No. 22-2927

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PARENTS DEFENDING EDUCATION,
Plaintiff-Appellant

v.

LINN-MAR COMMUNITY SCHOOL DISTRICT; SHANNON BISGARD; BRITTANIA MOREY; CLARK WEAVER; BARRY BUCHHOLZ; SONDRA NELSON; MATT ROLLINGER; MELISSA WALKER; RACHEL WALL,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Iowa
Case No. 22-cv-00078
District Judge C.J. Williams

BRIEF OF AMICI CURIAE STATE OF MONTANA AND 17 OTHER STATES SUPPORTING PLAINTIFF-APPELLANT

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INTERESTS OF AMICI CURIAE

The States of Montana, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Nebraska, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia, file this amicus brief to ensure that parents retain their fundamental right to direct the upbringing of their minor children—a right the Supreme Court has described as "essential" and "far more precious … than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and *May v. Anderson*, 345 U.S. 528, 533 (1953)).

SUMMARY OF ARGUMENT

Our constitutional system has "historically … recognized that the 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). So without a reason to believe a parent is unfit, courts presume that the State may not "inject itself into the private realm of the family [and] question the ability of that parent to make the best decisions concerning the rearing of [their] children." *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality op.) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)). And that presumption is not

overcome "[s]imply because the decision of a parent [about a child's medical treatment] is not agreeable to [the] child or because it involves risks." *See Parham*, 442 U.S. at 603. School districts can't shut parents out of their child's decision about their gender identity because the child objects or because the school believes the parent isn't supportive enough of an immediate gender transition.

Parents Defending Education (PDE) is a nationwide membership organization that seeks to prevent the politicization of K-12 education and to protect parental rights. PDE's members include parents within the Linn-Mar Community School District ("District" or "Linn-Mar") who are concerned that Linn-Mar's policies—including its recent adoption of Policy 504.13-R—will allow their children to make fundamentally important decisions about their gender identity without parental involvement. One of those parents believes their child often exhibits behavior that may lead outside observers to believe their child is confused about their gender identity. All of those parents wish to be informed, with or without their children's consent, if their children seek information or take any action related to their gender identity. But under Linn-Mar's

new policy, these parents will be denied that information unless their children consent.

Linn-Mar's policy violates parents' fundamental right "to direct the upbringing of their children"—"perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel*, 530 U.S. at 65. The policy inflicts an immediate and irreparable harm on parents by withholding information about whether their child has taken any action concerning his or her gender identity, leaving parents completely in the dark about their child's mental and emotional well-being. And this is no isolated occurrence: school districts across the country have adopted similar policies under the mistaken belief that to do otherwise would violate federal law.

Even so, the district court mistakenly concluded that PDE was not entitled to a preliminary injunction. The district court paid little mind to PDE's likelihood of success on the merits—"[t]he most important … factor," *see Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (citation and quotation marks omitted)—and it diminished the immediate and irreparable harm the policy inflicts on parents' fundamental rights. That was an abuse of discretion that this Court should correct.

ARGUMENT

This Court reviews a district court's denial of a preliminary injunction for an abuse of discretion, but it reviews the district court's legal conclusions de novo. *See MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020) (citation omitted). Because the district court's denial of PDE's preliminary injunction request rested on legal conclusions about PDE's likelihood of success on the merits and irreparable harm, this Court must review those conclusions de novo. *See id.* (reviewing district court's denial of a preliminary injunction de novo because its decision was based on a question of law).

I. Parents Possess a Longstanding, Fundamental Right to Direct the Care and Custody of Their Children.

Under the Fourteenth Amendment, States may not "deprive any person of … liberty … without due process of law." U.S. Const. amend. XIV. The Amendment's Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," *see Troxel*, 530 U.S. at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))—including those unenumerated rights that are "deeply rooted in this Nation's history and tradition," *see*

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting *Glucksberg*, 521 U.S. at 721).

