NO. 23-3740

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN & JANE DOE NO. 1; ET AL.,
Plaintiffs-Appellants,

v.

BETHEL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION; ET AL.,
Defendants-Appellees,

and

ANNE ROE,
Intervenor Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio
The Honorable Michael J. Newman
Case No. 3:22-CV-00337

BRIEF OF TAMMY FOURNIER, A WISCONSIN MOTHER, AS *AMICA CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

John J. Bursch
Vincent M. Wagner
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707-4655
jbursch@ADFlegal.org
vwagner@ADFlegal.org

David A. Cortman
Katherine L. Anderson
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
dcortman@ADFlegal.org
kanderson@ADFlegal.org

Counsel for Amica Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-3740 Case Name: Doe v. Bethel Local Sch. Dist. Bd. of Ed

Name of counsel: Vincent M. Wagner

Pursuant to 6th Cir. R. 26.1, Amica Curiae Tammy Fournier
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 21, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Vincent M. Wagner

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION AND INTEREST OF *AMICA CURIAE*[*]

Amica curiae is Tammy Fournier, a mother in Wisconsin. When Tammy and her husband first learned that their daughter, then 12 years old, had begun to struggle with anxiety and depression and to question her gender, the couple was understandably concerned. They immediately started researching how best to help her. Based on their research, the Fourniers decided that it would harm their daughter to treat her as a boy—in particular, to refer to her with a masculine name and male pronouns. That would likely perpetuate her gender confusion, not resolve it. So they instructed her school district to refer to her by her legal name and female pronouns only.

The district refused. Notwithstanding the Fourniers' instructions, it told them district policy required treating their daughter as a boy upon her request. In response, Tammy and her husband withdrew their daughter from the district. Under their care, their daughter soon decided she would no longer ask others to refer to her as a boy. In a new school district, she has dramatically improved.

Last year, a Wisconsin state trial court concluded that the Fourniers' former school district had violated their fundamental rights

[*] No counsel for a party authored this brief in whole or part; no one, other than *amica* and her counsel, made a monetary contribution for its preparation or submission; and all parties consented to its filing.

as parents. *See T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5–8 (Wis. Cir. Ct. Oct. 3, 2023). It enjoined that school district "from allowing or requiring staff to refer to students using a name or pronouns at odds with the student's biological sex, while at school, without express parental consent." *Id.* at *10. But Tammy still worries. Her daughter's new school district has a policy regarding the use of names and pronouns similar to the former school district's policy.

Parents around the Nation share those concerns. Many other school districts have policies empowering school employees to decide whether to treat children as the opposite sex. These policies often don't require parental notification or consent; in fact, they often *prohibit* disclosing the school district's decisions to a minor student's parents without the student's permission.

Reliable information is the raw material of good parental decision-making. Without it, parents can't exercise their "primary role … in the upbringing of their children"—a role long "established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). A fundamental "right to make decisions about the education of one's children" or other important childrearing decisions doesn't mean much if schools can simply refuse to give parents information they need to make those decisions. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022).

Tammy would have a much different story to tell if the school district had first discovered her daughter's struggles and withheld information from her about them. In that story, the district would have robbed a mother of the chance to help her daughter at a pivotal moment in the girl's development. Grateful that the government did not stand between her and important information about her daughter, Tammy supports these plaintiffs' right as parents to receive information about how their public school district is treating their children. Because the district court did not properly analyze that right, she respectfully asks this Court to reverse.

ARGUMENT

Parents' fundamental right to direct the upbringing, education, and healthcare of their children empowers parents to make the decisions for their children that they deem best. Our Nation has a history and tradition of vesting parents with this power in recognition of twin truths: that children lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions," and "that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see, e.g.*, *Risting v. Sparboe*, 162 N.W. 592, 594 (Iowa 1917) ("Human experience has demonstrated that children ordinarily will be best cared for by

those bound to them by the ties of nature, 'bone of their bone and flesh of their flesh.' ").

The decision below contradicts that history and tradition. It did not recognize that parents' right to make decisions on behalf of their children means little without access to the information they need to make those decisions. If allowed to stand, the district court's analysis would free schools to conceal information from parents—even critical mental-health or academic information. That would mean parents like Tammy Fournier might never know about their children's struggles with "matters of the greatest importance," like their identity as young men or women. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005). Because the decision below is wrong and poses a danger to parents' ability to help their children, this Court should reverse it.

