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**In the United States Court of Appeals for the First Circuit**

STEPHEN FOOTE, INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND OF B.F. AND G.F., MINORS; MARISSA SILVESTRI, INDIVIDUALLY AND AS GUARDIAN AND NEXT FRIEND OF B.F. AND G.F., MINORS, *Plaintiffs - Appellants*,  
JONATHAN FELICIANO; SANDRA SALMERON, *Plaintiffs*,

v.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, FORMER SUPERINTENDENT;  
LISA NEMETH, INTERIM SUPERINTENDENT; STACY MONETTE, PRINCIPAL,  
BAIRD MIDDLE SCHOOL; MARIE-CLAIRE FOLEY, SCHOOL COUNSELOR, BAIRD  
MIDDLE SCHOOL; JORDAN FUNKE, FORMER LIBRARIAN, BAIRD MIDDLE SCHOOL;  
TOWN OF LUDLOW, *Defendants-Appellees*.

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**On Appeal from the United States District Court for the  
District of Massachusetts Springfield Division, No. 3:22-cv-30041-MGM**

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**BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM, INC.; ABLE AMERICANS; AMERICAN CORNERSTONE INSTITUTE; AMERICAN PRINCIPLES PROJECT; AMERICAN VALUES; CENTER FOR POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND EDUCATION; CHRISTIANS ENGAGED; CITIZENS UNITED; CITIZENS UNITED FOUNDATION; COALITION FOR JEWISH VALUES; COMMITTEE FOR JUSTICE; COMMON SENSE CLUB; DR. JAMES DOBSON FAMILY INSTITUTE; EAGLE FORUM; FAITH AND FREEDOM COALITION; FAMILY INSTITUTE OF CONNECTICUT; MISSOURI CENTER-RIGHT COALITION; MY FAITH VOTES; NATIONAL ASSOCIATION OF PARENTS; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NATIONAL RELIGIOUS BROADCASTERS; NEW JERSEY FAMILY POLICY CENTER; PROJECT 21; RELIGIOUS FREEDOM INSTITUTE; RUSSELL KIRK CENTER FOR CULTURAL RENEWAL; TEA PARTY PATRIOTS ACTION, INC.; THE FAMILY FOUNDATION; THE JUSTICE FOUNDATION; AND YOUNG AMERICA'S FOUNDATION SUPPORTING APPELLANT AND REVERSAL**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The amici curiae Amici Curiae Advancing American Freedom, Inc.; Able Americans; American Cornerstone Institute; American Principles Project; American Values; Center For Political Renewal; Center For Urban Renewal And Education; Christians Engaged; Citizens United; Citizens United Foundation; Coalition For Jewish Values; Committee For Justice; Common Sense Club; Dr. James Dobson Family Institute; Eagle Forum; Faith And Freedom Coalition; Family Institute of Connecticut; Missouri Center-Right Coalition; My Faith Votes; National Association Of Parents; National Center For Public Policy Research; National Religious Broadcasters; New Jersey Family Policy Center; Project 21; Religious Freedom Institute; Russell Kirk Center For Cultural Renewal; Tea Party Patriots Action, Inc.; The Family Foundation; The Justice Foundation; 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.

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## 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.<sup>1</sup>

The Religious Freedom Institute is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security.

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<sup>1</sup> 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.



Young America's Foundation is a 501(c)(3) public charity whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. The Foundation accomplishes its mission by providing essential conferences, seminars, and educational materials to young people across the country, and through its school chapter program, Young Americans for Freedom. Chapters often face administrative obstacles on campus, and the Foundation supports students and parents to overcome such obstacles by, for example, filing public records requests to ensure administrators are providing complete information. The Foundation believes that parents are the best administrators of their children's own physical, moral, and educational development.

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.

Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV

promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing amicus curiae briefs in defense of equality and freedom for religious institutions and individuals.

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 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.

