

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, No. 1:22-cv-00078**

**BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM, INC.; AMERICAN
CORNERSTONE INSTITUTE; AMERICAN PRINCIPLES PROJECT; AMERICAN
VALUES; CENTENNIAL INSTITUTE AT COLORADO CHRISTIAN UNIVERSITY;
CITIZENS UNITED; CITIZENS UNITED FOUNDATION; COMMITTEE FOR JUSTICE;
COMMON SENSE CLUB; CONCERNED WOMEN FOR AMERICA; DR. JAMES
DOBSON FAMILY INSTITUTE; EAGLE FORUM; FAITH AND FREEDOM COALITION;
FAMILY RESEARCH COUNCIL; FOCUS ON THE FAMILY; NATIONAL CENTER FOR
PUBLIC POLICY RESEARCH; PROJECT 21 BLACK LEADERSHIP NETWORK;
SARAH PERRY; TEA PARTY PATRIOTS ACTION, INC.; THE FAMILY LEADER;
AND YOUNG AMERICA'S FOUNDATION SUPPORTING APPELLANT AND REVERSAL**

J. MARC WHEAT

Counsel of Record

ADVANCING AMERICAN FREEDOM, INC.

801 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 780-4848

MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

November 10, 2022

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The amici curiae Advancing American Freedom, Inc.; American Cornerstone Institute; American Principles Project; American Values; Centennial Institute at Colorado Christian University; Citizens United; Citizens United Foundation; Committee for Justice; Common Sense Club; Concerned Women for America; Dr. James Dobson Family Institute; Eagle Forum; Faith and Freedom Coalition; Family Research Council; Focus on the Family; National Center for Public Policy Research; Project 21 Black Leadership Network; Sarah Perry; Tea Party Patriots Action, Inc.; The FAMiLY LEADER; and Young America's Foundation are nonprofit corporations. They do not issue stock, and are neither owned by nor are the owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt securities to the public. The corporations are operated by volunteer boards of directors.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT..... i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. The Linn-Mar Community School District Transgender Policy Flouts the Freedom of Parents to Direct the Upbringing, Education, and Care of Their Children as a Fundamental Right..... 10

II. The Linn-Mar Community School District Transgender Policy Suppresses First Amendment Free Speech and Religious Free Exercise Rights..... 17

III. The Linn-Mar Community School District Transgender Policy Violates the Protection of Pupil Rights Amendment of 1978 19

CONCLUSION..... 21

CERTIFICATE OF COMPLIANCE..... 23

VIRUS CHECK CERTIFICATION..... 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases

<i>American Canoe Association Inc. v. City of Louisa Water and Sewer Comm'n</i> , 389 F.3d 536 (6th Cir. 2004).....	20
<i>Espinoza v. Mont. Dep't of Revenue</i> , 140 S. Ct. 2246 (2020)	18
<i>Federal Election Commission v. Akins</i> , 524 U.S. 11 (1998)	20
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	20
<i>Manzano v. South Dakota Dep't of Soc. Svcs.</i> , 60 F.3d 505 (8th Cir. 1995).....	10
<i>Meyer v. State of Nebraska</i> , 262 U.S. 390 (1923)	13
<i>Moore v. East Cleveland</i> , 431 U.S. 494 (1977)	18
<i>Obergefell v. Hodges</i> , 576 U.S. ____ (2015)	18
<i>Parham v. J. R.</i> , 442 U.S. 584 (1979)	14, 15
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	13, 14
<i>Prince v. Commonwealth of Massachusetts</i> , 321 U.S. 158 (1944)	13, 14, 18
<i>Pub. Citizen v. U.S. Dep't of Justice</i> , 491 U.S. 440 (1989)	20