I. Parents' fundamental rights include the right to information about a public school's treatment of their own child.

To determine the scope of a fundamental right protected by the Fourteenth Amendment, the touchstone is history. A court must ask whether the claimed right is one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up).

Here, the district court acknowledged the authority supporting Plaintiffs' fundamental right to make decisions for their children,

particularly regarding education. *See* Order, R.94, PageID#2018–26. But it did not "engage[] in a careful analysis of the history of the right at issue." *Dobbs*, 597 U.S. at 238. That omission made it miss how Plaintiffs' fundamental right includes the right to information necessary to make decisions the Fourteenth Amendment protects. *See* Complaint, R.1, PageID#17, 19–20.

A. This Nation's history and tradition establish parents' right to make decisions for their children.

The Fourteenth Amendment generally vests decisionmaking authority about a minor child in her parents. A failure to protect that authority from an unwarranted governmental override was the central problem with the statute in *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality) (criticizing lower court for "fail[ing] to provide any protection for [parent's] fundamental constitutional right to make decisions concerning the rearing of her own daughters"); *id.* at 72–73 (referring to "fundamental right of parents to make child rearing decisions"). Common-law sources support the Court's protection for parental decisionmaking. And it has applied principles drawn from those sources to guide its interpretation of the Fourteenth Amendment.

1. Parents' right to make decisions for their children is a corollary to the common-law duties they owe their children.

Reviewing Blackstone and many other historical sources, *Dobbs* noted that "[h]istorical inquiries … are essential" to the fundamental-rights analysis. 597 U.S. at 239; *see id.* at 240–55. And at least since

Meyer v. Nebraska, 262 U.S. 390 (1923), the Court has interpreted fundamental rights according to common-law principles. *See id.* at 399 (understanding "liberty" in the Due Process Clause as "the right of the individual … generally to enjoy those privileges long recognized at common law"). "Upon this point," said Justice Holmes in another context, "a page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Centuries of common-law precedent establish the deep historical roots of parents' decisionmaking authority. *See* 1 William Blackstone, *Commentaries on the Laws of England* *446–53 (describing the rights of parents at common law in England), http://bit.ly/3leX7za; 2 James Kent, *Commentaries on American Law* *189–217 (10th ed. 1860) (same, in the United States), https://bit.ly/3ttTN79. That same precedent establishes the rationale for that authority: the duties imposed on parents for the benefit of their children.

Blackstone wrote primarily of the *duties* parents owe their children. Any power or right that parents hold to make decisions for their children "is derived from the former consideration, their duty." 1 Blackstone, *supra*, at *452. The law grants a parent the right to make decisions for a child, "partly to enable the parent more effectually to perform his duty." *Id.* For example, at common law minors needed parental consent to marry. But this rule arose out of the parental duty to protect children from "the snares of artful and designing persons." *Id.*

In other words, because the government expects parents to protect their children, it authorizes parents to make decisions on behalf of their children—especially significant decisions, *e.g.*, marriage.

Expounding our own common law, Chancellor James Kent echoed Blackstone's dialectical understanding of parental duties and rights. *See* Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent & the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377, 380 (2009) (providing short biography of Kent and noting his informal title, "the American Blackstone"). Children need protection; their "wants and weaknesses … render it necessary that some person maintains them." 2 Kent, *supra*, at *189. And their parents are "the most fit and proper" for that purpose, a "plain precept of universal law" pointed out by "the voice of nature." *Id.* By imposing on parents a positive-law duty to "maintain[]" their children, "our municipal law" simply reflects the duty "prescribed … by those feelings of parental love and filial reverence which Providence has implanted in the human breast." *Id.*; *see* 1 Blackstone, *supra*, at *447 (describing "affection" "providence" has "implant[ed] in the breast of every parent" to "enforce" parental duties).

In recognition of the duties parents owe their children—duties rooted in both natural and positive law—American history and tradition have granted them correlative rights. "As they are bound to maintain and educate their children," for instance, "the law has given them a

right to such authority" to make decisions about their children's maintenance and education. 2 Kent, *supra*, at *203.

