizers cannot be forced to include certain groups in a parade, even though no one is required to hold a parade). Because using pronouns is a "'virtual necessity'" for engaging in any conversation, the compelled-speech doctrine applies. *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1325 (M.D. Ala. 2019) (quoting *Wooley*, 430 U.S. at 715); Indeed, trying not to "use any pronouns" would be "impossible to comply with." *Meriwether*, 992 F.3d at 517. "For purposes of the First Amendment, there is no difference between a law compelling an employee to utter a [person's] preferred pronoun and prohibiting an employee from uttering a pronoun the [person] does not prefer." *Taking Offense v. State*, 66 Cal. App. 5th 696, 710-11 (2021).

The district court found that students "do not have to refer to other students by names or pronouns" and could simply "use the universal word 'they'" to refer to another person. Add.22. But forcing a student to modify their message by staying silent or using the words "they" or "them" to refer to one person *is compelled speech*. The government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. The District "cannot force

[students] to choose between carrying a government message" and remaining silent in another student's presence at school. *Doe 1*, 367 F. Supp. 3d at 1326.

The district court's belief that students could use "they" or "them" likewise ignored the Policy's plain language. The Policy prohibits students from using the "incorrect ... pronouns to refer to a person." App.301, R. Doc. 3-11, at 49. If a person prefers to be called "she/her," *e.g.*, App.302, R. Doc. 3-11, at 50, students must use those words—using "they" or "them" would be prohibited. Moreover, the district court's belief that some "[a]dolescents often go about their school day not interacting with other students," Add.22, was not only unrealistic; it also ignored the fact that the children of PDE's members *do* "know[] and interact[] with transgender students," *e.g.*, App.67, R. Doc. 3-8, at 2, ¶6. Nor does the Policy require that the student's expression be made in the presence of the individual whose gender identity is not being "respect[ed]." App.298, 301, R. Doc. 3-11, at 46, 49.

Although the district court recognized that the Policy "arguably places students in the position that they cannot fully express themselves and their beliefs," it believed the Policy was constitutional because "schools may legitimately restrict First Amendment rights in certain limited circumstances." Add.23. True, the Supreme Court has identified "specific categories of student speech that schools may regulate in certain circumstances." *Mahanoy*, 141 S. Ct. at 2045. But the district court never found that any of these narrow circumstances actually applies. That is because none do. *See id.* "[P]ublic school students, like all other Americans, have the right to express unpopular ideas on

public issues, even when those ideas are expressed in language that some find inappropriate or hurtful." *Id.* at 2049 (Alito, J., concurring) (cleaned up); *see also Tinker*, 393 U.S. at 509 (schools cannot suppress speech merely "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). Indeed, courts regularly enjoin similar attempts by public schools to violate student speech rights. *See, e.g., Saxe*, 240 F.3d at 206 (school policy prohibiting "harassment" unconstitutional). The Policy is no exception.

Content- and Viewpoint-Discrimination. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victim's Bd.*, 502 U.S. 105, 118 (1991) (cleaned up). "Content-based regulations" are "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Accordingly, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). In addition, "the First Amendment's hostility to content-based regulation extends" to "restrictions on particular viewpoints." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (cleaned up). Viewpoint discrimination is flatly prohibited. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).

Here, the Policy disciplines students for both the content and viewpoint of their speech. The Policy prohibits speech that does not "respect a student's gender identity"

and speech that "uses the incorrect name or pronouns to refer to a person." App.298, 301, R. Doc. 3-11, at 46, 49. This is a classic content-based and viewpoint-based regulation of speech. *See, e.g.*, *Saxe*, 240 F.3d at 206 (bans on "'harassment'" covering speech impose "'content-based'" and "'viewpoint-discriminatory'" restrictions on that speech); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (school policy allowing only "responsible" speech was likely an unconstitutional content-based restriction). Moreover, the District has no interest, compelling or otherwise, in forbidding students from expressing their political or moral beliefs, and the Policy is not narrowly tailored to achieve any legitimate interest. *See Willson v. City of Bel-Nor*, 924 F.3d 995, 1001 (8th Cir. 2019).