The right of parents to direct the care and custody of their children "is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel*, 530 U.S. at 65; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (declaring that "the child is not the mere creature of the state," but rather "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"). And over the last century, the Supreme Court has reaffirmed that right time and again. *See Meyer*, 262 U.S. at 399 (the Due Process Clause protects parents' right to "establish a home and bring up children"); *Pierce*, 268 U.S. at 534–35 (the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); *Prince v. 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."); *Stanley*, 405 U.S. at 651 (raising one's children has been deemed an "essential" and "basic civil right[] of man" (citation and

quotation marks omitted)); *see also Dobbs*, 142 S. Ct. at 2257 (identifying, among a list of longstanding rights, "the right to make decisions about the education of one's children"). Nearly a century after *Meyer*, this much is clear: "Th[e] primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

That parental authority is based on the commonsense recognition "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 602. The law thus makes a basic assumption about children as a class: "[It] assumes that they do not yet act as adults do, and thus [it] act[s] in their interest by restricting certain choices that … they are not yet ready to make with full benefit of the costs and benefits attending such decisions." *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.23 (1988). That basic assumption restricts minor children's rights in myriad ways, such as restricting their right to vote, *see* U.S. Const. amend. XXVI, their right to enlist in the military without parental consent, *see* 10 U.S.C. § 505, or their right to drink alcohol, *see, e.g.,* 23 U.S.C. § 158. And that same principle is traditionally at work in public

schools, which routinely require parental consent before a student can receive medication or participate in certain school activities.

To be sure, this broad parental authority is not absolute—parents have no license to abuse or neglect their children. *See Parham*, 442 U.S. at 602–04. Nor does the parental relationship give parents the right to disregard lawful limitations on the use of medical procedures or drugs. *See Doe v. Pub. Health Tr.*, 696 F.2d 901, 903 (11th Cir. 1983) ("John Doe's rights to make decisions for his daughter can be no greater than his rights to make medical decisions for himself."). Relatedly, some parental decisions concerning their child's medical care may be "subject to a physician's independent examination and medical judgment." *Parham*, 442 U.S. at 604; *but see id.* ("[Yet parents] retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and the traditional presumption that the parents act in the best interests of their child should apply."). But parents are not stripped of their authority to act in the best interest of their children "[s]imply because the[ir] decision … is not agreeable to a child or because it involves risks." *See id.* at 603–04 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need

for medical care or treatment. Parents can and must make those judgments."). Indeed, "a fit parent"—*i.e.*, a parent who "adequately cares for his or her children"—is presumed to "act in the best interest of his or her child." *Troxel*, 530 U.S. at 68–69.

When a school district's legitimate policies "conflict with the fundamental right of parents to raise and nurture their child," "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest." *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000). But school districts have no interest—much less a compelling one—in hiding minor students' gender transitions from their parents.

II. The Policy Inflicts Immediate and Irreparable Harm on Parents' Fundamental Right to Care for Their Children.

A. The Policy authorizes school officials to make decisions about a child's gender identity behind parents' backs.

In April 2022, the Linn-Mar School Board adopted Policy 504.13-R, which gives any student the right to meet with a school counselor or administrator to create a "Gender Support Plan." App.477. When a student requests a Gender Support Plan—which the Policy defines as a "document" that "creates a shared understanding" about how the "student's

gender identity will be accounted for and supported," *see* App.480—the school will promptly schedule a meeting with the student. App.477. But parents are only permitted to attend, or even know about the meeting, if the student so chooses. App.477–78 (stating that "[t]he student should agree with who is a part of the meeting, including *whether their parent/guardian will participate*" (emphasis added)).