Not all societies have settled on this same arrangement. Chancellor Kent describes others, built "upon the principle, totally inadmissible in the modern civilized world, of the absorption of the individual in the body politic, and of his entire subjection to the despotism of the state." *Id.* at *195. Such societies are "wholly different" from our own. *Meyer*, 262 U.S. at 402. And their "statist notion[s]" are "repugnant to American tradition." *Parham*, 442 U.S. at 603. Here, "[t]he child is not the mere creature of the state." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

At common law, parents thus had "both the responsibility and the authority to guide their children's development and make important decisions on their behalf." Eric A. DeGroff, *Parental Rights & Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & Educ. 83, 108 (2009). This common-law parental right included a right to make educational decisions. Early authorities "established the right of parents to make educational choices for their children," even against "the preferences of civil authorities." *Id.* at 110 & n.178. "[B]y the nineteenth century, legal scholars were describing the right of parents to control the education of their children as 'practically … absolute' or 'absolute against all the world.'" *Id.* at 111–12 (footnotes omitted; omission in original).

American courts thus freed "parents to exercise those duties"—namely, the duties "to provide for their [children's] support and education"—"largely unhindered by the state." *Id.* at 112. This principle held true even as public schooling became the norm. In the late 19th century, "courts held that parents had a common law right to exempt their children from courses established by, and in some cases even required by, the state legislatures or local school districts." *Id.* at 113; *see, e.g.*, *State ex rel. Sheibley v. Sch. Dist. No. 1 of Dixon Cnty.*, 48 N.W. 393, 395 (Neb. 1891) ("no pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch"); *Morrow v. Wood*, 35 Wis. 59, 65 (1874) ("the parent has the right to make a reasonable selection from the prescribed studies for his child to pursue").

Our institutions presuppose—indeed, our *entire society* presupposes—that parents will act on behalf of their children, not the state. *See Troxel*, 530 U.S. at 66 (plurality op.) (tracing the Court's "extensive precedent" on this point). Perhaps no right, therefore, is more "essential to our Nation's 'scheme of ordered liberty'" than parents' right to make decisions for their children. *Dobbs*, 597 U.S. at 237–38 (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)).

2. The complementary rights and duties of parents have guided the Supreme Court's interpretation of the Fourteenth Amendment.

These common-law principles led the Supreme Court in 1923 to acknowledge that the Fourteenth Amendment protects "the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401. Two years later, the Court would elaborate that "those who nurture [a child] and direct his destiny"—in other words, a child's *parents*—"have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. Echoing the common law, this expressly links parents' right to make decisions for their children with the duties that they owe to their children. These complementary rights and duties, the Court would hold decades later, "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233.

Given the historical backdrop, when the Court in *Glucksberg* foregrounded the question whether a right is "deeply rooted in this Nation's history and tradition," it left no doubt about parental rights. 521 U.S. at 721 (cleaned up). The Court listed the "fundamental rights and liberty interests" for which the Due Process Clause "provides heightened protection." *Id.* at 720. And it *expressly included* the right to "direct the education and upbringing of one's children." *Id.* Because this right is fundamental, the government may not infringe it "*at all*, no

matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721 (cleaned up).

Three years after *Glucksberg*, *Troxel* reaffirmed that parents have a "fundamental liberty interest[]" in the "care, custody, and control of their children." *Troxel*, 530 U.S. at 65 (plurality op.); *see id.* at 80 (Thomas, J., concurring in the judgment) (acknowledging Court's precedent on this point). That liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Id.* at 65 (plurality op.). And as the plurality expressly acknowledged, the Fourteenth Amendment "provides heightened protection against government interference with [such] fundamental rights and liberty interests." *Id.* (citation omitted); *see id.* at 80 (Thomas, J., concurring in the judgment) (endorsing "strict scrutiny" as the correct test).

Dobbs reaffirmed yet again that parental rights are fundamental. 597 U.S. at 255–56. *Dobbs* relied on the *Glucksberg* framework to make clear that "procuring an abortion is not a fundamental constitutional right because such a right has *no* basis in the Constitution's text or in our Nation's history." *Id.* at 300 (emphasis added). In reaching that holding, it distinguished abortion from other rights that do in fact have a basis in "[o]ur Nation's historical understanding of ordered liberty." *Id.* at 256. Among those rights it included "the right to make decisions about the education of one's children." *Id.*

The Supreme Court has used numerous formulations to describe the historically rooted, fundamental right central to Plaintiffs' claims: a "claim to authority in [parents'] own household to direct the rearing of their children [that] is basic in the structure of our society," *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)); the right to "direct the education and upbringing of one's children," *Glucksberg*, 521 U.S. at 720; the liberty "interest of parents in the care, custody, and control of their children," *Troxel*, 530 U.S. at 65 (plurality); and, "the right to make decisions about the education of one's children," *Dobbs*, 597 U.S. at 256. However formulated, Plaintiffs' right to make decisions for their children, particularly regarding education, easily qualifies as "fundamental." *Glucksberg*, 521 U.S. at 720.

