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## **The U.S. and Virginia Constitutions, Title VI, and Title IX in K-12 Education**

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# The U.S. and Virginia Constitutions, Title VI, and Title IX in K-12 Education

2023 Seminar  
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## ABOUT THE SPEAKERS

### COURSE PLANNER/MODERATOR



**Farnaz F. Thompson**, McGuireWoods LLP / *Washington, DC*

Farnaz Farkish Thompson is a Partner and the Chair of the Education Industry Team at McGuireWoods LLP. She is a skilled litigator and investigator with extensive experience in representing corporations and institutions of higher education in high-profile litigation and sensitive government investigations. She advises clients on employment and education laws to help identify and resolve issues before they become adversarial in nature. She also zealously represents clients before federal agencies, including the U.S. Department of Labor and U.S. Department of Education. Prior to joining McGuireWoods, she served as in-house counsel at the University of Virginia and as the Deputy General Counsel for Postsecondary Education at the U.S. Department of Education.

### FACULTY



**Ryan Bangert**, Alliance Defending Freedom for Faith, For Justice / Lansdowne

Ryan Bangert serves as senior vice president for strategic initiatives and special counsel to the president at Alliance Defending Freedom. He oversees ADF's Blackstone Fellowship, government relations, and corporate engagement teams. He also advises executive leadership with strategic initiatives and appears as counsel for ADF clients. Before joining ADF, Bangert served as deputy first assistant attorney general and deputy for legal counsel in the office of the Texas attorney general. In those roles, he oversaw the state's Special Litigation Unit, which handled critical litigation against the federal government, and oversaw multiple divisions within the office. Prior to that, he served as deputy for civil litigation for Missouri Attorney General Josh Hawley, overseeing the state's civil litigation divisions, including the consumer protection and antitrust divisions, with over 200 attorneys and staff. Prior to his government service, Bangert was a litigation partner at Baker Botts L.L.P. Bangert earned his J.D. from Southern Methodist University, where he was a Hatton Sumner's scholar and graduated first in his class.

He is also an ADF Blackstone Fellow. Following law school, he clerked for Judge Patrick E. Higginbotham on the Fifth Circuit Court of Appeals.



**William Estrada**, Home School Legal Defense Association / *Purcellville*

Will began his legal career at the Home School Legal Defense Association (HSLDA), starting as a legal assistant in January 2004 before moving on to direct HSLDA's Federal Relations department and HSLDA's State and Federal PACs. Will's career changed in 2018 when he left the private sector to take a position as a career federal employee in the Office for Civil Rights at the U.S. Department of Health and Human Services. Will worked to enforce federal laws protecting conscience and religious freedom, civil rights, and anti-discrimination in the area of health and human services. Will served through two presidential administrations, and during the COVID-19 pandemic, where the Office for Civil Rights' work was central in the federal government's response to the pandemic. In November of 2021, Will resigned from the federal government, and was selected by the Board of ParentalRights.org and the Parental Rights Foundation to serve as the first full-time president of ParentalRights.org and the Parental Rights Foundation. As President, he led a team of dedicated staff and volunteers with the goal of advancing state and federal legislation to protect the fundamental right of parents to direct the education, upbringing, and care of their children, and to defeat state and federal legislation that harms children and families. Will's career came full circle when he returned to HSLDA in June of 2023 as Senior Counsel. Will has testified before Congress and multiple state legislatures, drafted federal and state legislation, worked on federal regulations both from outside and from inside the federal government, and met with Members of Congress, Cabinet Secretaries, and senior officials from federal agencies and the Executive Branch, as well as governors and elected and appointed officials at the state and local level. He was appointed by Governor Glenn Youngkin on July 1, 2023, to serve a four year term on the Board of Visitors of Christopher Newport University in Newport News, Virginia.



**Daniel C. Masakayan**, McGuireWoods LLP / *Tysons*

Daniel is an associate with the Labor and Employment group. He regularly assists public and private K-12 institutions in a variety of employment and regulatory compliance matters, representing school boards, division superintendents, heads of schools, and boards of supervisors.



Daniel assists K-12 schools in handling claims under Title VI, Title VII, Title IX and other federal and state discrimination laws in front of the U.S. Equal Employment Opportunity Commission, U.S. Department of Education, and other state and federal agencies. He further assists schools in handling sensitive investigations, as well as crafting student and employee policies under state and federal laws. He is from a family of educators and enjoys representing school clients that are shaping the next generation of students.