Beginning in seventh grade, students can use their Gender Support Plan to make crucial decisions about their medical care, mental health, and sense of self without any parental involvement whatsoever. Among those decisions, students may choose to be addressed by different names and pronouns, have their name changed for logins, email systems, and non-legal documents (*i.e.*, diplomas, yearbooks), use restrooms and locker rooms that correspond to their gender identity, participate in physical education and school activities in a manner consistent with their gender identity, and room with other students who share their gender identity on overnight field trips. *See* App.478–79. Students can make all of these requests, and have them granted, without their parents' knowledge or

consent and regardless of their age, *see* App. 477–80, even when they are required to get parental consent for lesser matters.[1]

Worse yet, the District will not inform parents whether their child has requested or been given a Gender Support Plan, or even whether it has any other information that would reveal the child's gender identity. *See* App.478 (prohibiting disclosure of "information that may reveal a student's transgender status to … parents … unless legally required to do so," without the student's consent); *id.* ("School staff should always check with the student first before contacting their parent/guardian."). Even the District's recordkeeping is secretive. *See* App.479 (requiring "all written records related to student meetings" about "their gender identity and/or gender transition" be kept in a "temporary file" "maintained by the school counselor"). And these records may only be accessed by staff members "authorized [by the student] in advance." *Id.*

Linn-Mar's Policy gives ultimate decisionmaking authority to children and displaces parents of their longstanding, primary role in

[1] One rightly fears what's next. *See After Being Denied Tattoo, Sixth Grader Decides to Have Gender Reassignment Surgery Instead*, THE BABYLON BEE (Apr. 13, 2022). After all, today's satire too often becomes tomorrow's reality.

ensuring their child's safety and well-being. Now, the question is, do schools have an obligation to facilitate the immediate transition of a student who believes they are transgender and to hide this change from parents who aren't on board? The answer is obviously: No. As a recent review of youth gender treatments recognized, "[s]ocial transition" is "an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning."[2] The District presumably does not treat a child's depression or other mental health issues without involving parents, and it has no duty or right to keep parents in the dark about gender-related distress either.

Worse still, Linn-Mar's 'immediate transition' approach lacks any solid, scientific foundation. Many medical professionals believe that this approach "can become self-reinforcing and do long term harm." Luke Berg, *How Schools' Transgender Policies Are Eroding Parents' Rights*

[2] *Independent Review of Gender Identity Services for Children and Young People: Interim Report* (The Cass Review), Feb. 2022, at 62, https://perma.cc/D5XP-EXAL.

(Am. Enter. Inst.), at 3, (Mar. 2022).[3] Given the recent explosion of students dealing with gender identity issues, there is a greater need for caution. *See id.* Not only that, but existing research suggests that these feelings eventually recede for most children—that is, for those who do not transition. *See id.* Even so, there are a growing number of "detransitioners," which further supports a cautious, rather than hasty, approach. *See id.* (citing Elie Vandenbussche, *Detransition-Related Needs and Support: A Cross-Sectional Online Survey, 69 J. Homosexuality* 1602 (2021)).

B. The District Court misconceived the nature and immediacy of the injury the Policy inflicts on parents' rights.

By its own terms, the Policy intrudes on parents' fundamental right to ensure their child's safety and well-being by removing them from the decisionmaking process, unless their child elects to include them. *See, e.g.*, App.477–78. In doing so, the Policy flips the "traditional presumption that fit parents act in the best interest of their children" on its head.

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[3] *See, e.g.*, Kenneth J. Zucker, *The Myth of Persistence: A Response to "A Critical Commentary on Follow-Up Studies and 'Desistance' Theories About Transgender and Gender Non-Conforming Children" by Temple Newhook et al. (2018)*, INT'L J. OF TRANSGENDERISM, at 7 (arguing that "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence").

See Troxel, 530 U.S. at 68. And refusing to inform parents whether their child has taken steps to transition inflicts an immediate harm on the parent-child relationship—either by leaving parents in the dark as to how to care for their child or by driving a wedge between parent and child.