B. Parents' fundamental right to make decisions for their children entails access to the information necessary to make those decisions.

Both at common law and as protected by the Fourteenth Amendment, the core parental right is the authority to make decisions on behalf of a minor child. In other words, "[p]arental rights are essentially a recognition of parents' authority to make decisions on behalf of or affecting their children, even when others (including state authorities) may disagree with those decisions." Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 Notre Dame J.L. Ethics & Pub. Pol'y 397, 402 (2023).

Parental rights are about who has the "ultimate decision-making authority." Martin Guggenheim, *The (Not So) New Law of the Child*, 127 Yale L.J. Forum 942, 947 (2018); *see* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109, 133 (2000) (considering whether a child would be better served if "contested matters" about her life "are determined by the State, rather than by her family").

Parents' fundamental rights, therefore, include more than mere notice. "The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring and dissenting). But as Justice Kennedy's discussion implies, parents' fundamental rights do not include less than notice. Without reliable information about "their children's actions," how can parents "speak and act on their behalf"?

The district court failed to see this necessary component of parents' rights. Consider an indisputable proposition from the decision below: "Parents have a right to make the initial choice about where their child attends school." Order, R.94, PageID#2025. As explained above and in Plaintiffs' own brief (Br.55–56), that proposition is correct although it understates the scope of parents' fundamental rights. But even that crabbed view of parental rights necessarily implies a right to some amount of reliable information "about curriculum and school

operations." Order, R.94, PageID#2025. Or about whether their child is actually *attending* school on a regular basis.

Any other rule would nullify *Meyer* and *Pierce*. A school could simply conceal from parents the details of a controversial operational issue—whether about bathroom usage or something more mundane, like declining academic performance among students. In such a scenario, parents might "still have the option to remove the[ir children] from that school." *Id.* But with the crucial information hidden from them, they would have no reason to pursue that option. If Robert Meyer had refused to teach German to Raymond Parpart but concealed his refusal from the boy's parents, they would have assumed their son was learning German.

To borrow Secretary Rumsfeld's famous categories, parents can evaluate a "known unknown[]" about their children's upbringing or education. U.S. Dep't of Def., *DoD News Briefing – D. Rumsfeld*, C-SPAN (Feb. 12, 2002), https://bit.ly/3I6IfKI. If a school announces that it will not inform parents about its bathroom policy or any other issue, parents can decide based on that announcement whether to continue enrolling their children at that school. But if a school conceals from parents new information about their own children—information any reasonable parent would want to know, including a child's new struggles with gender confusion—parents face an "unknown

unknown[]" about their children. And "it is th[is] latter category that tend[s] to be the difficult one[]." *Id.*

The district court was wrong to characterize Plaintiffs' parental-rights claim as "inventing a constitutional right." Order, R.94, PageID#2025. American history and tradition establish parents as the primary decisionmakers for their children. And when the government denies parents information necessary to make decisions, it denies their fundamental rights no less than if it had expressly prohibited them from making a particular decision. Public schools violate parents' fundamental rights when they fail to provide reliable information to parents about their own children's education.

The decision below ended its parental-rights analysis with a concern that protecting parents' right to reliable information from the government about their own children is "unworkable" in our "pluralistic society." Order, R.94, PageID#2026 n.6 (disagreeing with *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295 (W.D. Pa. 2022) ("*Tatel I*")). But it did not explain how simply providing information vital to parental decisionmaking undermines pluralism.

To the contrary, "[i]n a pluralistic society, absent a compelling need, a school district should have tolerance for differing parental views on sensitive topics," like those underlying Plaintiffs' lawsuit. *Tatel I*, 637 F. Supp. 3d at 326; *see Tatel v. Mt. Lebanon Sch. Dist.*, Civ. Action No. 22-837, 2023 WL 3740822, at *5–13 (W.D. Pa. May 31, 2023)

(denying motion to reconsider). The decision below, and many of the out-of-circuit decisions on which it relied, missed "the fundamental nature of the parental rights at issue and how to balance those rights with the interests of a public school in a pluralistic society." *Tatel I*, 637 F. Supp. 3d at 325; *see id.* at 324–26 (explaining flaws with the same out-of-circuit decisions discussed by the district court in this case).