<i>Quilloin v. Walcott</i> , 434 U.S. 246 (1978)	14
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	11
<i>Robertson v. Allied Sols., LLC</i> , 902 F.3d 690 (7th Cir. 2018).....	20
<i>Sanchez v. State</i> , 692 N.W.2d 812 (Iowa 2005).....	11
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	16
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816 (1977)	14
<i>Spiker v. Spiker</i> , 708 N.W.2d 347 (Iowa 2006).....	9, 10, 11
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	11, 16, 20
<i>Washington v. Glucksburg</i> , 521 U.S. 702 (1997)	16
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	13, 19

Constitutional Provisions and Statutes

U.S. Const. amend. I	10, 17
U.S. Const. amend. XIV	10, 17
Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h.....	19
All Writs Act, 28 U.S.C. § 1651	21

28 U.S.C. § 2201 20, 21

42 U.S.C. § 1983 21

Regulations

34 CFR Part 98..... 19

Rules

FRAP 29(a)(2)..... 1

Other Authorities

Betsy DeVos, Speech at Hillsdale College, October 19, 2020. Transcript available at <https://blog.acton.org/archives/117383-redemption-not-retreat-betsy-devos-vision-for-redeeming-u-s-education.html> 9

Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 PA. L. Rev. 613 (1999) 20

<http://policy.linnmar.k12.ia.us/policy/50413-r-administrative-regulations-regarding-transgender-and-students-nonconforming-gender#:~:text=The%20Linn%2DMar%20Community%20School,to%20receive%20supports%20at%20school>..... 12, 17

<https://www.linnmar.k12.ia.us/district/departments/student-support-services/health-services/> 12

National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (1983)..... 7, 9

Russell Kirk, *The Conservative Constitution* (1990)..... 17, 18

Russell Kirk, *The Politics of Prudence* (1993)..... 7

STATEMENT OF INTEREST OF *AMICI CURIAE*

Advancing American Freedom, Inc., (“AAF”) states under FRAP 29(a)(4)(E) that no counsel for a party other than AAF authored this brief in whole or in part, and no counsel or party other than AAF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. FRAP 29(a)(2).

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom of speech and the free exercise of religious belief. AAF believes that a person’s freedom of speech and the free exercise of a person’s faith are among the most fundamental of individual rights and must be secured, and that parental rights have been established beyond debate as an enduring American tradition.¹

The American Cornerstone Institute is a nonpartisan, not-for-profit organization founded by world-renowned pediatric neurosurgeon and 17th Secretary of the Department of Housing and Urban Development Dr. Benjamin S. Carson. The Institute’s mission is to educate the public on the importance of Faith, Liberty,

¹ All parties received timely notice and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amicus Curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Community, and Life to the continued success of the United States of America. The Institute believes the liberty interest of a parent to guide their child's education is a fundamental right and an enduring American tradition.

American Principles Project is the premier conservative political organization engaging in campaigns and elections and working to defend the American family in politics.

American Values, led by President Gary Bauer, is a public policy educational group committed to parents playing the central role in the education of America's children.

The Centennial Institute at Colorado Christian University works to enhance public understanding of the most important issues relating to faith, family, and freedom. We support freedom of speech, the free exercise of religion, and parental rights in education. We believe that parental partnership with educators is critical to the quality education of America's children.

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, individual liberty, and free enterprise. Citizens United and Citizens United Foundation regularly participate as litigants and amici in important cases in which these fundamental principles are at stake. Citizens United is a nonprofit social welfare organization exempt from federal income tax under Internal Revenue Code

(“IRC”) section 501(c)(4). Citizens United Foundation is a nonprofit educational and legal organization exempt from federal income tax under IRC section 501(c)(3).

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan legal and policy organization dedicated to promoting the rule of law, protecting individual liberty, and preserving the Constitution’s limits on governmental power. CFJ files *amicus curiae* briefs in key cases, supports constitutionalist nominees to the federal judiciary, and educates the American public and policymakers about the benefits of individual liberty and the proper role of our judiciary.

