No. 23-1280

IN THE

# Supreme Court of the United States

PARENTS PROTECTING OUR CHILDREN, UA,

*Petitioner,*

*v.*

EAU CLAIRE AREA SCHOOL DISTRICT, WISCONSIN, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF THE *AMICUS CURIAE* [1]

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

* * *

ALF long has defended parents' natural and legal right to superintend their children's upbringing and oversee their K–12 education. This fundamental parental right, however, is under attack by transgender activists, who despite their relatively small number have infiltrated many of the nation's

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[1] Petitioner's and Respondents' counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

public school systems. Their well-organized and funded effort to unravel our nation's social fabric systematically infuses gullible boys and girls with self-doubt about who they are, and as this case illustrates, *secretly* encourages and facilitates their "gender identity transition."

The question presented by this appeal is whether the Petitioner parents have standing to challenge the Respondent school district's gender identity transition policy—a policy, like thousands that have proliferated throughout the United States, that explicitly keeps parents in the dark if a student wishes to conceal his or her supposed gender identity, *e.g.*, "transgender," "non-binary," "gender-nonconforming," "gender-expansive," or "gender-questioning," and/or ongoing gender identity transition. This means that if a student requests confidentiality, parents are not informed, much less asked to consent, to the "Gender Support Plan" developed by school staff to facilitate a transgender-indoctrinated student's supposedly well-considered choices about his or her name, pronouns, attire, bathroom, locker room, athletic teams, etc. while at school. *See* Pet. at 8-11; Pet. App. 72-77.

The Court should grant the petition and contrary to the Seventh Circuit's opinion, hold that parents do not have to wait to sue a school district until after its gender identity transition policy has inflicted long-term or irreparable harm on their child. To underscore the importance of the question presented, this amicus brief highlights the deeply rooted

jurisprudential history of parents' right to direct their children's upbringing and education.

## SUMMARY OF ARGUMENT

The Greek philosopher Epictetus famously explained that "only the educated are free." Epictetus, *The Discourses as Reported By Arrian*, Book II, ch. 1, § 22. Indeed, aside from national security, it is difficult to think of anything more important to our nation's freedom and future than the education of its youngest citizens.

This Court long has recognized parents' critical role in ensuring that their children are provided with an effective education. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing "the power of parents to control the education of their own"); *see also Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022) (upholding parents' freedom under a state tuition assistance program "to designate the secondary school they would like their child to attend"). The principle of parental control, which includes educational choice and oversight, is deeply rooted in American and English common law.

But in recent years effective education, especially at the K–12 level, has been seriously undermined by transgender activists who have successfully imposed their radical ideology on public school systems throughout the United States. *See, e.g.*, Pete Hegseth & David Goodwin, *Battle for the American Mind* 10 (2022) ("Stories for kids with good life lessons are no longer good enough; the pages must contain an

agenda. Maybe your sixth or seventh grader will encounter the 'gender unicorn' instead—a widely used Barney look-alike purple unicorn who explains concepts like gender identity, gender expression, and sexual attraction.").

The school district "gender identity transition policy" involved in the case is typical of many that have been adopted throughout the United States. It reflects the manner in which the so-called transgender rights movement not only has infiltrated K-12 public schools, but also is aggressively supporting confused young students who, according to school staff, either "assert" or "express" a desire to "transition" to a gender identity that is different from the gender to which they were "assigned" at birth. *See* Pet. App. 64.

At a student's request, the policy requires school administrators and faculty to *conceal* from parents his or her ongoing gender identity transition and/or new gender identity. Keeping parents in the dark about this fundamental and intimate information obliterates parental control over their child's upbringing and education.

A recently published Heritage Foundation report discusses the nature and scope of the problem:

> [T]here is no doubt that issues of sexuality and identity, especially during adolescence, can profoundly affect how individuals understand themselves and others, as well as influence the course of their lives. Because minors lack the

> experience, knowledge, and judgment to make sense of this by themselves, the question is who will fill that gap. Public schools answer this question with gender policies that impose a particular ideological view of these issues, but prevent parents from playing this role. They elevate a child's gender-related choices to that of paramount importance, *while excluding a parent from knowing of, or participating in, that kind of choice*.
>
> In doing so, they have *broken the bonds of trust between parent and child*, relegating parents to uninformed bystanders in the development of their children's very identities. Policies like this are as foreign to federal constitutional and statutory law as [they are] medically unwise.