Providing reliable information to parents about their own children serves, rather than undermines, pluralism. Plaintiffs here prove the point. They come from different backgrounds and are members of diverse faith communities. *See* Complaint, R.1, PageID#11–17. But a desire to make wise decisions for their children unites them. And the Constitution guarantees them the right to make those decisions. The school district violates that right when it denies them information necessary to make those decisions.

II. Schools violate parents' fundamental rights when they treat students as the opposite sex while concealing it from parents.

According to "parental exclusion" policies, many American school districts now require staff to treat a student as the opposite sex without notice to or consent from the student's parents—often, even over their objection. *E.g.*, *Mirabelli v. Olson*, No. 3:23-CV-00768, 2023 WL 5976992, at *12 (S.D. Cal. Sept. 14, 2023) (preliminarily enjoining policy that required school staff "to conceal from parents, by mis-direction and substitution, accurate information about their child's use

of a new name, gender, or pronouns at school"). Treating a child as the opposite sex has significant mental-health implications, which heightens parents' need for reliable information about this from schools. *Cf.* Ryan Bangert, *Parental Rights in the Age of Gender Ideology*, 27 Tex. Rev. L. & Pol. 715, 724–28 (2023) (promoting "a parent-centric approach" to students' gender struggles). And modern parental-rights precedent confirms that these parental-exclusion policies violate the Fourteenth Amendment.

A. School districts nationwide have parental-exclusion policies.

In recent years, many school districts with parental-exclusion policies have faced lawsuits after deciding to treat a student—usually a middle-school girl—as the opposite sex while concealing that decision from her parents. Tammy Fournier, *amica curiae*, was fortunate that she and her husband discovered their daughter's struggles before her school did. *Kettle Moraine*, 2023 WL 6544917, at *1. The school couldn't keep any information from them.

Many other parents have been less fortunate. They have discovered, after the fact, a decision by their child's school to treat the child as the opposite sex. Their discoveries have often led to litigation, like the following examples:

- Two Michigan parents recently sued a school district alleging not only that the district concealed its treatment of their 13-year-old daughter as a boy but that a school neuropsychologist altered

records to hide evidence of this treatment from her parents. Complaint ¶¶ 114–36, 170–73, *Mead v. Rockford Pub. Sch. Dist.*, No. 1:23-CV-01313 (W.D. Mich. Dec. 18, 2023), ECF No. 1.

- A mother in upstate New York sued her daughter's former school district alleging that the district concealed from her its treatment of her 12-year-old daughter as a boy—despite her regular requests for information about changes she had perceived to the girl's well-being. Complaint ¶¶ 89–111, *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, No. 5:24-CV-00155 (N.D.N.Y. Jan. 31, 2024), ECF No. 1.

- A California school district settled a lawsuit based on allegations that it had "actively concealed" from a girl's mother its treatment of her as a boy. Pls.' Unopposed Mot. for Approval of Minor's Compromise at 1, *Konen v. Caldeira*, No. 5:22-CV-05195 (N.D. Cal. June 22, 2023), ECF No. 49, *dismissed*, Stip. of Dismissal; & Order Thereon (Aug. 3, 2023), ECF No. 54.

- In Florida, a 12-year-old girl's parents alleged that a school counselor met weekly with her—in secret—and referred to her using a male name and pronouns. Second Am. Compl. ¶¶ 17–63, *Perez v. Clay Cnty. Sch. Bd.*, No. 3:22-CV-83 (M.D. Fla. May 31, 2023), ECF No. 43.

- In Maine, a mother alleged that school staff secretly treated her 13-year-old daughter as if she were a boy while at school, which the mother only discovered after a staff member had given the girl a "chest binder" to hide her breasts. Compl. ¶¶ 5, 15–37, *Lavigne v. Great Salt Bay Cmty. Sch. Bd.*, No. 2:23-CV-158 (D. Me. Apr. 4, 2023), ECF No. 1; *see* Order, *Lavigne* (Nov. 7, 2023), ECF No. 23 (dismissing only individual defendants).