National Religious Broadcasters (NRB) is a non-profit, membership association that represents the interests of Christian broadcasters throughout the nation. Most of its approximately 1100 member organizations are made up of radio stations, radio networks, television stations, television networks, and the executives, principals, and production and creative staff of those broadcast entities. NRB member broadcasters

are both commercial and non-commercial entities. Since 1944, the mission of NRB has been to help protect and defend the rights of Christian media and to maintain access for Christian communicators. Additionally, NRB seeks to effectively minister to the spiritual welfare of the United States of America through the speech it advances to the public.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia. Its interest in this case is derived directly from its concern to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

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, 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.

The National Center for Public Policy Research is a communications and research foundation rooted in the belief that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. Its mission focuses on providing the conservative movement with new tools and capabilities to become more effective.

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.

The Justice Foundation is a 501(c)(3) charitable foundation that provides free legal representation to protect individual and parental rights across the nation, while enforcing constitutional limits on state authority. It supports the fundamental and natural right of parents to direct the education and upbringing of their own children. The Justice Foundation believes that parental rights are fundamental to the family

and society, and it opposes efforts to expand state authority and control over children at the expense of parental rights.

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.

Able Americans provides conservative solutions to problems faced by Americans with disabilities. It seeks to positively impact the lives of people with disabilities of all kinds — including special physical needs, mental health, behavioral and substance abuse problems—by removing government-created barriers and advancing free-market solutions that lead to better outcomes.

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).

Project 21, a national leadership network for black conservatives, promotes the views of black citizens whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation’s civil rights establishment. Project 21 has participated as amicus curiae in significant cases involving equal protection principles. *See, e.g., Shelby Cty. v. Holder*, 570 U.S. 529 (2013); and *Bartlett v. Strickland*, 556 U.S. 1 (2009).

New Jersey Family Policy Center, Inc. is a 501(c)(4) nonprofit organization, incorporated under the laws of the State of New Jersey. The vision of the New Jersey Family Policy Center sees a state where God is honored, Religious Freedom Flourishes, Families Thrive, and Life Is Cherished.

The Center for Urban Renewal and Education (CURE) is a policy and research center dedicated to fighting poverty and restoring dignity through messages of faith, freedom and personal responsibility. CURE seeks free-market solutions to provide education, employment, healthcare and the opportunity for black families to grow and their communities to flourish.

The purpose of the Center for Political Renewal (CPR) is to provide policy guidance, model legislation and related resources to lawmakers, and allied organizations, seeking to advocate for policies that further Christian culture, in particular, as it informs family life.

The National Association of Parents' core objective is to preserve and support the parent-child relationship. By advocating for the rights of parents as protected by the U.S. Supreme Court, ParentsUSATM works to support parents' rights to raise their children as they see fit, so long as they are not harmed. Through strategic litigation, education, and lobbying, we will reshape public policy to be in alignment with your rights as a parent.

My Faith Votes is a non-partisan movement that motivates, equips and activates Christians in America to vote in every election, transforming our communities and influencing our nation with biblical truth.

Christians Engaged is a national discipleship ministry that exists to awaken, motivate, educate, and empower ordinary believers in Jesus Christ to: PRAY for our nation and elected officials regularly, VOTE in every election to impact our culture, and ENGAGE our hearts in some form of civic education and involvement for the well-being of our nation. According to the Bible, God has ordained the family as the foundational institution of human society.

The Russell Kirk Center for Cultural Renewal aims to recover, conserve, and enliven those enduring norms and principles that Russell Kirk called the Permanent Things. As Kirk put it, “There are certain permanent things in society: the health of the family, inherited political institutions that insure a measure of order and justice and freedom, a life of diversity and independence, a life marked by widespread possession of private property. These permanent things guarantee against arbitrary interference by the state. These are all aspects of conservative thought, which have developed gradually as the debate since the French Revolution has gone on.” It is the work of the Kirk Center to strengthen the Permanent Things, especially as they relate to America’s tradition of order, justice, and freedom.