**Jack L. White**, McGuireWoods LLP / *Tysons*

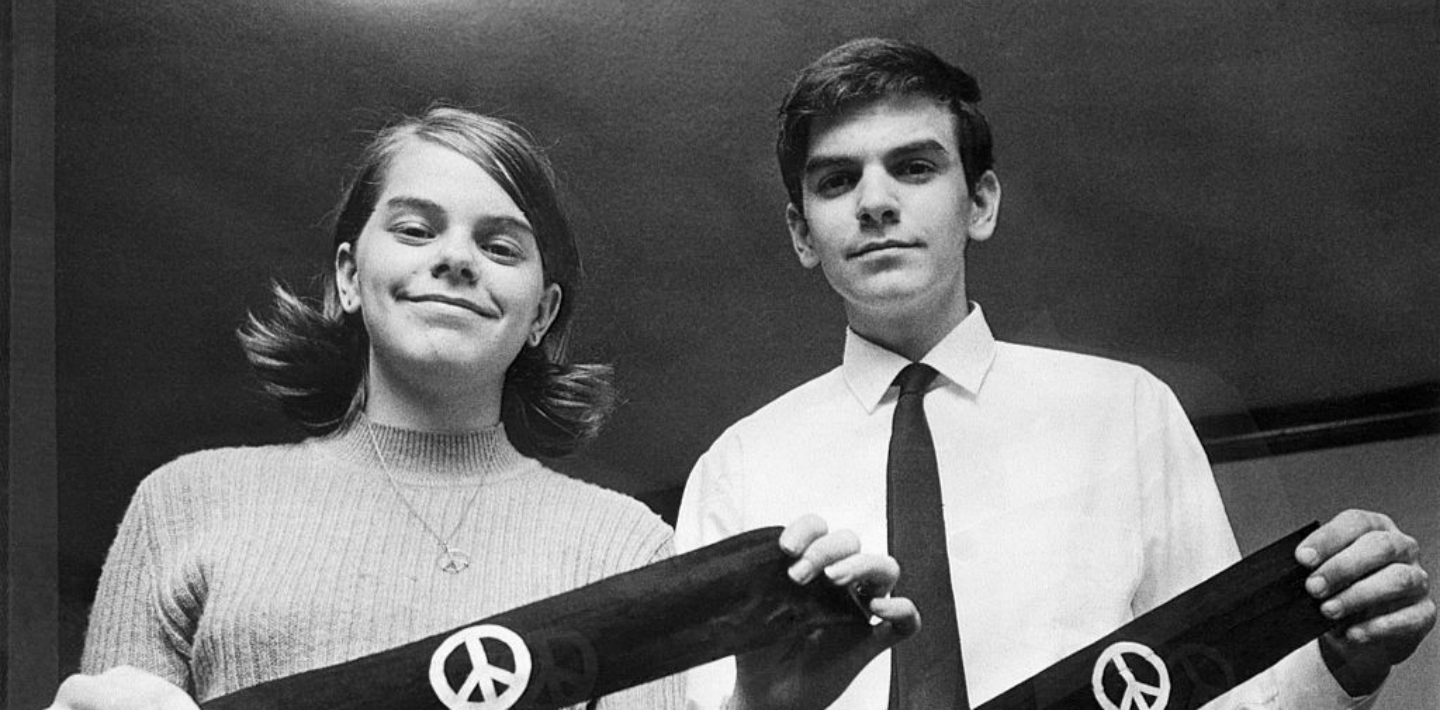
Jack is a partner in the firm's nationally ranked Government Investigations and White-Collar Litigation practice, focusing his practice on civil litigation, regulatory enforcement, and congressional investigations for clients in the defense, technology, federal contracting, and other business sectors. As an accomplished trial lawyer and legal strategist, Jack has handled a range of complex litigation, investigations, and enforcement matters, including representing clients in congressional investigations. His extensive experience in litigation, investigations, and strategic counseling is particularly deep with respect to defense industry clients and other businesses operating in the federal sector, including emerging companies for which he provides support for continued growth. One of Jack's principal practice areas involves conducting internal investigations and providing counseling on matters pertaining to diversity, equity, and inclusion, assisting several companies to develop and implement initiatives in these areas. Jack was one of five civilian members who served on an independent review panel that investigated the command climate and culture at Fort Hood, as they related to sexual assault, harassment, and crime. After releasing their report, Jack and his fellow panel members testified before the House Armed Services Subcommittee on Military Personnel. Jack also provides particularly valuable counsel to companies through growth, particularly in the government contracting sector, guiding them through legal and regulatory compliance as they transition out of small business status and through graduation from the SBA's 8(a) Business Development Program into viable competitive enterprises. He also assists companies with the seating and engagement of fiduciary and advisory boards. As a graduate of the U.S. Military Academy at West Point, Jack served five years on active duty in the U.S. Army and continued his service in the Army Reserve while earning his J.D. at Pepperdine University School of Law. He has also served as a law clerk for U.S. Supreme Court Justice Samuel Alito after first clerking for Alito at the 3rd U.S. Circuit Court of Appeals.



# Constitutional and Statutory Issues in K-12 Education

Ryan L. Bangert

SVP, Strategic Initiatives &  
Special Counsel to the President



Tinker v. Des Moines Independent  
School District, 393 U.S. 503 (1969).

# Regulation of Student Speech

- Speech causing a "material disruption"
- "Indecent" speech
- Speech bearing the school's "imprimatur"
- Off-campus speech associated with the school



Mahanoy Area School District v. B.L.,  
141 S. Ct. 2038 (2021).

# Regulation of Teacher Speech

- **Pickering v. Bd. of Educ., 391 U.S. 563 (1968).**
  - Public school teachers have a First Amendment right to speak as "private citizens" on "matters of public concern."
- **Garcetti v. Ceballos, 547 U.S. 410 (2006).**
  - When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes.



Meriwether v. Shawnee State University,  
992 F.3d 492 (6th Cir. 2021).





Loudoun County School Board v. Cross, No.  
210584, 2021 WL 9276274 (Va. Aug. 30, 2021).





Vlaming v. West Point School District,  
No. 211061 (Va. Sup. Ct.).



Figliola v. Harrisonburg Sch. Dist., No. CL22-1304 (Rockingham Cty. Dist. Ct. Dec. 2, 2022).



Allen v. Millington, 2:22-cv-197 (D. Vt.).



303 Creative v. Elenis, 143 S Ct. 2298  
(2023).





Kennedy v. Bremerton Sch. Dist., 139 S Ct.  
634 (2019).