Concerned Women for America (CWA) is the largest public policy women’s organization in the United States with members in all fifty states, and thousands within the Eighth Circuit. Through its grassroots organization, CWA encourages policies that strengthen and protect women and families and advocates for the traditional virtues that are central to America’s cultural health and welfare. CWA actively promotes legislation, education, and policymaking that strengthens parental rights and preserves women’s safety and dignity. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The Dr. James Dobson Family Institute is a nonprofit organization that uplifts and defends the biblical and traditional framework of the family, which includes parental rights and the freedom to exercise one’s religious beliefs. Inherent within

these convictions are the freedom of speech and the right for parents to have the principal input and influence over their child's upbringing and academic development. These most foundational rights have been preserved for centuries and must be maintained for the institution of the family to remain intact and flourish.

The mission of Eagle Forum is to empower conservative and pro-family men and women to participate in the process of self-government and public policy-making so that America will continue to be a land of individual liberty, with respect for the nuclear family, public and private virtue, and private enterprise. Its network of state-based chapters share the mission of mobilizing and mentoring grassroots conservative activists to impact public policy at all levels of government; from Congress to state legislatures, to local commissions and boards. Eagle Forum is organized under section 501(c)(4) of the IRS Code.

Family Research Council (FRC) seeks to advance faith, family, and freedom in public policy. FRC recognizes and respects the right of parents to raise their children as well as the fundamental right of free speech.

Focus on the Family is a Christian ministry organization, headquartered in Colorado, committed to strengthening the family in the United States and abroad by providing help and resources that are grounded in biblical principles. As part of that mission, Focus on the Family educates and advocates for parental rights and protecting the innocence of children. To that end, Focus has advocated since its

inception in 1977 for the strengthening of families through the education and training of parents in their critically important roles as heads of their families, for the biblical value of male and female, and for the primary role of parents in caring for, and directing the upbringing of their children. The president of Focus on the Family, Jim Daly, hosts the flagship Focus on the Family radio broadcast about family issues carried daily on 2,000 radio outlets in the United States and heard weekly by nearly 7 million listeners.

The Project 21 Black Leadership Network has a long-standing interest in protecting the rights of parents in the education of their children.

Tea Party Patriots Action, Inc. joins out of concern that as school districts and the teachers unions have become increasingly brazen in teaching ideologically-driven curriculum, parents have been systematically blocked from schools, and shut out from performing their moral duties in their children's upbringing. Blocking parents from receiving vital information about their own children's health and welfare is a violation of parents' rights and exposes children to enormous risks. Tea Party Patriots Action stands with parents and supports their right to be involved in all aspects of their children's lives -- not relegated to the sidelines by school administrators.

Young America's Foundation is a 501(c)(3) non-profit, non-partisan, educational organization whose mission is to educate and inspire increasing numbers of young

Americans concerning the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. The Foundation accomplishes its mission by providing essential conferences, seminars, educational materials, internships, and speakers to young people across the country.

Additional organizations and individuals, listed below, also join this brief. These *amici curiae* are concerned about how the Eighth Circuit's decision will affect the rights of parents to raise their children and are committed to securing fundamental constitutional rights against government infringement.

Additional *amici curiae*:

Terry Schilling
President
American Principles Project

Bill Spadea
Founder
Common Sense Club

Faith and Freedom Coalition

National Center for Public Policy Research

Sarah Perry
Former Senior Counsel to the Assistant Secretary for Civil Rights
U.S. Department of Education

Bob Vander Plaats
President/CEO
The FAMiLY LEADER

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“Ever since the publishing of the report of the National Commission on Excellence in Education, ‘*A Nation At Risk*’ [in 1983], a great deal of talk about education, and scribbling about it, have occurred. As for any evidences of general improvement, however – why, one does not discover them easily.” Russell Kirk, *The Politics of Prudence* 240 (1993). Indeed, even as early as 1983, it seemed that “Our society and its educational institutions seem to have lost sight of the basic purposes of schooling...” *A Nation At Risk* 5 (1983).