The Common Sense Club, Faith and Freedom Coalition, and the Missouri Center-Right Coalition also join this brief. These *amici curiae* are concerned about how the First Circuit’s decision will affect the rights of parents to raise their children and are committed to securing fundamental constitutional rights against government infringement.

Family Institute of Connecticut (FIC) is a 501(c)(3) non-profit organization founded in 1989, to help improve and strengthen the family in Connecticut.

### **SUMMARY OF THE ARGUMENT**

When parents send their children to school, they expect their children to be educated, not to have their authority undermined by willful school employees. In



this case, the officials of Ludlow Public Schools encouraged appellants' children to use new names and pronouns to adopt an entirely new identity and sought to hide these important personal decisions from their parents. The school in this case was acting consistent with Guidance issued by the Massachusetts Department of Elementary and Secondary Education which encourages schools to engage in secretive social manipulation. These actions on the part of the school, an arm of the state, are inconsistent with the fundamental, constitutionally recognized right of parents to direct the upbringing of their children, the right of the parents to freely exercise their religious beliefs, and the Protection of Pupil Rights Amendment of 1978. The district court's dismissal of the appellants' claims denied parents the opportunity to have their fundamental First Amendment rights vindicated. This Court should reverse the district court's dismissal.

## **INTRODUCTION**

Parents expect a school to teach children to learn to read and write, stretch their imagination through math and science, and to acquire through the survey of history and art a familiarity with the ideas that hold us together. Parents do not expect school administrators and teachers to come to class armed with doctrines to undermine their children's basic understanding of reality. Most of all, no parent expect those administrators and teachers to actively encourage their children to conceal important personal information from them. Should schools conceal poor academic

performance from parents? Depression? Sexual activity? Drug use? In this case, parents of two children who, at the time of the relevant events in this case were eleven and twelve years old, sued their children’s school after school officials had secretive conversations with the children about their gender identity, began using alternative names and pronouns for the children, and concealed these actions from the parents. *Foote v. Town of Ludlow*, No. CV 22-30041-MGM, 2022 WL 18356421, at \*1 (D. Mass. Dec. 14, 2022).

How did we get here? Confusion in the classroom is not a new concern. In 1983, the National Commission of Excellence in Education released a report called *A Nation at Risk: The Imperative of Educational Reform*.<sup>2</sup> As Russel Kirk observed a decade later, “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” had “lost sight of the basic purposes of schooling...” *A Nation At Risk* 5 (1983). The school’s decision in this case to encourage (and in some cases conceal from parents) students’ social gender transition is a particularly astonishing example in today’s educational context of that loss of sight.

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<sup>2</sup> National Commission on Excellence in Education, *A Nation at Risk*, (1983), <https://www.reaganfoundation.org/media/130020/a-nation-at-risk-report.pdf>

In June 2012, the Massachusetts Board of Elementary and Secondary Education (“Board”) revised the Access to Equal Education Opportunity Regulations (“Policy”), 603 CMR 26.00, to include gender identity as a protected class, consistent with the Legislature’s revision of Massachusetts’ student anti-discrimination provision. *See* District court amended complaint at line 22.

The Massachusetts Department of Elementary and Secondary Education (“DESE”) then issued “Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment” (“Guidance”).<sup>3</sup> This Guidance, though paying lip service to the authority of parents in the gender identity decisions of their children at least with regard to “young” students, implicitly operates out of the assumption that parents who are not fully on board with a child’s gender identity do not have a right to be informed about what the school is discussing with their child.