The district court held that the Policy was content-neutral because it "applies to misuse of any student's name or pronouns, including those who identify as cisgender." Add.23. As an example, the court stated that the Policy would prohibit students from calling a boy "Nathaniel" if he "prefers the nickname Nate" and "if Nate is a cisgendered male, the Policy bars anyone from calling Nate 'her.'" Add.23-24. But the fact that the Policy applies to all students (not just transgender and nonbinary students) is irrelevant. A law is content based if "its application depends on the 'communicative content' of the speech." *Rodgers*, 942 F.3d at 456 (quoting *Reed*, 135 S. Ct. at 2226). Here, the Policy's application depends on the "communicative content" of a student's speech. For example, if a student says "he" or "him," when another student prefers "she," "her," "they," or "them," the student has violated the Policy. That is a paradigmatic

content-based regulation. *Id.*; *see also Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 791 (8th Cir. 2015) (a law is not content neutral if it is "concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech" (cleaned up)).

The district court also found that the Policy was viewpoint neutral because the Policy "has not been shown to penalize students for expressing views that there are only two genders or that gender dysphoria does not exist" or "that it penalizes opposite expression." Add.24. But PDE brought a *facial* challenge, so no evidence of unlawful prosecutions based on viewpoint is needed. *See 281 Care*, 638 F.3d at 628 ("The Supreme Court has repeatedly held that plaintiffs have standing to bring pre-enforcement challenges" to restrictions on protected speech, "even when those [restrictions] have never been enforced."). Moreover, "a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Iancu*, 139 S. Ct. at 2301 (law prohibiting "immoral or scandalous" trademarks was an unlawful viewpoint-based regulation). Here, the Policy plainly targets "ideas that offend." *Id.* Speech that "respect[s] a student's gender identity" is allowed, but speech that "[dis]respect[s]" a student's gender identity is not. App.298, R. Doc. 3-11, at 46; *see also* App.301, R. Doc. 3-11, at 49 (using the incorrect name or pronouns "is a form of bullying and harassment"). That the Policy on its face discriminates based on viewpoint should have "ended the matter." *Iancu*, 139 S. Ct. at 2302.

The district court held that "even if the Policy restricts free speech rights of

students to some degree, schools have more leeway to do so in a school setting." Add.24. But the court again never explained why any of the limited exceptions in the school setting apply. Nor could it. The First Amendment prohibits content- and viewpoint-based regulations even in the school setting. *See, e.g.*, *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 170-74 (D. Mass. 1994) (school dress code prohibiting clothing that "harasses" or "demeans" was unconstitutional speech restriction).

Overbreadth. The First Amendment prohibits schools from adopting regulations of students that are "so broad as to 'chill' the exercise of free speech and expression." *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995). "Because First Amendment freedoms need breathing space to survive," the government "may regulate in the area only with narrow specificity." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (cleaned up). Schools must carefully craft their regulations "to punish only unprotected speech and not be susceptible of application to protected expression." *Id.*

The Policy is unconstitutionally overbroad. Countless forms of protected speech could be perceived as failing to "respect a student's gender identity." App.298, R. Doc. 3-11, at 46. Consider the statement: "I have no 'ill-will towards' you, but I 'believe[] that people are created either male or female and that a person cannot 'transition' from one sex to another.'" App.67, R. Doc. 3-8, at 2. This is protected speech, yet it unquestionably fails to show "respect" to the student's gender identity. The Policy also does not limit its reach to speech made on school grounds, *see* App.298, R. Doc. 3-11,

at 46, even though the District's ability to punish speech made off school grounds is extremely limited, *see Mahanoy*, 141 S. Ct. at 2046. Courts regularly find these types of far-reaching school policies to be unconstitutionally overbroad. *See, e.g.*, *Saxe*, 240 F.3d at 215-16 (high school speech policy punishing "harassment" was overbroad because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech"); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 701-02 (W.D. Penn. 2003) (speech policy prohibiting "abusive," "inappropriate," and "offen[sive]" language was overbroad); *Cartwright*, 32 F.4th at 1125 (policy against "discriminatory harassment" was overbroad)

Surprisingly, the district court held that the Policy was not overbroad because PDE did not "show[] [that] the Policy is *intended* to discipline accidental misuse, jokes, or opinions related to gender identity in general," Add.24-25 (emphasis added); *see also* Add.25 (analyzing the "purpose" of the Policy), or that the Policy was "being applied beyond its legitimate sweep," Add.25. But the government's good intentions and enforcement history are of no moment in an overbreadth challenge. *See Legend Night Club v. Miller*, 637 F.3d 291, 301 (4th Cir. 2011) (finding statute overbroad despite government's assertion that the statute "has been, and will be, enforced only against adult entertainment establishments" because the Court could not "read the statute [to] apply only to those licensees"); *Stevens*, 559 U.S. at 480 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). What matters is whether the Policy—on its face—is overbroad.