Perhaps there is no more astonishing example of “los[ing] sight of the basic purposes of schooling” than the case before this Court concerning the secret transitioning of children from one gender to another without the knowledge of parents.

On April 25, 2022, the Linn-Mar School Board adopted Policy 504.13-R, entitled “Administrative Regulations Regarding Transgender and Students Nonconforming to Gender Role Stereotypes.” (“Policy”) *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.

The Policy prevents parents from having any knowledge or control over their child's interests and questions 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.

Notably, 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 most memorable conclusion from *A Nation At Risk* merits new currency in light of the actions of the Linn-Mar School Board: “If an unfriendly foreign power had attempted to impose... the ... educational [policy] that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves.” *A Nation At Risk* 5 (1983).

The Linn-Mar School Board’s actions are in direct conflict with one of the most ancient liberties of parents to direct the upbringing, education, and care of their children. In a speech at Hillsdale College, then-Secretary of Education Betsy DeVos stated “[t]hat the family [is a] sovereign sphere... A sphere that predates government altogether. It’s been said, after all, that the family is not only an institution; it’s also the foundation for all other institutions. The nuclear family cultivates art, athletics, business, education, faith, music, film – in a word, culture.” Undermining fundamental parental rights undermines our culture.

The Iowa Supreme Court has consistently recognized that “the right to direct the upbringing of one’s children, is fundamental,” and “state action infringing on that interest must be narrowly tailored to serve a compelling state interest.” *Spiker v. Spiker*, 708 N.W.2d 347, 351 (Iowa 2006). This Court has recognized that, as a

general matter, parents have a liberty interest in the "care, custody, and management of their children." *Manzano v. South Dakota Dep't of Soc. Svcs.*, 60 F.3d 505, 509-10 (8th Cir. 1995). The Iowa Supreme Court and this Court are in the mainstream of a long line of U.S. Supreme Court cases comprising a parental rights doctrine found in the First and Fourteenth Amendments of the U.S. Constitution.

In criminal courts and in contract law, for example, juveniles are, for their own protection, often deemed not yet psychologically prepared to accept full responsibility for their actions. Restoring parental rights to guide, instruct, and protect their children from impulsive and possibly ill-informed childhood decision making (and their adult enablers), *amici* ask this Court to prevent the Linn-Mar School Board from fundamentally altering historic presumptions about juveniles.

ARGUMENT

I. The Linn-Mar Community School District Transgender Policy Flouts the Freedom of Parents to Direct the Upbringing, Education, and Care of Their Children as a Fundamental Right.

This Court has recognized that, as a general matter, parents have a liberty interest in the "care, custody, and management of their children." *Manzano v. South Dakota Dep't of Soc. Svcs.*, 60 F.3d 505, 509-10 (8th Cir. 1995).

More recently, in *Spiker v. Spiker*, 708 N.W.2d 347, 351 (Iowa 2006), the Supreme Court of Iowa recognized that "the right to direct the upbringing of one's children, is fundamental," and "state action infringing on that interest must be

narrowly tailored to serve a compelling state interest”[to] provide[] heightened protection against government interference with certain fundamental rights and liberty interests.”” *Sanchez v. State*, 692 N.W.2d 812, 819 (Iowa 2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). We apply strict scrutiny when a fundamental liberty interest is at issue. *Id.* at 819-20 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).” *Spiker v. Spiker*, 351.

That the Iowa Supreme Court applies strict scrutiny when a fundamental liberty such as parental rights is at issue is clear in the case law; what is not clear is how Linn-Mar Community District arrived at the decision that it will apply more circumspection and parental involvement when administering aspirin than when facilitating gender assignment to children under its care.

First, in the Linn-Mar Community School District, when it comes to distributing any medication be it prescription or over-the-counter, a parent must approve of such distribution through the medication permission form. This then allows the Administration to dispense the medication to the student at the proper time, or if it is over-the-counter, school administrators will impose an upper-bound limit of a certain amount of ibuprofen or aspirin available to them over the course of the year.