The Guidance informs educators that, “The responsibility for determining a student's gender identity rests with the student or, in the case of young students not yet able to advocate for themselves, with the parent.” *Id.* It says that, regarding the issue of pronoun usage, “in the case of a younger student,” parents should be consulted. *Id.* As to the issue of privacy, the question of with whom to share the

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<sup>3</sup> Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment, [https://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html?source=post\\_page-----](https://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html?source=post_page-----) (last visited Mar. 10, 2023).

student's gender identity "should be made in consultation with the student, or in the case of a young student, the student's parent or guardian." *Id.* The section on privacy concludes that, for students who are under the age of 14 and have not yet entered the ninth grade, "the student's parent (alone) has the authority to decide on disclosures and other student record matters." *Id.*

However, despite these apparent concessions to parental authority, the Guidance displays an underlying bias against parents who might be unwilling to affirm the capacity of their child to choose a different gender. For example, the Guidance notes that "Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance." *Id.* None of the "real-world examples" the Guidance includes to illustrate the issues it discusses describe parents who objected to their child's social gender transition, nor does the document anywhere suggest that such opposition would be acceptable.

Additionally, despite, as quoted above, saying that in the case of young students, "[t]he responsibility for determining a student's gender identity rests . . . with the parent," it makes the dubious claim that "[o]ne's gender identity is an innate, largely inflexible characteristic of each individual's personality that is generally established by age four." *Id.* The previous two claims precede, in the same paragraph, the conclusion that "the person best situated to determine a student's gender identity is that student himself or herself." *Id.* The paragraph on privacy concludes, "The key

question is whether and how sharing the information will benefit the student.”<sup>4</sup> *Id.* The claims that (1) the student is the person best situated to determine his or her gender identity and (2) the question of whether to inform the parents of a change in gender identity is what the school official determines is best for the child, the decisions about the child's wellbeing are necessarily shifted from the parents to the state. *See Parham v. J. R.*, 442 U.S. 584, 602-603 (1979) (“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.”).

Finally, the Guidance reaches the apex of its anti-parent bias when it encourages school officials to conspire with their students to conceal information from those students’ parents. The guidance states, “[s]chool personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian” and that “school personnel should discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written communication to the student's parent or guardian.” *Id.* In other words, school officials are to ask whether a student’s

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<sup>4</sup> The quotation above relating to students who have neither entered the ninth grade nor reached the age of 14 derives from a regulatory requirement that the student record may be released by high school students or those who are 14-17 years old without parental consent. *See* 603 CRM §§ 23.01, 23.07. It does not necessarily pertain to discussions with students about their gender identity, generally.

preferred pronouns should be used in communications with the parents to avoid inadvertently revealing the social transition to the student's parents.

The Guidance's utter disregard for the authority of parents and its encouragement of students to lie to their parents is abhorrent and is inconsistent with the most basic moral norms upon which our society is based. Unless school officials are prepared to make a claim that the child is being abused as defined by law, they have no right inserting themselves between parents and their children. The actions of Ludlow Public Schools officials in this case directly conflict with one of the most ancient liberties of parents: to direct the upbringing, education, and care of their children.

The most memorable conclusion from *A Nation At Risk* merits new currency in light of the actions of the Ludlow Schools officials: "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).

American law, from criminal and contract law to sexual and medical consent law, recognizes that juveniles are often not yet mature enough to take full responsibility for their decisions and actions. *Amici* ask this Court to overturn the district court's dismissal of Plaintiffs' claims and thus to recognize parents' natural and

fundamental right to protect their children from impulsive and possibly ill-informed decisions and the adults intent on enabling such decisions

## ARGUMENT

### **I. The Actions of the Ludlow Public Schools’ Officials in this Case Flout the Fundamental Right of Parents to Direct the Upbringing, Education, and Care of Their Children.**

*A. The Supreme Court, this Court, and the Supreme Judicial Court of Massachusetts have all recognized the fundamentality of parental rights in the education and raising of children.*