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## **“Constitutional and Statutory Issues in K-12 Education”**

Virginia Continuing Legal Education

Tuesday, August 8, 2023

Will Estrada and Ryan Bangert

**Parental rights are protected as a 14<sup>th</sup> Amendment Substantive Due Process Right by the U.S. Supreme Court. And 18 states including Virginia specifically protect parental rights as fundamental in state code.**

- I. The U.S. Supreme Court has held for 100 years that parental rights are protected as fundamental under the 14<sup>th</sup> Amendment’s Substantive Due Process Clause.
  - a. *See, e.g., Meyer v. Nebraska, Pierce v. Society of Sisters, Wisconsin v. Yoder, Troxel v. Granville.*
  - b. For a comprehensive look at the U.S. Supreme Court’s jurisprudence, including the four cases cited above, see the Parental Rights Foundation’s *amicus curiae* brief submitted in May to the 11<sup>th</sup> Circuit Court of Appeals by Will Estrada.
- II. While parental rights have been given strong protection by the U.S. Supreme Court, the federal appellate courts have declined to overrule public schools when parents challenge specific classes, instruction, or policies.
  - a. *Fields v. Palmdale*: Original decision by a three-judge panel was very restrictive to parental rights in public school settings. The parents requested an *en banc* hearing; while the 9th Circuit rejected *en banc* review, the opinion was amended in the denial of rehearing. Original decision citation: 427 F.3d 1197 (Nov. 2, 2005) *En banc* denial Memorandum Opinion: 447 F.3d 1187 (May 17, 2006). U.S. Supreme Court denied cert. From the *en banc* denial:

“In sum, we affirm that the *Meyer-Pierce* due process right of parents to make decisions regarding their children’s education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions[.] ... Nor does our decision address any question of state law, or consider any issues that might be raised by the parents in state court. Nor, as we stated unequivocally, does our opinion address the propriety of the school allowing the survey to be circulated. Finally, our decision does not affect the rights of parents to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation.”
  - b. *See also, Leebaert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005); *C. N. v. Ridgewood Board of Education*, 430 F.3d 159 (3rd Cir. 2005); *Parker v. Hurley*, 514 F.3d 87 (1st



Cir. 2008), *cert denied*; *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019), *cert denied*.

- c. A recent and interesting case along these lines was *C.K.-W v. Wentzville R-IV Sch. Dist.*, 619 F.Supp.3d 906 (E.D. Missouri Aug. 5, 2022). In this case, the District Court upheld a school board's policy regulating certain books in school libraries, quoting numerous U.S. Supreme Court cases establishing that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." Case was dismissed by the 8th Circuit after appellants withdrew their appeal.

- III. Virginia is one of 18 states to have a state level fundamental parental rights statute, protecting parental rights specifically in state law. Passed in 2013, Virginia's law says simply: "Rights of parents. A parent has a fundamental right to make decisions concerning the upbringing, education, and care of the parent's child." Va. Code Ann. § 1-240.1. The law also codified the Virginia Supreme Court's 2013 decision of *L.F. v. Breit*, 736 S.E.2d 711 (Va. 2013), where the Virginia Supreme Court held the following:

"The relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. ... Indeed, the Supreme Court of the United States [in *Troxel v. Granville*] has characterized a parent's right to raise his or her child as 'perhaps the oldest of the fundamental liberty interests recognized by this Court.' Any statute that seeks to interfere with a parent's fundamental rights survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. *McCabe v. Commonwealth*, 650 S.E.2d 508, 510 (2007); see also *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)." (*cleaned up*)

- IV. The other 17 states protecting parental rights as fundamental in state code are West Virginia (W. Va. Code § 44-10-7, *as extended by In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (WV 1973); *see also* W. Va. Code § 49-1-1(a) and W. Va. Code § 49-6D-2(a)); Kansas (Kan. Stat. Ann. § 38-141(2)(b); *see also* Kan. Stat. Ann. § 60-5305(a)(1)); Michigan (Mich. Comp. Laws § 380.10); Texas (Texas Family Code § 151.003); Utah (Utah Code Ann. § 62A-4a-201; *see also* Utah Code Ann. § 30-5a-103); Colorado (Colo. Rev. Stat. § 13-22-107(1)(a)(III)); Arizona (Ariz. Rev. Stat. § 1-601); Nevada (Nevada Rev. Stat. Ann. § 126.036); Oklahoma (Okla. Stat. tit. 25, § 2001—2005); Idaho (Idaho Code § 32-1012 – 1013); Wyoming (Wyo. Stat. Ann. § 14-2-206); Florida (Fla. Stat. § 1014.03); Montana (Mont. Code Ann. § 40-6-701); Georgia (Ga. Code Ann. § 20-2-786), North Dakota (House Bill 1362 signed into law on May 18, 2023), Iowa (Senate File 496 signed into law on May 26, 2023), and Alabama (House Bill 6 signed into law on June 16, 2023).
- V. Looking ahead: two major types of parental rights cases are likely headed to the U.S. Supreme Court: cases by parents challenging public school district policies requiring that school district personnel NOT inform parents about their children's

gender identity, and cases by parents challenging state laws banning gender reassignment surgeries and puberty blockers for minors.

- a. Cases by parents challenging public school district policies requiring that school district personnel inform parents about their children's gender identity: two cases to watch are *Foote, et al. v. Ludlow School Committee, et al.*, Case No. 3:22-cv-30041-MGM, pending before the First Circuit Court of Appeals, and *Littlejohn v. School Board of Leon County, Florida, et al.*, Case No: 4:21-CV-00415-MW-MJF, pending before the 11th Circuit Court of Appeals. In both cases, parents of minor daughters (11 and 13 respectively) challenged school board policies after the public schools "socially transitioned" their daughters without telling the parents. Both appeals are by the parents after losing at the Federal District Court levels.
- b. Cases by parents challenging state laws banning gender reassignment surgeries and puberty blockers for minors: many cases, but two of particular note are *Jane Doe v. Ladapo*, 2023 WL 3833848 (N.D. Florida, June 6, 2023), *appeal docketed*, and *L. W. by and through Williams v. Skrmetti*, 2023 WL 4410576 (8th Cir. July 8, 2023). The 8th Circuit case is particularly of note as the federal appeals court stayed the district court's decision to grant a preliminary injunction against Tennessee's law. The Court included a detailed discussion of parental rights in its issuance of the stay.