Courts will not find irreparable harm if the applicant's threatened harm can be remedied by monetary damages. *See MPAY Inc.*, 970 F.3d at 1020 (finding the alleged harm was not irreparable because "any harm [MPAY] may suffer in the form of lost customers and lost profits is quantifiable and compensable with money damages"); *see also* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1 (3d ed. 2022). But courts routinely find irreparable harm when the denial of a preliminary injunction will lead to a "probable violation of [the applicant's] constitutional rights." *See, e.g.*, *D.M. v. Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019).

The district court found that PDE failed to establish standing or show irreparable harm because the parents' injury was neither sufficiently grievous nor imminent. Add.10–12, 18–21. Yet to reach that conclusion, the district court both misconceived the nature and diminished the degree of the parents' injury. The district court found that PDE likely

had no standing because the Policy had never been applied to its members' children and PDE only "assert[ed] a conjectural possibility of injury." Add.19. And it found no irreparable harm because "all [PDE] and its members face is speculative, notional harm that may never occur." Add.11. To be sure, the parents would suffer irreparable injury if they showed that their children were likely to receive Gender Support Plans and they were likely to be "denied any information or involvement if their children are given those plans." Add.11. But that overlooks the immediate harm the Policy inflicts. By withholding information from parents about whether their children have sought those plans or have otherwise contemplated transitioning, the Policy directly infringes on their right to help their child navigate these rough waters. And once that bell has been rung, it cannot be un-rung. *See D.M.*, 917 F.3d at 1004; *see also* 11A *Federal Practice and Procedure* § 2948.1.

C. School districts across the country have adopted similar parental exclusion policies.

Unfortunately, Linn-Mar's Policy is neither groundbreaking nor unique. In recent years, school districts nationwide have quietly implemented similar gender transition guidelines. These parental exclusion policies differ in execution—*i.e.*, whether they place students or school

officials in the driver's seat—but they both relegate parents to the back seat. All such policies thus prevent parents from helping their children make crucial decisions about their identity and mental health, in direct violation of parents' fundamental rights. *Parham*, 442 U.S. at 603.

Some policies—like Linn-Mar's—leave parental involvement to the student's discretion. These policies forbid school officials from disclosing information about a student's transgender status to parents unless the student has authorized the disclosure. Policies like this have shown up in large cities like Washington, D.C.,[4] Philadelphia,[5] Chicago,[6] and Los

[4] *See* D.C. Pub. Schs., *Transgender and Gender-Nonconforming Pol'y Guidance*, at 8 (2015) (instructing educators to not share transgender status with parents without permission from the child), https://perma.cc/G94K-YQ9C.

[5] *See* Sch. Dist. of Phila., *Transgender and Gender Non-Conforming Students*, at 3 (June 16, 2016) ("School personnel should not disclose … a student's transgender identity … to others, including parents … unless the student has authorized such disclosure."), https://www.philasd.org/src/wp-content/uploads/sites/80/2017/06/252.pdf.

[6] *See* Chi. Pub. Schs., *Guidelines Regarding the Support of Transgender and Gender Nonconforming Students*, at 4 (2019) (asserting that children have a right to keep their transgender status from their parents), https://perma.cc/WT5W-E52T.

Angeles,[7] as well as smaller cities like Eau Claire, Wisconsin.[8] And the New Jersey Department of Education has issued similar guidance to all public-school districts in the State.[9]

Other policies require school officials to determine whether it is appropriate to disclose the student's transgender status to their parents. To one degree or another, these policies give school officials discretion to determine whether parents should be involved in a student's transition plan. Policies like this have shown up in school districts in Charlotte[10]

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[7] *See* L.A. Unified Sch. Dist., Pol'y Bulletin BUL-2521.3, *Title IX Policy/Nondiscrimination Complaint Procedures*, at 18 (Aug. 14, 2020) (describing gender identity as confidential), https://perma.cc/2LLZ-5XAH.