The Massachusetts Supreme Court has consistently recognized that “a parent’s liberty interest in child rearing is indeed fundamental” and “state action infringing on that interest must be narrowly tailored to serve a compelling state interest.” *Blixt v. Blixt*, 437 Mass. 649, 655 (2002). Appeals Courts of Massachusetts have also recognized that the “right of a parent to direct a child’s education and upbringing is fundamental.” *Sagar v. Sagar*, 57 Mass. App. Ct. 71, 75 (2003). This Court has recognized that, as a general matter, parents have a liberty interest in the “care, custody, and management of their children.” *Kauch v. Dep’t for Children, Youth & Their Families*, 321 F.3d 1, 4 (1st Cir. 2003). Further, the precedent of the Massachusetts Supreme Court and this Court are consistent with a long line of U.S. Supreme Court cases that have found a parental rights doctrine rooted in the First and Fourteenth Amendments of the U.S. Constitution. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this court has not attempted to define with

exactness the [due process] liberty . . . Without doubt, it denotes . . . the right of the individual to . . . marry, establish a home and bring up children.”); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (finding that the act challenged in that case, “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (citing *Pierce*, 286 U.S. at 535) (“[A] State’s interest in education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protect by the Free Exercise Clause of the First Amendment, and the traditional interests of parents with respect to the religious upbringing of their children.”).

There is no constitutional justification for school officials to conceal from parents some of the most sensitive matters a family may face, except in the most extreme circumstances. For nearly a century, the Supreme Court has repeatedly affirmed the rights and responsibilities inherent in parenthood. *See Pierce*, 268 U.S. at 535 (“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.”); *Meyer*, 262 U.S. at 400 (“It is the natural duty of the parent to give his children education suitable to their station



in life.”); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) (“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.”) *Yoder*, 406 US at 232 (declaring that parental rights have been “established beyond debate as an enduring American tradition.”); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (“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.’”) This consistent and clear recognition of parental rights demands on the part of public educators a high regard for the will of parents.

*B. The significance of the disregard of parental rights in this case is evident when compared to the significant parental involvement in the schools’ administration of medication to students.*

The Ludlow Public Schools’ policy on the distribution of medication to students demonstrates that they understand the importance of parental consent for even basic interventions. In the Ludlow Public Schools, the distribution of all medications, prescription and over the counter, is closely controlled. With narrow exceptions, medications must be delivered to the school nurse by hand by the student’s parent

and administered by the school nurse.<sup>5</sup> The nurse may only administer the medication when the nurse has, in writing, (1) a specific request from the parent for the administration, (2) instructions from the parent for administration, and (3) instructions from the student’s dispensing physician.<sup>6</sup> Further, “whenever possible, an individualized medication administration plan [must] be completed by the school nurse in collaboration with” the student’s parents.<sup>7</sup> The medications, if prescription, must be in the labeled pharmacy container, and if over the counter, must be in their original container.<sup>8</sup> The school may not administer the first dose of any new medication, with no exceptions.<sup>9</sup>

In contrast to Ludlow’s meticulous medication policy, the DESE Guidance requires almost no parental input and the school officials in this case sought none. As discussed above, parents must be consulted on issues regarding the student records for students both under the age of 14 and who have not yet reached the ninth grade, and the DESE Guidance feigns support for parental involvement in other issues of student gender transition. In reality, parents may be kept completely in the dark as school officials’ coax their children into deep personal confusion. In cases

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<sup>5</sup> Ludlow Public Schools Online Policy Manual, <https://z2policy.ctspublish.com/masc/browse/ludlowset/ludlow/JLCD> (last visited Mar. 10, 2023).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

like the one before this Court, students may be allowed to choose new names and demand the use pronouns of the opposite gender or contrived pronouns wholly unconnected to reality, all while school officials encourage those children to lie to their parents, supposedly for their safety. We used to know that when someone told a child, “don’t tell mommy and daddy about this,” something bad was almost certain to follow. Now, apparently, this approach is the normal course of business for officials at Ludlow Public Schools.