The district court tried to narrow the Policy's reach, stating that the Policy provides only that "a student will be punished for *intentional and repeated* misuse of name or pronoun and behavior *targeting* specific people." Add.25 (emphasis added). But the Policy contains no such limitations. The Policy prohibits "[a]n intentional *and/or* persistent refusal by ... students to respect a student's gender identity." App.298, R. Doc. 3-11, at 46 (emphasis added). In addition, the Policy prohibits "[r]epeated *or* intentional misgendering," which is defined as "intentionally *or accidentally* us[ing] the incorrect name or pronouns to refer to a person." App.301, R. Doc. 3-11, at 49 (emphasis added). Courts cannot "impose a limiting construction on a statute" unless it is "readily susceptible to such a construction." *Stevens*, 559 U.S. at 481 (cleaned up); *see also Willson*, 924 F.3d at 1004 ("This court will not rewrite a law to conform it to constitutional requirements." (cleaned up)). The Policy is overbroad.

Vagueness. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A government policy is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A policy is also unconstitutionally vague when it has no "explicit standards for those who apply them" and thus "impermissibly delegates basic policy matters to [officials] for resolution on an ad hoc

and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-09.

This principle of clarity is especially demanding when First Amendment freedoms are at stake. If the challenged law "interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). "Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law." *Scull v. Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959).

The Policy is void for vagueness because it gives students no guidance about what speech is permitted and what speech isn't. The Policy doesn't specify what constitutes expression that does not "respect a student's gender identity," and whether a name or pronoun is "incorrect" turns entirely on another individual's subjective preferences. App.298, 301, R. Doc. 3-11, at 46, 49; *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1310 (8th Cir. 1997) ("[T]he failure to define the pivotal term of a regulation can render it fatally vague."). This absence of a clear standard also creates a serious risk that school officials will enforce the policy in an arbitrary manner, determining on an "ad hoc and subjective basis" what speech is "disrespectful" and deserves punishment and what speech is acceptable. *Grayned*, 408 U.S. at 109; *Stephenson*, 110 F.3d at 1311 (school district's policy prohibiting "gang" symbols was void for vagueness); *Westfield High*, 249 F. Supp. 2d at 127 (speech policy allowing only

"responsible" speech unconstitutionally vague because it "reserves a measure of judgment and discretion to whatever school administrator a student happens to turn for advice on the matter").

The district court acknowledged that "'respect' could mean a variety of things." Add.25. Yet it found the Policy not vague because "[g]iven its position under a section about names and pronouns, it appears 'respect' means students and staff members must use a student's preferred name and pronouns when speaking to or about them at school." Add.25. But the Policy is not "readily susceptible to such a construction," *Stevens*, 559 U.S. at 481 (cleaned up), and courts cannot "rewrite a law to conform it to constitutional requirements," *Willson*, 924 F.3d at 1004 (cleaned up). The district court mistakenly also focused on whether there was "evidence" that the Policy "leads to arbitrary or discriminatory enforcement." Add.26. Again, because PDE brought a *facial* vagueness challenge, enforcement history is irrelevant. *See 281 Care*, 638 F.3d at 628.

II. PDE satisfies the remaining preliminary-injunction factors.

Because PDE is likely to succeed on the merits, the remaining preliminary injunction factors are readily satisfied. *See, e.g.*, *D.M. by Bao Xiong*, 917 F.3d at 1004 (finding remaining factors satisfied to prevent likely violation of Fourteenth Amendment rights); *Rodgers*, 942 F.3d at 456 ("Generally, if a party shows a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are deemed to have been satisfied." (cleaned up)).