If the medication permission form is not signed by the parent and returned, the school will not administer the medication to the student.²

In contradistinction to the Linn-Mar aspirin policy, the Linn-Mar Transgender Policy (formally, policy 504.13-R, entitled “Administrative Regulations Regarding Transgender and Students Nonconforming to Gender Role Stereotypes”) may keep parents completely in the dark about a school district administrator’s plans to transition a child from one gender to the other. Under the Transgender Policy, a student can request a meeting with the counselor to receive support and begin implementation of the Gender Support Plan. The student (who is under the age of consent and cannot enter into contracts) then has to agree to who will be a part of the meeting, and if they do not want the parents to be there then the parents will not be notified. When it comes to confidentiality of the child’s transgender status at school, school administrators must ask the student before contacting parents, so that staff knows the pronouns and name to use in case the parents have not learned of the student’s transgender identity from someone other than school district staff.³ Even though parents of children at Linn-Mar Community School District *may not be*

² <https://www.linnmar.k12.ia.us/district/departments/student-support-services/health-services/>

³ <http://policy.linnmar.k12.ia.us/policy/50413-r-administrative-regulations-regarding-transgender-and-students-nonconforming-gender#:~:text=The%20Linn%2DMar%20Community%20School,to%20receive%20supports%20at%20school.>

notified the gender assigned by school administrators to their own child, parents *will be notified* if their child is provided aspirin or ibuprofen.

There is no Constitutional justification for the Linn-Mar Community School District to conceal from parents some of the most sensitive matters for which a family may face. “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction... The 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.” *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

In *Wisconsin v. Yoder*, the U.S. Supreme Court declared that parental rights have been “established beyond debate as an enduring American tradition.” 406 US 205, 232 (1972). For almost a century, the U.S. Supreme Court has recognized the traditional role of parents in directing the care, custody, and control of their minor children. “It is the natural duty of the parent to give his children education suitable to their station in life.” *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923). “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder... It is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.” *Prince*

v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1944) “The liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

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 unlike an aspirin being provided to a student, even know that it is happening. School administrators insinuating themselves between students and parents disrupts that important relationship within the family, and can precipitate the breakup of the family unit. “We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

In conflict with *Parham*, the Transgender 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. “The 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. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.” *Parham v. J. R.*, 442 U.S. 584, 602-603 (1979).

What if school administrators imagine that parents would be less than enthusiastic that their Johnny is now their Janey? (“Every student has the right to be addressed by a name... that corresponds to their gender identity.” App.298, R. Doc. 3-11, at 46). The Transgender Policy is clear that parents need not be told about these developments: the student “will have priority of their support plan over their parent/guardian.” App.296, R. Doc. 3-11, at 44. Even so, “The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are

strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children. The Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests of all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksburg*, 521 U.S. 702, 720-721 (1997). “The 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 this Court. In light of this extensive precedent, it cannot now 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.” *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

The Linn-Mar Community School District Transgender Policy is unconstitutional on its face.

II. The Linn-Mar Community School District Transgender Policy Suppresses First Amendment Free Speech and Religious Free Exercise Rights

In addition to abridging time-honored parental rights, the Linn-Mar Transgender Policy requires students not undergoing a school-led gender transition to use other students' preferred pronouns when speaking and prohibits a wide range of protected speech. The Linn-Mar School Board policy states that "An intentional and/or persistent refusal by staff or students to respect a student's gender identity is a violation of school board policies..."⁴ The Transgender Policy also prohibits "[r]epeated of intentional misgendering" which is defined as "intentionally or accidentally us[ing] the incorrect name or pronouns to refer to a person." *Id.* Penalties for these policy violations include suspension and expulsion.