Sarah Parshall Perry & Thomas Jipping, *Public School Gender Policies That Exclude Parents Are Unconstitutional* at 3, Heritage Found., Legal Mem. No. 355 (June 12, 2024) (internal quotation marks omitted) (emphasis added).[2]

The Court needs to grant review in this case and hold that parents have standing to challenge on constitutional, statutory, and/or common-law grounds

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[2] Available at https://tinyurl.com/2555uk85.

gender transition identity policies like the abhorrent one at issue here.

## ARGUMENT

### The Court Should Grant Review and Hold That Parents Have Standing To Challenge School District Gender Identity Transition Policies

#### A. This Court long has recognized parents' right to direct the upbringing and education of their children

In various contexts, the Supreme Court has repeatedly recognized "the fundamental interest of parents . . . to guide the . . . education of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2276 (2020) (Gorsuch, J., concurring) ("[T]his Court has already recognized that parents' decisions about the education of their children can constitute protected religious activity.") (citing *Yoder*). "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 232.

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

The Court reaffirmed this parental right a short time later, holding that parents have the right "to

direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925). *Pierce* emphasized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

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

Several years later, the Court recognized the logical implications of this constitutional presumption of competency when it held that parents can commit their child to a mental facility against his or her will, so long as the child (through a legal representative) is afforded an opportunity to present evidence to rebut the presumption. *See Parham v. J.R.*, 442 U.S. 584 (1979). "Our jurisprudence," the Court wrote,

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

Notably, in *Parham* Justice Stewart wrote a concurring opinion that is even more emphatic about parents' rights and responsibilities with regard to their children, even when it comes to difficult decisions about their psychological well being. "For centuries," he wrote, "it has been a canon of the common law that parents speak for their minor children. So deeply embedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it." *Id.* at 621 (Stewart, J., concurring in the judgment). The state law at issue in *Parham*, he continued, correctly presumed that parents act in their children's best interests, even when parents "make decisions for their minor children

that deprive the children of liberty." *Id.* at 624. "In the case of parents, the presumption[] [is] grounded in a statutory embodiment of long-established principles of the common law." *Id.* at 623.

The Supreme Court most recently addressed parental rights in *Troxel v. Granville*, 530 U.S. 57 (2000). There, the Court invalidated application of a state statute that allowed, over a parent's objections, nonparental visitation rights with children, provided that a trial court has determined by a preponderance of evidence that the children would benefit from such visitations. *See* 530 U.S. at 67-75. In *Troxel* the trial court had awarded visitation rights to paternal grandparents (whose son had committed suicide) over the strong objection of the children's natural mother. *Id.* at 60-63. The Supreme Court explained that "[m]ore than 75 years ago, in *Meyer* . . . we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'" *Id.* at 65.

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

Justice Souter's separate opinion in *Troxel* strongly endorsed the importance of parental rights, observing that such rights would be undermined if the trial court's visitation ruling were upheld. *Id.* at 75-79 (Souter, J., concurring in the judgment). Quoting *Meyer*, Justice Souter explained that "[a]s we first acknowledged in *Meyer*, the right of parents to 'bring up children,' 262 U.S., at 399, and 'to control the education of their own' is protected by the Constitution, *id*., at 401." *Troxel*, 530 U.S. at 77. He further indicated that "[t]he strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character." Id. at 78.

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

### B. English and American common law undergird this Court's parental rights jurisprudence

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

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

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

Renowned British jurist William Blackstone was emphatic about the rights parents possess. He wrote

that one of their most important rights and duties is "that of giving [their children] an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any." Blackstone, *supra* at *438. Blackstone's views relied on the work of jurist and political philosopher Samuel Pufendorf. *Id.* While Pufendorf recognized that parents could delegate the responsibility of educating their children to others, he too was adamant that parents retain full responsibility for, and oversight of, their children's education. *See* Samuel Pufendorf, *The Whole Duty of Man According to the Law of Nature* 274 (Andrew Tooke trans., 4th ed. 1716).