Irreparable Injury. A "'presumption of irreparable injury flows from a violation

of constitutional rights.'" *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)); *see also Dorce v. Wolf*, 506 F. Supp. 3d 142, 145 (D. Mass. 2020) (""The deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (quoting *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 217 (D.D.C. 2020))). Without an injunction, PDE's members will be denied their constitutional rights as parents to know about, influence, and control the most fundamental decisions concerning their children. *See D.M. by Bao Xiong*, 917 F.3d at 1004 (violation of students' Fourteenth Amendment rights was irreparable harm). The children of PDE's members also will be deprived of their First Amendment rights to free speech. *See Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Reflecting its flawed standing and merits analysis, the district court found that PDE had proved only that it was "possible" that the Policy violated the parents' constitutional rights. Add.11. That is wrong, as explained above. The district court also believed that if the District ultimately "disciplined children for violation of the Policy, that discipline would be subject to review and could be reversed, and thus, not irreparable." Add.12. But the students' speech is being *chilled* by the Policy right now. It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod,* 427 U.S. at 373.

Balance of Equities and Public Interest. In determining whether to grant a preliminary injunction, "[t]he balance-of-harms and public-interest factors 'merge when

the Government' ... 'is the nonmoving party.'" *Eggers*, 48 F.4th at 564-65 (alteration omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).[4] These factors favor injunctive relief because it is "'always in the public interest to prevent the violation of a party's constitutional rights.'" *D.M. by Bao Xiong*, 917 F.3d at 1004 (quoting *Awad v. Ziriax*, 670 F.3d 111,1132 (10th Cir. 2012)). Nor does the District have any valid interest in stripping parents of their constitutional rights or suppressing protected speech. *See Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020) (There is no "legitimate interest in enforcing an unconstitutional ordinance.").

The district court held that the balance of harms favored the District because a preliminary injunction "would prevent enforcement of the entire Policy because [PDE] has challenged the entire administrative Policy." Add.14. Thus, the district court believed, a preliminary injunction "would block students from any protection from

[4] Despite Supreme Court and Eighth Circuit precedent, the district court held that the balance of equities and the public interest factors do *not* merge when the government opposes a preliminary injunction motion. Add.12-13 & n.1. In doing so, the district court questioned whether PDE had "intentional[ly] meant to misguide the Court" and it found that PDE had provided "sloppy, poor writing for which there is little excuse." Add.12-13 n.1. But PDE accurately stated the law. It is not just this Court that has found that these factors merge; countless others have as well. *See Eggers*, 48 F.4th at 564-65 (listing cases); *see also, e.g.*, *MediNatura, Inc. v. FDA*, 998 F.3d 931, 945 (D.C. Cir. 2021) ("If the government is the party sought to be enjoined, the public interest and balance of the equities factors merge."); *Roman v. Wolf*, 977 F.3d 935, 940-41 (9th Cir. 2020) ("Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge."); *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (same); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 295 (2d Cir. 2021) (same); *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (same); *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020) (same).

harassment and bullying on the basis of gender identity," would "prevent the school from disciplining such harassment and bullying under various Title IX and Iowa civil rights-related provisions," and would prevent schools from "step[ping] in and stop[ping] the bullying and would leave a vulnerable child with no remedy." Add.14.

The district court's fears are obviously wrong. PDE challenged only the Policy. PDE did not challenge Title IX or any other Iowa state law. If the District is enjoined from enforcing the Policy, those state and federal laws will remain in place and are enforceable. Indeed, the School District did not adopt the Policy until April 2022, App.302, R. Doc. 3-11, at 50, and no other school district in Iowa (to PDE's knowledge) has a similar policy. The District presumably could have enforced these state and federal laws before the Policy was adopted. And if the District believed that PDE's requested injunction was too broad, it was free to argue for a narrower one that would still remedy PDE's injuries. But it never did. The court had no authority to deny PDE injunctive relief on the grounds that the Policy contained other requirements that the district court found desirable. *Cf. Dakotans for Health v. Noem*, --- F.4th ---, 2022 WL 16559224, at *8 (8th Cir. 2022) (a preliminary injunction must "remedy ... the specific harms shown by the plaintiffs" (cleaned up)). And even after an injunction, the District would remain free to try to craft a new policy that does not violate the Constitution. *See, e.g.*, *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 927, 935-36 (W.D. Va. 2012).

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction.

Dated: November 3, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 12,349 words, excluding the parts exempted by Rule 32(f). This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

The electronic version of the brief has been scanned for viruses and is virus-free.

Dated: November 3, 2022 */s/ J. Michael Connolly*

VIRUS CHECK CERTIFICATION

The electronic version of the addendum has been scanned for viruses and is virus-free.

Dated: November 3, 2022 */s/ J. Michael Connolly*

CERTIFICATE OF SERVICE

I certify that on November 3, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification to all counsel of record.

/s/ J. Michael Connolly