Such a policy violates the freedom of speech and free exercise clauses of the First Amendment. The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. This Court has a duty to safeguard religious freedom because "[a]ny *political constitution develops out of a moral order; and every moral order has been derived from religious beliefs.*" Russell Kirk,

⁴ <http://policy.linmar.k12.ia.us/policy/50413-r-administrative-regulations-regarding-transgender-and-students-nonconforming-gender#:~:text=The%20Linn%2DMar%20Community%20School,to%20receive%20supports%20at%20school.>

The Conservative Constitution 174 (1990). Indeed, “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.” *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

Here, Linn-Mar Community School District has clearly burdened students’ religious exercise by putting before them the difficult choice between avoiding suspension or expulsion at the hands of school administrators on one side and demonstrating tacit approval of gender ideology inconsistent with their religious beliefs on the other. A student who objects to referring to another student by terms that offend his or her conscience must be protected from reprisal, and the conscience protected from coerced speech. “The right to be religious without the right to do religious things would hardly amount to a right at all.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring). The U.S. Supreme Court observed in *Obergefell v. Hodges*, 576 U.S. ____ (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Id.*, at ____ (slip op., at 27). “The values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Even more markedly than in *Prince*,

therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

III. The Linn-Mar Community School District Transgender Policy Violates the Protection of Pupil Rights Amendment of 1978

The Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h and 34 CFR Part 98, protects public school children by empowering parents in two primary ways. First, it provides parents with robust informational rights regarding school activities that touch upon or affect family privacy. *See* 20 U.S.C. §§ 1232h(b), (c). Second, it guarantees parents the right to prior notice and an opportunity to opt out their children from (1) surveys and information gathering not directly related to academic instruction that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and (2) activities involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that are designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group (e.g., socio-emotional learning). 34 CFR 98.4. The Pupil Rights Amendment codifies, in part, parents’ well-established constitutional liberty interest

in family privacy and in controlling their children's education and upbringing. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). (citations omitted).

The District's violations of the Pupil Rights Amendment are actionable in federal court. The Supreme Court has repeatedly recognized that a statutory right to information also confers constitutional standing. *See Federal Election Commission v. Akins*, 524 U.S. 11, 20-21 (1998) ("injury in fact" includes the inability to obtain information that must be disclosed by statute); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992) (standing if plaintiffs "are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs"); *American Canoe Association Inc. v. City of Louisa Water and Sewer Comm'n*, 389 F.3d 536 (6th Cir. 2004); *see also* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 PA. L. Rev. 613, 650 (1999). The injury is not that the defendants are merely failing to obey the law, it is that they are disobeying the law by failing to turn over information that parents desire and need, and thereby directly impairing their ability to use it for the Pupil Rights Amendment's substantive purpose – protecting familial privacy and ensuring parents have the right to control their child's education. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 694 (7th Cir. 2018). Remedies could include a declaration of rights under 28

U.S.C. § 2201, a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651, and/or damages under 42 U.S.C. § 1983.

The Linn-Mar Community Transgender Policy, which is not and does not purport to be directly related to academic instruction, violates the Pupil Rights Amendment and concretely harms parents. It states “[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. It further states that 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. In other words, the District explicitly denies parents their statutory rights to know about, and opt out from, its federally regulated information gathering, and from its activities designed to affect a child’s behavior, emotions, or attitudes. Accordingly, the District’s Transgender Policy is facially unlawful.

CONCLUSION

This Court should reverse the district court and enter a preliminary injunction in favor of the parents.

Respectfully submitted,

/s/ J. Marc Wheat

J. Marc Wheat

Advancing American Freedom, Inc.

801 Pennsylvania Avenue, N.W.

Suite 930

Washington, D.C. 20004

(202) 780-4848

mwheat@advancingamericanfreedom.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

This brief contains 4,728 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

DATED: November 10, 2022 /s/ J. Marc Wheat
J. Marc Wheat

VIRUS CHECK CERTIFICATION

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

DATED: November 10, 2022 /s/ J. Marc Wheat
J. Marc Wheat

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I electronically filed the foregoing brief with the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: November 10, 2022

/s/ J. Marc Wheat
J. Marc Wheat