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

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

authorities carry the burden of proving otherwise. This is essentially the same presumption that the Supreme Court subsequently adopted in *Stanley* and *Parham*, *supra*.

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

While *Turner* did not directly involve a dispute between a parent and a school, its holding and rationale are nevertheless relevant to the present case because of the burden of proof that it enunciated. *Turner* explicitly rejected the notion that a parent can be presumed to be incompetent or incapable of educating and caring for his or her child. Instead, a presumption of competency must attach to the parents in all disputes between them and a school over a

particular policy or teaching matter. *Id.* at 284-85; *accord Mill v. Brown*, 88 P. 609 (Utah 1907).

The Wisconsin Supreme Court applied this presumption in the educational context in *Morrow v. Wood*, 35 Wis. 59 (1874). There, a father enrolled his son in a public school. *Id.* at 60. While generally agreeing with the teacher's proposed curriculum, the father disagreed with the teacher's decision to have his son study geography. *Id.* After the father directed his son to refuse to study that subject, his teacher inflicted corporal punishment. *Id.* at 62-63. The state supreme court rejected the notion that "upon an irreconcilable difference of views between the parent and teacher as to what studies the child shall pursue, the authority of the teacher is paramount and controlling." *Id.* at 63. It observed that normally, a parent has the "exclusive right to govern and control the conduct of his minor children." *Id.* at 64. The court also emphasized that by electing to send the child to public school, the parent did not relinquish his ability to have a say in what the student was to learn. *Id.* at 65. "The parent is quite as likely to make a wise and judicious selection as the teacher . . . ." *Id.* at 66.

The Nebraska Supreme Court echoed this language in *Sheibley v. School District No. 1*, 48 N.W. 393 (Neb. 1891). There, the court noted that a parent is presumed to be acting in the best interests of the child. *Id.* at 395. "[W]ho is to determine what studies [the student in question] shall pursue in school—a teacher, who has a mere temporary interest in her welfare, or her father, who may reasonably be

supposed to be desirous of pursuing such course as will best promote the happiness of the child?" *Id.* The court accordingly concluded that a parent's right to determine a child's course of studies prevailed over thr views of a teacher.

### C. The Eau Claire school district's gender identity transition policy—like numerous others—violates fundamental parental rights

Respondent Eau Claire Area School District's gender identity transition policy contains all three of the components common to a multitude of similar policies that have been adopted and are being implemented by school districts throughout the United States. *See* Perry & Jipping, *supra* at 4-5. These troubling hallmarks of gender identity transition policies, often expressed in the radical terminology of transgender activists, indisputably abridge parents' right to direct their children's upbringing and education:

1. *They take at face value and treat as conclusive a student's communication or other indication of his or her gender identity*. Perry & Jipping, *supra* at 4.

Eau Claire's "Administrative Guidance for Gender Identity Support" declares that "a transgender individual is an individual that asserts a gender identity or gender expression at school or work that is different from the gender assigned at birth." Pet. App. 64. Even though minors lack the maturity, judgment, and experience to make life-altering decisions such as

whether to change their natural-born gender, *see* Perry & Jipping, *supra* at 5, the district court acknowledged that Eau Claire's policy "does not contain any minimum age limit." Pet. App. at 22. Thus, school administrators and teachers are required to accept whatever "gender identity" or "gender expression" a transgender-indoctrinated student of any age may assert (or be deemed to assert).

2. *They require school personnel immediately to treat the student consistent with whatever gender identity a student may have communicated, including the use of student's preferred names or pronouns and access to student's desired school facilities.* Perry & Jipping, *supra* at 4.

The "Student Gender Support Plan" required by the Eau Claire school district's Administrative Guidance "shall address, as appropriate" subjects such as "[t]he name and pronouns desired by the student"; "[r]estroom and locker room use"; "[p]articipation in athletics and extracurricular activities;" and lodging for overnight school field trips. Pet. App. 65, 74; *see also id.* at 72-77 (Gender Support Plan template).