- And an Arizona mother alleged that her then-eighth-grade daughter's school listed the girl under a boy's name in the playbill for a school musical without informing her it was treating her daughter as a boy. *See* Pls.' First Am. Compl. ¶¶ 102–40, *Walden v. Mesa Unified Sch. Dist. #4*, No. CV2023-018263 (Ariz. Superior Ct. Feb. 9, 2024).

This non-exhaustive list shows that parental-exclusion policies—and lawsuits brought by the parents they hurt—are not limited to any one region. They appear in school districts coast-to-coast.

Litigation over these policies is in its early stages. But courts are beginning to recognize that such policies violate parental rights by circumventing parents' decisionmaking authority. In addition to Tammy's victory, *Kettle Moraine*, 2023 WL 6544917, at *10, last June, one court partially enjoined a school district's parental-exclusion policy, *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, No. 23-CV-069-SWS, 2023 WL 4297186, at *13–15 (D. Wyo. June 30, 2023). Insofar as that policy required staff to "refuse to disclose" or to "provide materially misleading or false information" in response to parental requests about names and pronouns used to address their children at school, it likely violated parents' rights. *Id.* at *15.

Courts have also ruled in favor of teachers who object to concealing information from parents about treating a child as the opposite sex. Granting a teacher's request to enjoin a requirement that she participate in a parental-exclusion policy, a court ruled that parents' right to "raise their children as they see fit" necessarily "includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred." *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). That court found it "difficult to envision why a

school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being." *Id.*

And a California federal court last September called a parental-exclusion policy "a trifecta of harm." *Mirabelli*, 2023 WL 5976992, at *18. It hurts a kid "who needs parental guidance and possibly mental health intervention." *Id.* It hurts school staff "who are compelled to violate the parent's rights" when forced "to conceal information they feel is critical for the welfare of their students." *Id.* And it hurts parents "by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make health care decisions for their children." *Id.*

B. Parental-exclusion policies present long-term risks for children.

Make no mistake, though the use of cross-gender names and pronouns is often labeled "social transition," *see Mirabelli*, 2023 WL 5976992, at *6 (citation omitted), their use relates to mental health. Granting summary judgment to Tammy and her husband in a lawsuit against their daughter's former school district, a Wisconsin trial court recently explained this relationship. Based on undisputed expert evidence, the court found that "[s]ocial transitioning is a 'powerful psychotherapeutic intervention' that likely reduces the number of children desisting from their transgender identity and can lead them to

using puberty blockers and cross-sex hormones, which carry known risks." *Kettle Moraine*, 2023 WL 6544917, at *2.

Other sources agree. The World Professional Association for Transgender Health (WPATH) is a transgender-advocacy group that has produced guidelines for medical and surgical gender interventions. *See generally* WPATH, *Standards of Care for the Health of Transgender and Gender Diverse People* (2022 v.8), http://bit.ly/3JkBDc7. Those guidelines define "gender dysphoria" as the "distress or discomfort that may be experienced because a person's gender identity differs from that which is physically and/or socially attributed to their sex assigned at birth." *Id.* at S252. And a "gender social transition in prepubertal children," including a public school's use of cross-gender names and pronouns for students, is a "form of psychosocial treatment that aims to reduce gender dysphoria" in children. Kenneth J. Zucker, *Debate: Different Strokes for Different Folks*, 25 Child and Adolescent Mental Health 36 (2020).

This "form of psychosocial treatment" has long-term implications. Many studies have found that the vast majority of children (roughly 80–95%) who experience gender dysphoria during childhood ultimately find comfort with their biological sex as they enter into adulthood; such children are said to "desist." WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 11 (2011 v.7), https://bit.ly/2Qfw2Lx. At the same time, children who *have*

transitioned report higher rates of suicidal ideation, suicide attempts, and suicide. *See* Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, 142 Pediatrics 1, 1–3 (2018), perma.cc/3Q5B-CCKG. A heartbreaking 50.8% of adolescents in the study who identified as "female to male transgender" reported having attempted suicide. *Id.* By comparison, 27.9% of all respondents who were "not sure" about their gender identity reported having attempted suicide, and 17.6% of female respondents who did not identify as transgender or questioning reported the same. *Id.*

Given the serious implications of treating a child as the opposite sex, parents require information from schools about this issue. As summarized by *Kettle Moraine*, a large body of scientific evidence establishes the need for parental involvement in an important decision like whether to treat a child as the opposite sex. 2023 WL 6544917, at *1–2. In particular, that court considered evidence from two expert witnesses.