## “Constitutional and Statutory Issues in K-12 Education”

Virginia Continuing Legal Education

Tuesday, August 8, 2023

### Free Speech, Free Exercise, and the Establishment Clause in the Classroom: Considerations based on the U.S. and Virginia Constitutions.

#### I. Campus Free Speech: Backgrounder

- a. Students’ speech rights have long been defined by the familiar standard set forth in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
  - i. *Tinker* involved a challenge to a hastily assembled school policy that prohibited students from wearing armbands to school. The policy was directed at an effort by students to wear black armbands as a show of solidarity against the U.S.’s Vietnam War policy.
  - ii. The Supreme Court found: “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>1</sup>
  - iii. For students, the special characteristics of the school environment dictate that the school may regulate speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others”;<sup>2</sup> speech that is “indecent,” “lewd,” or “vulgar” uttered on school grounds;<sup>3</sup> speech that others may reasonably perceive as bearing the “imprimatur” of the school (like a school-sponsored newspaper);<sup>4</sup> and speech, uttered during an off-campus school sponsored trip, promoting illegal drug use.<sup>5</sup>
  - iv. Schools also have an interest in regulating some off-campus speech by students. Examples include “severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.”<sup>6</sup> Outside those circumstances, however, schools have

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<sup>1</sup> *Tinker*, 393 U.S. at 506.

<sup>2</sup> *Id.* at 513.

<sup>3</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

<sup>4</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>5</sup> *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

<sup>6</sup> *Mahanoy Area Sch. Dist. v. B.L.*, 414 S. Ct. 2038, 2045 (2021).

diminished leeway to regulate off-campus student speech. Otherwise, schools could control student speech 24 hours per day.

- b. Teacher's free speech rights are controlled by a different line of cases governing public employee speech more generally.
  - i. *Garcetti v. Ceballos*, 547 U.S. 410 (2006), held that when public employees make statements pursuant to their "official duties," they are not speaking as citizens for First Amendment purposes.
    - 1. The dispute arose in the context of a district attorney who was disciplined for recommendations made in an official memorandum recommending dismissal of a prosecution based on a faulty warrant. Thus, a fairly clear case of "official duties."
    - 2. The Court observed that its holding does not mean that "all speech within the office is automatically exposed to restriction," and reserved the question whether its holding applied to "speech related to scholarship or teaching."<sup>7</sup>
  - ii. *Pickering v. Board of Education*, 391 U.S. 563 (1968), held that public school teachers, like students, do not surrender their First Amendment rights when they step on campus.
    - 1. As applied in the Fourth Circuit, teachers may not be disciplined for speaking as citizens on matters of public concern.
    - 2. The test is "(1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's [adverse employment] decision."<sup>8</sup>

## II. Free Speech: Current Issues

- a. Pronoun usage increasingly results in litigation raising speech and religious freedom claims in the K-12 context.
  - i. Although not a K-12 case, *Meriwether v. Shawnee State University*, 992 F.3d 492 (6<sup>th</sup> Cir. 2021), provides a template for reasoning through pronoun issues in the K-12 context. In that case, the 6<sup>th</sup> Circuit held that Shawnee State University violated Professor Nicholas Meriwether's First Amendment rights when it threatened him with discipline if he

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<sup>7</sup> *Garcetti*, 547 U.S. at 425.

<sup>8</sup> *McVey v. Stacy*, 157 F.3d 271, 277-78 (4<sup>th</sup> Cir. 1998).

failed to use a student’s preferred pronouns “regardless of the professor’s views on the subject.”

1. The court held the First Amendment protects the speech of university professors when they are engaged in core academic functions, such as teaching and scholarship. *Garcetti* does not apply in those circumstances.
  2. The use of “titles and pronouns carries a message” that is related to a subject of public concern. It relates to “a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes.”<sup>9</sup> “Pronouns can and do convey a message implicating a sensitive topic of public concern.”<sup>10</sup>
  3. Beyond free speech, the University’s conduct “exhibited hostility” to Meriwether’s religious beliefs, and “irregularities in the university’s adjudication and investigation processes permit a plausible inference of non-neutrality.”<sup>11</sup>
- ii. Fourth Circuit precedents suggest that application *Garcetti* is inappropriate in the K-12 academic setting.<sup>12</sup>
- b. Virginia state courts have seen a substantial share of litigation raising questions about teacher speech rights.
- i. In *Loudoun County School Board v. Cross*, No. 210584, 2021 WL 9276274 (Va. Aug. 30, 2021), an elementary school gym teacher, Tanner Cross, spoke during the public comment portion of a school board meeting. He opposed a proposed policy that would have teachers to use whatever pronoun a student requested, even if the pronoun conflicted with the student’s biological sex. He stated that he could not in good conscience “lie” to a student.
    1. Within days after his speech, Cross was placed on administrative leave on grounds that his speech caused a “disruption” by eliciting complaints from parents whose children attended the school where he taught.
    2. Cross’s suspension was enjoined by the state trial court. It found, under *Pickering*, that Cross spoke as a private citizen on a matter

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<sup>9</sup> *Meriwether*, 992 F.3d at 508.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 514.

<sup>12</sup> *See Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 694 n.11. (4th Cir. 2007) (“The Court explicitly did not decide whether [*Garcetti*] would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering*–*Connick* standard as articulated in *Boring* to this appeal.) (citation omitted).

of public concern, and that the school's interest in limiting his speech was outweighed by his interest in speaking.