[8] *See* M.D. Kittle, *Wisconsin School District: Parents are not 'Entitled to Know' if Their Kids are Trans*, THE FEDERALIST (Mar. 9, 2022), https://thefederalist.com/2022/03/08/wisconsin-school-district-parents-are-not-entitled-to-know-if-their-kids-are-trans/.

[9] *See* N.J. Dep't of Educ., *Transgender Student Guidance for Sch. Dists.*, at 2–3 (last visited Nov. 10, 2022) ("A school district shall accept a student's asserted gender identity; parental consent is not required."), https://nj.gov/education/students/safety/sandp/transgender/Guidance.pdf.

[10] *See* Charlotte-Mecklenburg Schs., *Supporting Transgender Students*, at 34 (June 20, 2016) (describing a case-by-case approach to involve parents in transition plans), https://perma.cc/3GAV-UHHM.

and New York,[11] as well as Hawaii's Department of Education.[12] While these policies condition parental involvement on student's consent, they still impair parents' fundamental right to raise their children.

The explosion of these policies appears to be the product of ideologically driven advocacy groups claiming that federal law requires this result.[13] One such group, the Gay, Lesbian, and Straight Education Network (GLSEN), promotes a so-called "model" policy—similar to Linn-Mar's—which falsely claims that disclosing a student's "gender identity and transgender status" without the student's consent may violate the Family Education Rights Privacy Act (FERPA). *See* GLSEN & Nat'l Ctr.

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[11] *See* N.Y.C. Dep't of Educ., *Guidelines to Support Transgender and Gender Expansive Students: Supporting Students* (last visited Nov. 10, 2022) ("[S]chools [must] balance the goal of supporting the student with the requirement that parents be kept informed about their children."), https://perma.cc/RT86-YQXT.

[12] *See* Haw. Dep't of Educ., *Guidance on Supports for Transgender Students*, at 5 (last visited Nov. 10, 2022) ("[I]nitial meeting[s] may or may not include the student's parents."), https://perma.cc/ECZ6-NJGE.

[13] *See, e.g.*, Nat'l Educ. Ass'n, *Legal Guidance on Transgender Students' Rights*, at 19–20 (2016) (arguing that FERPA precludes sharing transgender status in most circumstances), https://perma.cc/V7U5-ZXGK; GLSEN & ACLU, *Know Your Rights: A Guide for Transgender and Gender Nonconforming Students*, at 5 (2016) ("If your school reveals [transgender status] to anyone without your permission, it could be violating federal law."), https://perma.cc/RPD4-UFJJ.

for Transgender Equality, *Model Local Education Agency Policy on Transgender and Nonbinary Students*, at 4 (Rev. Oct. 2020). Even if that strained interpretation of FERPA had any merit (it doesn't), rights created by federal statute yield to those grounded in the U.S. Constitution whenever there is a conflict. *See, e.g.,* M*arbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it."). These federal statutes of recent vintage—no matter how laudable their aims—cannot displace parents' longstanding right to care for their children.

CONCLUSION

Without question, the decision to transition genders is life-altering. And when a student considers transitioning genders, parents have a fundamental, constitutional right to be involved in that decisionmaking process. *See Troxel*, 530 U.S. at 65. Yet school districts across the country, strong-armed by ideologically driven advocacy groups, have shut parents out of the process and trampled on their fundamental rights. These policies even fail on a practical level, as children are not yet is a position to "make sound judgments" about their "need for medical care or

treatment." *Parham*, 442 U.S. at 603. Rather, "[p]arents can and must make those judgments." *See id.* This Court must therefore reverse.

DATED November 10, 2022.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,656 words.

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/s/ *Peter M. Torstensen, Jr.*
PETER M. TORSTENSEN, JR.

CERTIFICATE OF SERVICE

I certify that on this date, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

Dated: November 10, 2022

/s/ *Peter M. Torstensen, Jr.*
PETER M. TORSTENSEN, JR.