As stated above, unless school administrators are prepared to make the serious claim that a parent is abusing his or her child, they have no business involving themselves in the raising of children without parental consent. Representatives of the state cannot simply claim that they are acting in the best interest of the child and on those grounds insinuate themselves between the parents and their children. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“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.”). Nor can school officials hide behind the supposed consent of the children in this case. *See Parham v. J. R.*, 442 U.S. 584, 602-603 (1979) (“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.”). The children in this case were eleven and twelve years old. They would not be allowed to provide consent for taking medication at school. They cannot legally consent to sexual activity. Contracts with minors may be voidable. They would be tried as minors in a criminal context. The school’s decision to encourage the students to socially transition without their parents’ knowledge or consent is as reprehensible as it is illegitimate.

In a speech at Hillsdale College, then-Secretary of Education Betsy DeVos said “the family [is a] sovereign sphere... A sphere that predates the 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.”<sup>10</sup> The right of parents to raise their children, barring extraordinary circumstances, is just as old as the institution of the family and has long been recognized by the Supreme Court as protected by the United States Constitution. By encouraging minor students to socially transition in this case, the Ludlow Public Schools administrators trampled over that fundamental right.

## **II. The Ludlow Public Schools’ Actions in This Case Violate the Free Exercise Clause 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 . . .

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<sup>10</sup> Virginia Aabram *Secretary of Education Betsy DeVos Speaks at Hillsdale*, (Oct. 22, 2022) <https://hillsdalecollegian.com/2020/10/secretary-of-education-betsy-devos-speaks-at-hillsdale/.cite>

prohibiting the free exercise” of religion. U.S. Const. amend. I. 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, *The Conservative Constitution* 174 (1990). And it is the family, the most basic societal institution, where religious beliefs are most often passed on to the next generation. 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). The parental right to raise children includes the right to teach them to live according to a particular religion’s teachings. *See Yoder*, 406 U.S. at 233 (“[T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.”). As the Supreme Court observed in *Obergefell v. Hodges*, 576 U.S. 644, 679 (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.”

The First Circuit has considered cases similar to the case at bar, but distinct in important ways. First, in *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), this Court held that a single instance of a school’s failure to

comply with a state notice and exemption statute, which resulted in the plaintiffs' child's attendance of an assembly where AIDS was discussed, had not sufficiently interfered with the parents' right to direct the education of their children. In *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), this Court rejected the free exercise and due process claims of parents objecting to the use of books that portrayed same-sex marriage in a positive light to their elementary school-aged children because the Court found that the parents had failed to show a significant burden to their free exercise rights.

The sequence of these two previous cases followed by the current case represents a slow ratcheting up of tension between parental and First Amendment rights on one hand and school actions that violate the values of parents on the other. In both cases, this Court considered and rejected claims of hybrid rights under *Employment Division v. Smith*, 494 U.S. 872 (1990). *See Brown*, 68 F.3d at 539; *Parker*, 514 F.3d at 97. In *Smith*, the Supreme Court recognized an exception to that case's neutral and general applicability standard for cases where free exercise claims are joined with free expression or parental rights. 494 U.S. at 882. Despite this Court's rejection of hybrid-rights arguments before, the parent's claim in this case is compelling and deserves to be heard.

The Supreme Court has clearly recognized, time and again, the fundamentality of the parental right. That it has not been recognized as a privacy right should not

leave it without protection, especially where it falls into a recognized category like the hybrid rights exception.

Therefore, given the significance of the harms to constitutional interests in this case, the parents' claims deserve to be heard and so the district court's dismissal should be reversed.

### **III. The Ludlow Public Schools Gender Identity 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 Ludlow Public Schools' approach to transitioning students from one gender to the other concretely harms parents and is not, and does not purport to be, directly related to academic instruction. By acting consistent with the DESE's guidance, Ludlow Public Schools have adopted a policy of withholding information from parents without the student's supposed consent to share that information with the parents. 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 actions of the Ludlow Public Schools officials in this case were 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

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## **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 6,041 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: March 20, 2023

/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: March 20, 2023

/s/ J. Marc Wheat  
J. Marc Wheat

## CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, 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: March 20, 2023

/s/ J. Marc Wheat  
J. Marc Wheat