3. The Virginia Supreme Court affirmed, finding the school district substantially undervalued Cross's speech, which concerned a matter of substantial public debate and implicated his core religious beliefs, and overestimated the extent of any disruption, which was limited to a handful of calls from parents.<sup>13</sup>
- ii. In *Vlaming v. West Point School District*, Peter Vlaming, a French teacher, was terminated when, for reasons of faith and conscience, he was unable to comply with a school policy requiring that he use pronouns consistent with students' gender identity and not their biological sex. The state trial court dismissed all of his claims, including state constitutional and statutory free exercise and free speech claims.
1. At the Virginia Supreme Court, appellants have argued that the Virginia Constitution should be read to prohibit compulsion to violate one's religious beliefs absent "grave and immediate public danger." This would dispense with the *Smith* "neutral and generally applicable" construct.<sup>14</sup>
  2. Appellants also argue that neither *Garcetti* nor *Pickering* apply when the government seeks to compel speech indicating *personal agreement* on matters of public concern in the context of instruction.
- iii. In *Figliola v. Harrisonburg School District*, a group of teachers and parents, on behalf of themselves and their children, sued the school district after it announced a policy requiring that teachers (a) employ pronouns matching students' gender identity, not their biological sex, and (b) not disclose that activity to parents unless their children first expressly give permission. Moreover, school counselors were trained to implement "gender transition plans" and to report to administration any teachers who failed to follow the policy.
1. The state trial court dismissed the parents' claims but denied the demurrer with respect to the teacher's claims.<sup>15</sup>
  2. Parents were found to lack standing.

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<sup>13</sup> *Cross*, 2021 WL 9276274, at \*6.

<sup>14</sup> Vlaming's opening brief at the Virginia Supreme Court is accessible at this link: <https://adflegal.org/sites/default/files/2022-05/Vlaming-v-West-Point-School-Board-2022-05-23-VA-Supreme-Court-Opening-Brief.pdf>

<sup>15</sup> A copy of the Rockingham County Court's decision is accessible at this link: <https://adflegal.org/sites/default/files/2022-12/Figliola-v-Harrisonburg-City-Public-Schools-2022-12-02-Trial-Court-Opinion.pdf>

3. Demurrer with respect to teachers' claims was denied, however. Teachers' free speech claims were allowed to proceed, with the court reserving the factual questions whether use of pronouns occurred as part of teachers' "official duties" and whether the school had a weighty interest in compelling such speech. The court also allowed the teachers' statutory religious freedom claim given that compelling them to engage in what they viewed as lying to students and parents violated their deeply held beliefs.
  4. NOTE: In *Parents Defending Education v. Linn-Mar Community School District*, No. 22-2927 (8<sup>th</sup> Circuit), plaintiffs bring federal constitutional challenges to similar policies implemented in an Iowa school district. The case is pending on appeal.
- c. Students likewise have been targeted for discipline for objecting to certain aspects of school policies concerning transgender students.
- i. In *Allen v. Millington*,<sup>16</sup> the Orange Southwest School District (VT) disciplined both Blake Allen, a 14-year-old student and volleyball player, and her father Travis Allen, who served as a coach in the district, after they objected to a biologically male student, T.S., who identified as female and was on the team using the girls' locker room while members of the volleyball team were changing.
    1. The following day, Blake told friends in French class that T.S. is "literally a dude" and that "he does not belong in the girl's locker room." A student who overheard the conversation reported it to administration, and Blake was investigated under the district's bullying and anti-harassment policy and given two-day out-of-school suspension and ordered to participate in a "restorative circle" exercise.
    2. Roughly one week later, T.S.'s mother posted on Facebook and accused Blake of slander for "making up" the story about the locker room. Travis responded while at home: "the truth is your son watched my daughter and multiple other girls change in the locker room. While he got a free show, they got violated." He was subsequently suspended without pay for refusing to apologize for misgendering T.S.
    3. T.S. announced in math class that he was going to "f\*\*\*\*\* kill Blake Allen," but was not disciplined after it was reported.
    4. Lawsuit alleged First Amendment retaliation and compelled speech (based on the restorative circle and essay requirement)

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<sup>16</sup> The Complaint is accessible at this link: <https://adfflegal.org/sites/default/files/2022-10/Allen-v-Millington-2022-10-27-Complaint.pdf>



claims. The district argued that the State was a required party because its policies mirrored state anti-bullying policies.

- d. NOTE: The Supreme Court's recent decision in *303 Creative v. Elenis*, No. 21-476, 2023 WL 4277208 (U.S.), may well bear on decisions by school districts to compel students and teachers to speak words that conflict with their deeply held religious beliefs. The Court in that case noted that when public accommodation laws and the First Amendment collide, the First Amendment wins.

### III. The Free Exercise Clause and Religious Accommodation

#### a. Free Exercise also protects teachers:

- i. In *Ricard v. Geary County School District*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372 (D. Kan. May 9, 2022), a middle school math teacher was suspected and reprimanded for failing to follow a school policy requiring that she use students' preferred names and pronouns that reflected their gender identity. Plaintiff also was required not to disclose her forced participation in gender transition plans to parents. The district disclaimed its pronouns policy at the PI hearing, but not its parental communications policy.
- ii. The communications policy was found to burden the teacher's free exercise, to be riddled with exceptions and not neutral and generally applicable and was not in serve of a compelling state interest. Specifically, looking to fundamental parental rights, the court found the state could not possess a compelling interest in *not* disclosing material information about a child's proposed gender transition to a parent.<sup>17</sup>
- iii. Moreover, as noted in *Meriwether*, evidence of directed hostility plus irregularities in implementation of a school's process may raise an inference of religious hostility.

