No. 23-601

In The

Supreme Court of the United States

JOHN AND JANE PARENTS 1, JOHN PARENT 2,
PETITIONERS,

V.

MONTGOMERY COUNTY BOARD OF EDUCATION AND SHEBRA L. EVANS, BRENDA WOLFF, JUDITH DOCCA, KARLA SILVESTRE, REBECCA SMONDROWSKI, LYNNE HARRIS, SCOTT JOFTUS, AND MONIFA B. MCKNIGHT, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,
RESPONDENTS.

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

BRIEF FOR AMERICA FIRST LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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America First Legal Foundation (AFL) is a public interest law firm representing citizens in cases of broad public importance. AFL litigates to protect Americans' constitutional and common law rights, including parental rights, from government overreach. AFL, which is staffed by former Department of Justice officials and a former acting general counsel of the United States Department of Education, has a strong institutional interest in ensuring that the federal courts are open to meritorious complaints of constitutional violations by federal, state, or local governments, and in vigilantly protecting the rights of fit parents to raise and care for their children.

SUMMARY OF ARGUMENT

The panel majority's standing decision conflicts with the relevant decisions of this Court. Also, fit parents alone should have the authority to make medical decisions for their children regarding "gender identity." However, hundreds of school districts nationwide maintain parental preclusion policies, such as the policy at issue here, that transfer such authority to the state, usurping parental rights and causing Constitutional injury. Accordingly, this case raises an important question of federal law that should be settled by this Court.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than the amicus has made a monetary contribution to the preparation and submission of this brief. All parties' received timely notice of the filing of this brief.

ARGUMENT

The petitioners are public school parents challenging the Montgomery County, Maryland, School Board's "Parental Preclusion Policy." App.107a. This policy regulates the relative rights and responsibilities of parents and state actors with respect to the "gender identity" claims of children attending the Montgomery County Public Schools. App.108a. Among other things, it allows the state to change a child's name and to exhibit as other than his or her birth sex at school without parental notification. App.150a-155a. It requires administrators at state-run schools to implement a "Gender Support Plan" that will identify a child's new name, pronouns, which sex-separated facilities the child can use, which athletic teams they can play on, and determine whether school bureaucrats and staff will actively hide all this information from the child's parents. App.153a. It allows the state to deceive a child's parents by reverting to the child's given name when communicating with them. App.155a. The point and purpose of the policy, and of others like it,[2] is to deny a parent or guardian critical information regarding the mental and physical health of her child. App.108a.

The panel majority's ruling conflicts with the relevant decisions of this Court. Also, this case raises an important question of federal law that has not been, but should be, settled by this Court. Therefore,

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[2] *See* NYS Dep't of Edu., *Creating a Safe, Supportive, and Affirming School Environment for Transgender and Gender Expansive Students: 2023 Legal Update and Best Practices* at 16 (June 2023), http://tinyurl.com/83ctaut3.

the parents' petition for certiorari should be granted. *See* Sup Ct. R. 10(a), (c).

I. THE PANEL MAJORITY'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

The panel majority's standing decision conflicts with the decisions of this Court.

It is well-established that fit parents have the primary responsibility for medical decision-making involving their own children. The Parental Preclusion Policy expressly strips parents of their right to decide whether a gender-identity social transition is in their child's best interest, shifting authority from a mother or father to school bureaucrats without due process. Consequently, the policy inflicts concrete, present harm that can be remedied by a court order enjoining the policy's enforcement, *see TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021), and the parents should be entitled to the resolution of their claims in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

However, perhaps to avoid a merits decision, (App.15a, 21a-24a, 26a), the panel majority cited *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2014), and ruled that the parents lack standing unless and until they discover that their child has been "transitioned" by the state without their knowledge. App.5a. The panel majority misapplied *Clapper*, needlessly causing a conflict with decisions of this Court, *see, e.g., Parents Involved in Community*

Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), *see also TransUnion LLC,* 594 U.S. at 425 and *Spokeo, Inc. v. Robins,* 578 U.S. 330, 347 (2016) (Thomas, J., concurring), and with decisions of other United States courts of appeal, *see, e.g., Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 667 (8th Cir. 2023), *Religious Sisters of Mercy v. Bacerra*, 55 F.4th 583 (8th Cir. 2022), and *Franciscan Alliance, Inc. v. Becerra*, 47 F.4th 368 (5th Cir. 2022).[3] The weight of the conflicting precedent suggests that purposive considerations perhaps may have colored the panel majority's standing analysis—it is difficult to imagine the panel majority deciding this case the same way if the challenged policy permitted bureaucrats to administer Oxycodone to children without parental notice or consent and then to hide the fact that they did so from parents.