One was Dr. Stephen B. Levine, former WPATH committee chairman. Dr. Levine detailed the findings of one "cohort study by authors from Harvard and Boston Children's Hospital" finding that youth and young adults who self-identified as transgender "had an elevated risk of depression (50.6% vs. 20.6%) and anxiety (26.7% vs. 10.0%)," and a "higher risk of suicidal ideation (31.1% vs. 11.1%), suicide attempts (17.2% vs. 6.1%), and self-harm without lethal intent

(16.7% vs. 4.4%) relative to the matched controls." Expert Aff. of Dr. Stephen B. Levine, MD, at 45, *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650 (Wis. Cir. Ct. filed Feb. 3, 2023), https://bit.ly/3SpeX0q.

Summarizing the results of numerous studies, Dr. Levine warned that, "as we look ahead to the patient's life as a young adult and adult, the prognosis for the physical health, mental health, and social well-being of the child or adolescent who transitions to live in a transgender identity is not good." *Id.* at 47. "Meanwhile, *no studies* show that affirmation of pre-pubescent children or adolescents leads to more positive outcomes" later in life compared to other forms of ordinary therapy. *Id.* (emphasis added).

The other expert witness in *Kettle Moraine* was Dr. Erica E. Anderson. For years, Dr. Anderson's clinical psychology practice "has focused primarily on children and adolescents dealing with gender-identity related issues," many of whom "have transitioned—either socially, medically, or both—to a gender identity that differs from their natal sex." Expert Aff. of Dr. Erica E. Anderson, Ph.D. at 1, *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650 (Wis. Cir. Ct. filed Feb. 3, 2023), https://bit.ly/40liv5I.

That long clinical record led Dr. Anderson to emphasize how potentially harmful it can be for school districts not to notify parents before treating students as the opposite sex. Parents are "a critical part of the diagnostic process to evaluate how long the child or adolescent

has been experiencing gender incongruence" and to predict "how likely those feelings are to persist." *Id.* at 27. As a result, "parental involvement is a necessary prerequisite for any kind of treatment by a medical professional, whether for gender dysphoria or any coexisting mental-health condition." *Id.* at 29. Therefore, Dr. Anderson concluded, "[a] school policy that involves school adult personnel in socially transitioning a child or adolescent without the consent of parents or over their objection violates widely accepted mental health principles and practice." *Id.* at 32.

As *Kettle Moraine* concluded, "[a] school facilitated transition without parental consent/buy-in infringes on parents' ability to take a more cautious approach to their child as well as a treatment approach that does not involve immediate transitioning." *Kettle Moraine*, 2023 WL 6544917, at *2. By concealing information from parents, parental-exclusion policies make "parental consent/buy-in" impossible. This violates parents' fundamental rights.

C. Parental-exclusion policies are inconsistent with Fourteenth Amendment precedent.

State and federal appellate decisions, including those of this Court, support the conclusion that parental-exclusion policies violate parents' fundamental rights.

These policies create a situation similar to the one addressed in *Arnold v. Bd. of Educ. of Escambia Cnty.,* 880 F.2d 305 (11th Cir. 1989),

unrelated holding abrogated by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993). That decision held that "[c]oercing a minor to obtain an abortion or to assist in procuring an abortion *and to refrain from discussing the matter with the parents* unduly interferes with parental authority . . . [and] responsibility." *Id.* at 313 (emphasis added). When a school conceals information, it "deprives the parents of the opportunity to counter influences on the child the parents find inimical to their religious beliefs or the values they wish instilled in their children." *Id.* That is particularly true of information related to abortion, sex, gender, or any other issue that "raises profound moral and religious concerns." *Id.* at 314.

Similarly, a New York City program involving "the distribution of condoms to high school students" violated parents' fundamental rights. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 263 (N.Y. App. Div. 1993); *see id.* at 265–67 (treating protections under U.S. and New York Constitutions as essentially coextensive). Through that program, the city had "made a judgment that minors should have unrestricted access to contraceptives" and then "forced that judgment" on parents. *Id.* at 266. Because parents "must send their children to school" and many, including the parents in that case, cannot afford private school, the policy effectively eliminated parental authority over whether their children should have access to contraceptives. *Id.*; *cf. Deanda v. Becerra,* 645 F. Supp. 3d 600, 627–29 (N.D. Tex. 2022), *oral argument heard*, No.