#### b. Title VII may provide a powerful mechanism for asserting religious accommodation claims:

- i. In *Kluge v. Brownsburg Community School Corporation*, 64 F.4<sup>th</sup> 861 (7<sup>th</sup> Cir. 2023), a high school music teacher was discharged after the school rescinded an accommodation that allowed him to use student's last names instead of preferred first names and pronouns that matched their gender identities.
  - 1. On cross-motions for summary judgment, the trial court rejected both the teacher's Title VII religious accommodation claim and his First Amendment retaliation claim.

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<sup>17</sup> *Ricard*, 2022 WL 1471372, at \*7-\*8.

1. Applying *Hardison*'s "de minimis" cost standard, the Court of Appeals affirmed as to the Title VII claim, finding use of last names frustrated the school's "mission to educate all of its students, and its desire to treat all students with respect and affirmation for their identity in the service of that mission."<sup>18</sup>
- ii. However, this past June, the Supreme Court's decision in *DeGroff v. DeJoy*, No. 22-174 (S. Ct. 2023), rejected the "de minimis" standard as not in keeping with Title VII's requirements for religious accommodations. Rather, "undue hardship is shown when a burden is "substantial" in the overall context of an employer's business. The test now appears to be whether a reasonable accommodation would result in "substantial increased costs" to an employer.
- c. Virginia offers more robust protection for Free Exercise than the U.S. Constitution (see discussion of *Vlaming* above).

#### IV. The Establishment Clause

- a. The Establishment Clause is an evolving area of constitutional jurisprudence, particularly as it intersects with public education. Two recent cases
  - i. In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Court rejected the *Lemon* test for Establishment Clause claims. The case involved personal religious observance (mid-field prayer) by a football coach.
    1. The Court held that the coach properly pled and established First Amendment claims for violations of his religious exercise and speech rights. As to his speech claim, the Court observed that the coach met the first prong of the *Pickering* test: his speech was undertaken as a private citizen on a matter of public concern.
    2. The school could not justify its suppression of the coach's speech based on an interest in avoiding Establishment Clause liability under the *Lemon* test. Rather, the Clause must be interpreted by reference to historical understandings and precedents. And no sound historical understanding of precedent requires schools to be "hostile" to religious practice.
  - ii. In *Carson v. Makin*, 142 S. Ct. 1987 (2022), Maine enacted a tuition assistance program that allowed parents living in rural areas that lacked a secondary school to select a secondary school of their choice. The state would transfer payments to the school provided it was accredited or approved. The state did not allow payments to go to "sectarian" schools.

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<sup>18</sup> *Kluge*, 64 F.4th at 894.

The Court found this violated the Free Exercise Clause and was not justified by an “antiestablishment” interest on the part of the school.

- b. In sum, the Court will be highly skeptical of claims by school districts that discrimination against or hostility to religious practice is mandated by the Establishment Clause.



23-10385

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United States Court of Appeals  
*for the*  
Eleventh Circuit

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JANUARY LITTLEJOHN, JEFFREY LITTLEJOHN,

*Plaintiffs – Appellants,*

versus

SCHOOL BOARD OF LEON COUNTY, FLORIDA, ROBIN OLIVERI,  
RACHEL THOMAS, ROCKY HANNA, DR. KATHLEEN RODGERS,

*Defendants – Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION  
THE HONORABLE MARK E. WALKER  
CASE NO: 4:21-CV-00415-MW-MJF

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**BRIEF OF *AMICUS CURIAE* PARENTAL RIGHTS FOUNDATION  
IN SUPPORT OF PLAINTIFFS – APPELLANTS  
AND IN SUPPORT OF REVERSAL**

---

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*Littlejohn, et al. v. School Board of Leon County, Florida, et al.*

Case No. 23-10385

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Lawson Cox, Laurie – School Board Member

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Walker, Hon. Mark E. – Chief United States District Judge

Wood, Rosanne – School Board Member

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## INTEREST OF AMICUS CURIAE

The Parental Rights Foundation (PRF) is a national, nonprofit, nonpartisan, advocacy organization with supporters in all fifty states.

PRF seeks to preserve the legal protection afforded to loving and fit parents to raise, nurture, and educate their children without undue state interference. Concerned with the erosion of this legal protection, PRF seeks to protect children by preserving the liberty of their parents. PRF furthers this mission by educating those in government and the public about the need to roll back intrusive state mechanisms that harm more children than they help, and about the need to strengthen fundamental parental rights at all levels of government.

The United States Supreme Court has repeatedly recognized and held that parents have a fundamental right to direct the care, custody, education, and control of their children. *See, e.g.*, most recently in *Troxel v. Granville*, 530 U.S. 57 (2000). Yet parents continue to encounter obstacles in exercising those rights—in schools, in hospitals, in their communities, and in the family court system. When government authorities refuse to recognize the Constitution as a limit on the exercise of its power, the problem exacerbates. PRF submits this amicus brief because this case represents what is rapidly becoming all too-common in public schools: 1) school personnel ignoring the fundamental nature of parental rights; 2) school personnel believing they can encourage minor children to hide vital information from their parents;

3) school personnel encouraging children to disobey and ignore their parents' wishes; and 4) school personnel deceiving parents and hiding information about their own children from them.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Counsel for Appellants have consented to the filing, but counsel for Appellees have not.

## **INTRODUCTION**

This brief examines the history of parental rights case law before the U.S. Supreme Court, as well as key decisions regarding parental rights from the Eleventh Circuit.

## **STATEMENT OF ISSUE**

Whether the District Court erred in ruling that the right of parents to direct the upbringing, education, and care of their children is not clearly established as a fundamental right.