Notably, the school district's Administrative Guidance includes the following admonition:

> Schools maintain separate restrooms and locker rooms for male and female students (i.e. sex assigned at birth). Access should be allowed based on the *gender identity* (i.e., man, woman, trans, non-binary, etc.) expressed by the student. Any student

> who is uncomfortable using a shared restroom or locker room regardless of the reason, shall upon request, be provided with an alternative. . . . However, *staff should not require a transgender or gender nonconforming student /employee to use a separate, nonintegrated space unless requested by the individual student*.

*Id.* at 66-67.

Along the same lines, the Administrative Guidance states that

> [a]dministrators and staff should respect the right of an individual to be addressed by a name and pronoun that corresponds to their gender identity. . . . Student ID cards are not legal documents, and therefore, may reflect the student's preferred name.

*Id.* at 67, 68.

Further,

> [s]tudents shall have the right to dress in accordance with their gender identity within the constraints of the dress codes adopted by the district and respective schools.

*Id.* at 70.

Enabling, encouraging, and affording nearly absolute deference to, life-altering and potentially

physically psychologically, and socially harmful gender identity choices made by students who are legally underage for all other purposes turns the traditional teacher-student relationship (as well as the parent-child relationship) on its head.

3. *They prohibit communication about the student's gender identity or "transgender status" to anyone, including his or her parents, without the student's permission.* Perry & Jipping, *supra* at 4.

Although Eau Claire's gender identity transition policy pays lip service to parental involvement, it requires teachers and administrators to hide from parents, at a student's request, his or her new gender identity or ongoing transition. *See* Pet. at 8-11.

For example, a box at the top of the Gender Support Plan template, designated "Confidential," acknowledges that parents may not be "involved in creating [the] plan," and that the student may "state[] they do not want parents to know." Pet. App. at 72. The "Parent/Guardian Involvement" section of the template asks: "Are parents/guardians of this student aware of their child's gender status?" and "Are the parents/guardians aware of student's [gender identity-related] requests at school?" *Id.* at 73. Along the same lines, the template's "Confidentiality, Privacy, and Disclosure" section asks: "How public or private will information about this student's gender identity be?" *Id.* at 74. Questions like these implement the school district's Administrative Guidance that "[p]rotecting the privacy of

transgender, non-binary, and/or gender non-conforming students . . . must be a top priority." *Id.* at 67. The Administrative Guidance states that "[s]chool personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian," including because of parents' possible "lack of acceptance" *Id.* at 66. Thus, as the court of appeals explained, a student's individual Gender Support Plan "records the shared understanding *between the student and the School District* of a student's gender identity and parental involvement in the process." *Id.* at 3 (emphasis added).

Concealing this critical information, while actively supporting and facilitating gender identity transitions, squarely violates sacrosanct parental rights.

As if keeping parents in the dark were not enough, the school district's "Equity PD [Professional Development] For All Staff" training materials include truly shocking statements about parents, whom the school district apparently views as potential "oppressors" of their own children. For example, as the certiorari petition observes, the training materials include the reminder to gender transition facilitators that

> *parents are not entitled to know their kids identities. That knowledge must be earned.*

*Id.* at 80 (emphasis added). And in the seemingly unlikely event that a transitioning transgender student's parents somehow "earn" the privilege to find out about their own child's gender identity, the training materials provide the following far-left advice to gender transition facilitators:

> Queerness is often a disenfranchised oppression, in that many people feel entirely justified when their discriminatory thinking is rooted in religion. . . . When the conversation turns to navigating parents' faith-based rejection of their student's queer identity, it's critical to remember that we must not act as stand-ins for oppressive ideas/behaviors/attitudes, even and especially if that oppression is coming from parents. . . .
>
> White, cis-gender, heterosexual, middle class, Christian men and women without a disability might find the conversations about identity to be uncomfortable. One way to address this is to explain that it's sometimes hard to talk about identity when your identities are normalized in such a way that you do not experience marginalization.

*Id.* at 82-83.

This Court should grant review and hold that parents have standing to challenge public school

districts' gender identity transition policies that substitute the troubling ideology of "woke" administrators and teachers for the sound judgment of a child's own parents.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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