23-10159 (5th Cir. Nov. 6, 2023) (concluding that federal government program allowing minors to access contraceptives without parental consent violates parents' fundamental rights). Like that program, parental-exclusion policies deny parental authority to make crucial decisions about their children's lives, except these policies additionally violate parents' rights by concealing the school's actions.

This concealment creates the same constitutional problem addressed in *Gruenke v. Seip*. There, the Third Circuit held that a swim coach, though receiving qualified immunity, violated the rights of a girl's parents by not notifying them before forcing her to undergo a pregnancy test. *See* 225 F.3d 290, 306–07 (3d Cir. 2000). *But see Tatel I*, 637 F. Supp. 3d at 332 (denying qualified immunity based on *Gruenke* when school employees failed to notify parents of important information about their own children).

The girl's mother argued the coach's "failure to notify her … obstruct[ed] [her] parental right to choose the proper method of resolution." *Gruenke*, 225 F.3d at 306. The Third Circuit agreed that the mother had "sufficiently alleged a constitutional violation" due to the coach's "arrogation of the parental role." *Id.* at 306–07. The coach had "usurp[ed]" the mother's authority to make a decision involving her daughter—how to handle a pregnancy. *Id.* at 307. And he had done so primarily by failing to give her information she needed to make her own decision. The same principle should hold in other cases where a school

has concealed information from parents that they need to make important decisions for their children—like decisions about how best to address a child's struggles with gender.

This Court's decision in *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), supports the conclusion that parental-exclusion policies violate parents' fundamental rights. There, two States prohibited medical professionals from performing certain procedures on minors that, in the States' judgment, could "lead to the minor becoming irreversibly sterile," among other serious consequences. *Id.* at 468 (citation omitted). A group of parents claimed this prohibition violated their fundamental parental rights. *Id.* at 475. Rejecting that claim, this Court discerned no history or tradition to support those parents' claimed right "to obtain banned medical treatments for their children." *Id.* Because "there is no historical support for an affirmative right to specific treatments," parents do not obtain such a right simply because they seek a dangerous and experimental treatment on their children's behalf. *Id.* at 476.

In so holding, *Skrmetti* expressly distinguished situations like those presented by parental-exclusion policies. *Id.* at 475–76. It noted "a material distinction between the State effectively sticking a needle in someone over their objection and the State prohibiting the individual from filling a syringe with prohibited drugs." *Id.* at 476. As an example, it discussed *Kanuszewski v. Michigan Department of Health & Human*

Services, 927 F.3d 396 (6th Cir. 2019). There, the Court considered a Michigan program for collecting and storing newborn blood samples "without parental consent." *Skrmetti*, 83 F.4th at 476. It held that program "violated nonconsenting parents' rights 'to make decisions concerning the medical care of their children.' " *Id.* (quoting *Kanuszewski*, 927 F.3d at 418).

Whereas the States in *Skrmetti* "*restrict[ed]* medical care," Michigan had "*compelled* medical care." *Id.* By failing to obtain parental consent before treating a child as the opposite sex—a course of action that often leads to a lifetime of medical consequences—parental-exclusion policies like the one here resemble the Michigan program this Court invalidated in *Kanuszewski*.

CONCLUSION

This Court should reverse the judgment below and remand for further proceedings.

Dated: February 21, 2024

Respectfully submitted,

/s/ Vincent M. Wagner

John J. Bursch
Vincent M. Wagner
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, Virginia 20176
(571) 707-4655
jbursch@ADFlegal.org
vwagner@ADFlegal.org

David A. Cortman
Katherine L. Anderson
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
dcortman@ADFlegal.org
kanderson@ADFlegal.org

Counsel for Amica Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Fed. R. App. P. 29(a)(5) because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 6,446 words and does not exceed 6,500 words.

This brief also 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 365 in 14-point Century Schoolbook font.

/s/ Vincent M. Wagner
Vincent M. Wagner
Counsel for Amica Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2024, I electronically filed the foregoing brief with the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that counsel for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Vincent M. Wagner
Vincent M. Wagner
Counsel for Amica Curiae