## **SUMMARY OF ARGUMENT**

The interest of parents “in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by [the U.S.

Supreme] Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal punctuation removed). The issues before the Court in this case are not difficult. The District Court’s conclusion that the case should be dismissed because “[p]arental liberty interests under the U.S. Constitution are a ‘murky area of unenumerated constitutional rights,’” *Littlejohn v. School Board of Leon County Florida*, 2022 WL 18670372 \*9 (N.D. Fla. Dec. 22, 2022) (quoting *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013)) fundamentally misunderstands the history of parental rights in our nation, and how the federal courts recognize this right.

U.S. Supreme Court precedent makes it clear that public schools may not actively attempt to hide information from a parent about the parents’ thirteen-year-old child.

Other federal courts hold that an eleven-year-old is too young to consent to a vaccine without parental consent, even if the public school provided appropriate information to the child. *See, e.g., Booth v. Bowser*, 597 F. Supp. 3d 1 (D.D.C. March 18, 2022). Certainly, a thirteen-year old’s name, pronouns, choice of bathroom, rooming assignment during a school field trip, and gender identity<sup>1</sup> should involve the child’s parents, and not be hidden from the parent by the public school. Case law is clear that public schools do have broad authority – to adopt curriculum, to include

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<sup>1</sup> *Littlejohn v. School Board of Leon County Florida*, 2022 WL 18670372 \*1 (N.D. Fla. Dec. 22, 2022).

or not include certain books in school libraries, to administer surveys (after notifying parents), and to teach children about controversial topics. But case law is likewise clear that public schools may not attempt to deceive parents and hide key information about their own child from them.

## **ARGUMENT**

### **I. U.S. Supreme Court Precedent Shows that Parental Rights are Fundamental, Well-Established, and Well-Understood**

The U.S. Supreme Court first examined the issue of parental rights in the context of state action infringing upon that right 100 years ago, in the case of *Meyer v. Nebraska*, 262 U.S. 390 (1923). Prior to this infringement, no controversy existed between the state and parents as the deeply rooted historical and legal traditions of the nation recognized the family as the backbone of society. For example, John Locke, wrote the following in 1690:

“Adam was created a perfect man, his body and mind in full possession of their strength and reason, and so was capable, from the first instant of his being, to provide for his own support and preservation, and govern his action according to the dictates of the law of reason which God had implanted in him. From him the world is peopled with his descendants, who were all born infants, weak and helpless, without knowledge or understanding: but to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them....

This is that which puts the authority into the parents' hands to govern the minority of their children. God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it, as his wisdom designed it, to the children's good, as long as they should need to be under it."

John Locke, Second Treatise of Civil Government, 1690, Sec. 56, Sec. 63.

In the early 20th century, a rise of political and social activism sought to alter those deeply rooted historic views on family and government. And this activity directly led to *Meyer v. Nebraska*.

The state of Nebraska passed a law prohibiting parents from having their children taught in another language. Robert Meyer, a teacher at a small Lutheran private school, was convicted of violating the law.

The Supreme Court held in its decision that "it is the natural duty of the parent to give his children education suitable to their station in life." *Id.* at 400. This reasoning hearkened back to the Declaration of Independence, in which our Founders recognized two crucial ideas: 1) our rights come not from government, but from "the Laws of Nature and of Nature's God," and 2) that "all men are created equal [and] that they are endowed by their Creator with certain unalienable Rights[.]" *Declaration of Independence*, at 1.

In *Meyer*, the Supreme Court explained that "[t]he individual has certain fundamental rights which must be respected. ... [The individual] cannot be coerced



by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.” *Meyer*, at 401.

And then, the Court did something logically spectacular: it went back to the family as the building block of society. As classically trained people, the justices on the Court rejected the Greek philosopher Plato’s musing that “children are to be common” as contrary to our own nation’s founding:

“Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest, and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”

*Meyer*, at 402.

Importantly, the Court found that parental rights are a substantive due process right within the Fourteenth Amendment. *Meyer*, at 398.

Two years later, in *Pierce v. Society of The Sisters of The Holy Names of Jesus And Mary*, 268 U.S. 510 (1925), in a case challenging an Oregon law standardizing education of children in public schools and centralizing it within state power, the Court unanimously again found that parental rights are a substantive due process right within the Fourteenth Amendment, building upon the foundation laid in *Meyer*: “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” *Pierce*, at 535.

Less than twenty years later, the U.S. Supreme Court again recognized parental rights in *Prince v. Massachusetts*, 321 U.S. 158 (1944). Here, the guardian of a nine-year-old girl was convicted of allowing her child to sell Jehovah's Witness publications in violation of a state law protecting children from labor violations. While upholding the conviction, the Court affirmed a key concept of parental rights:

“[i]t 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.”

*Id.* at 166.

Four Justices dissented from the Court's decision and would have overturned the woman's conviction. Indeed, Justice Murphy wrote in his dissent, foreshadowing the Court's ruling twenty-eight years later in *Wisconsin v. Yoder*, the following: “Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial.” *Prince*, at 175 (J. Murphy, dissenting).

Then came 1972, and perhaps the most well-known Supreme Court decision affirming parental rights, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). There the Court overturned the convictions of members of the Old Order Amish religion and the Conservative Amish Mennonite Church who were convicted of violating Wisconsin's compulsory attendance statute by not sending their children to public

school after the eighth grade. The Court said, “[t]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. ... Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Yoder*, 406 U.S. 205, 213-214, 232 (1972).