[3] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 800 (2015) also is instructive. The Court held that the Arizona Legislature had standing because the "asserted deprivation"—the loss of "primary responsibility for redistricting"—was an injury that "would be remedied by a court order enjoining the enforcement of [Arizona's constitutional amendment]." *Id.* at 800. Here, parents, have the "primary responsibility" for decision-making involving their own children, including their medical care. The Parental Preclusion Policy strips parents of their "primary responsibility" to decide whether a gender-identity social transition is in their child's best interests, shifting it, without due process, to the state. This is a concrete and ongoing injury that "would be remedied by a court order enjoining the policy's enforcement."

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

The Due Process Clause of the Fourteenth Amendment guarantees parental rights because they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *See Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 231 (2022); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Accordingly, the Court has repeatedly recognized that a parent has a protected liberty interest in directing the upbringing and education of her child. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O'Connor, J.); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). If a parent is fit, then "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children" because fit parents are presumed to "act in the best interest of his or her child." *See Troxel*, 530 U.S. at 68–70. The government can override the presumption of fitness only after providing the parent or guardian with procedural due process, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *May*, 345 U.S. at 533, and a record containing "clear and convincing

evidence" of abuse or harm. *Troxel*, 530 U.S. at 69–70; *Stanley,* 405 U.S. at 658.[4]

The Parental Preclusion Policy allows the state to subject a child to an experimental and controversial form of psychological/psychosocial medical treatment ("social gender identity transition") without parental notice or consent, or due process and a finding of unfitness. App.27a, 108a, 119a. This policy is very similar in purpose, execution, and effect, to hundreds of other "gender identity" policies nationwide. Although the statistics have not been independently verified, a parents' rights database reports that as of December 15, 2023, as many as 1048 school districts, containing as many as 18,422 state-run schools serving perhaps as many as 10,755,066 students, have "gender identity" policies openly stating that bureaucrats, teachers, and staff can or should keep a student's transgender status hidden from parents.[5]

To date, the Court has not decided whether such policies are constitutionally permissible, nor has

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[4] Notably, children cannot provide informed consent for medical care; that right has traditionally been reserved for parents. "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." *Parham*, 442 U.S. at 603. This includes the right of a parent to say no. The fact a child may disagree with a parent's decision "does not diminish the parents' authority to decide what is best," nor does it "transfer the power to make that decision from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603–04.

[5] Parents Defending Education, *List of School District Transgender – Gender Nonconforming Student Policies* (*Updated Dec. 15, 2023),* http://tinyurl.com/mrxxj3dt.

it clearly delineated the parameters of a fit parent's constitutional right to know if the state is engaged in the "social gender identity transition" of his child or otherwise encouraging her to ingest hormones or undergo mutilating surgery.[6] There have been multiple lawsuits filed on behalf of parents, including by AFL, alleging that such policies violate the Constitution.[7] Plainly, the issue is not going away. Therefore, AFL urges the Court to grant the parents' petition for certiorari and settle the constitutional issue.

CONCLUSION

For these reasons, AFL respectfully requests that the Court grant the parents' petition for certiorari pursuant to Sup. Ct. R. 10(a), (c).

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[6] The Parental Preclusion Policy seemingly violates the federal parents' right-to-know law, the Protection of Pupils Rights Amendment, 20 U.S.C. § 1232h, 34 CFR Part 98.

[7] *See e.g., Parents Protecting Our Children v. Eau Claire Area School District*, 657 F. Supp. 3d 1161 (W.D. Wis. 2023), *appeal docketed*, No. 231534 (7th Cir. argued Sep. 26, 2023); *Regino v. Staley*, No. 2:23-CV-00032, 2023 WL 4464845 (E.D. Cal. July 11, 2023), *appeal docketed*, (9th Cir. Jul. 25, 2023); *Foote v. Town of Ludlow*, No. CV 22-30041-MGM, 2022 WL 18356421 (D. Mass. Dec. 14, 2022), *appeal docketed*, (1st Cir. argued Sep. 13, 2023); *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees,* No. 23-CV-069-SWS, 2023 WL 4297186 (D. Wyo. June 30, 2023); *Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.,* No. 22-CV-78, 2022 WL 4232912 (N.D. Iowa Sept. 12, 2022), *dismissed in part as moot and vacated in part,* 83 F.4th 658 (8th Cir. 2023); *Littlejohn v. Sch. Bd. of Leon Cnty. Fla.*, 647 F. Supp. 3d 1271 (N.D. Fla. 2022), *appeal docketed* (11th Cir. Feb. 8, 2023).

Respectfully submitted,

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