The District Court's decision cannot be reconciled with the Supreme Court's decision in *Yoder*. If school officials knowingly contradict parents and hide vital information from them, there is no way that the parents can “guide the religious future and education of their children.” *Id.* There is also no way that the parents can exercise “parental concern for the nurture and upbringing of their children.” *Id.* The District Court's reasoning undermines the Supreme Court's decision in *Yoder*, and the Supreme Court's recognition that parents, not government officials (even public-school teachers) are the ones with the “primary role ... in the upbringing of their children...” *Id.*

Two years after *Yoder* came *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Although this case dealt with school board policies requiring

pregnant teachers to take involuntary maternity leave, the Supreme Court once again reaffirmed that “[t]his Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 639-640.

In 1977, in a case dealing with who exactly constitutes a family in the context of a local housing ordinance, the Supreme Court again reiterated that “[o]ur 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, 503-504 (1977).

Also in 1977, in a case dealing with New York State and New York City’s policies regarding the removal of foster children from foster homes, the Supreme Court again reaffirmed the family as the building block of society that predates the government of the United States:

“But there are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements. The individual’s freedom to marry and reproduce is older than the Bill of Rights. Accordingly, unlike the property interests that are also protected by the Fourteenth Amendment, 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.”

*Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (internal citations and quotations omitted).

This decision from the Supreme Court once again stands in stark contrast with the District Court’s opinion in this case. Under a proper understanding of Supreme Court precedent, the District Court should have held for the parents.

Returning to Supreme Court precedent, in the 1978 case of *Quilloin v. Walcott*, 434 U.S. 246 (1978), a family law case dealing with a natural father’s challenge to the adoption of his child by the child’s stepfather, the Court stated, “[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. ... 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.” *Id.* at 255.

That is exactly what is happening in the case before this Court. No parental unfitness exists. Indeed, there has not even been an allegation of parental unfitness.

Also in 1978, in another family law case dealing with a dependency proceeding, the Supreme Court decided *Stanley v. Illinois*, 405 U.S. 645 (1978). The

Supreme Court held for the unwed father and once again reaffirmed the importance of parental rights:

“The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed essential, basic civil rights of man, and rights far more precious than property rights. 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. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”

*Id.* at 651 (*cleaned up*).

One year later came *Parham v. J. R.*, 442 U.S. 584 (1979), where the Supreme Court made this ringing pronouncement that stands in stark contrast to the District Court’s decision in this case:

“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. ... The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries \* 447; 2 J. Kent, Commentaries on American Law \* 190. ... The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition. 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. ... 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. ... We cannot assume that the result in *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*, would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child. Neither state officials nor federal courts are equipped to review such parental decisions.”

*Id.* at 602-604 (*cleaned up*).

In 1982, in a child neglect case from New York, the Supreme Court again reaffirmed the importance of parental rights, saying,

“[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. ... [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”

*Santosky v. Kramer*, 455 U.S. 745, 753, 760 (1982).

Eleven years later, the Supreme Court decided a case dealing with non-resident immigrant juveniles who were detained by the federal government, *Reno v. Flores*, 507 U.S. 292 (1993). A particular line of the case is exceedingly helpful in reminding the lower courts that parental rights must be respected as a constitutional

limit on the exercise of state power, even if nonparents believe they would do a better job making decisions for a child than the child's parents:

“‘The best interests of the child,’ a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole constitutional criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately. Similarly, ‘the best interests of the child’ is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.”

*Id.* at 303-304 (internal citations omitted).

In the 1997 case of *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court upheld Washington State's law banning assisted suicide. The Court in that case reaffirmed that parental rights are a fundamental right, and that strict scrutiny should be utilized in reviewing governmental actions infringing upon parental rights: “In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children. . . . The Fourteenth Amendment forbids the government to infringe ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the



infringement is narrowly tailored to serve a compelling state interest.” *Id.* at 720 - 721 (cleaned up).

And most recently, in the grandparent visitation case of *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court summed up almost a century’s worth of precedence, stating, “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. ... In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. ... The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Id.* at 65-66, 72-73.

In this case the Leon County School District and the Leon County School District personnel believed that a “better” decision could be made concerning the names, pronouns, rooming assignments, and personal decisions of a thirteen-year-old minor child than the decisions made by the child’s fit and loving parents. Under clear Supreme Court precedent, such interference with the fundamental rights of parents violates the Due Process Clause of the Fourteenth Amendment.

## **II. Strict Scrutiny is the Correct Standard of Review for Fundamental Parental Rights**

As demonstrated *supra*, parental rights are fundamental. And as a fundamental right, the correct standard of review is strict scrutiny: “The Fourteenth Amendment forbids the government to infringe ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (cleaned up). In *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) the Court said “the Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ [] include[s] a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” Using different terminology, but still standing for strict scrutiny, the Supreme Court explained this in *Wisconsin v. Yoder*: “The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.” *Id.* at 215.

In *Troxel* the Court reaffirmed the fundamental nature of parental rights and, in the context of nonparental visitation cases decided under state law,<sup>2</sup> the Court held for the parent and found Washington’s nonparental visitation statute unconstitutional without needing to reach a strict scrutiny determination: “[Washington’s nonparental visitation statute] unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad.” *Id.* at 67. And the Supreme Court made it clear prior to its declaration that parental rights are a fundamental right that “[t]he [Fourteenth Amendment’s Due Process] Clause also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” *Id.* at 65.

Parental rights are fundamental rights. As such, they require strict scrutiny analysis.

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<sup>2</sup> “Because we rest our decision on the sweeping breadth of [Washington’s nonparent visitation statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.” *Troxel*, at 73.

### **III. This Court's Past Precedent Supports Parents' Position**

This Court has a rich history of protecting parental rights as fundamental, and of ensuring that parents do not lose their fundamental parental rights simply because they choose to enroll their children in a public school that is funded by their own tax dollars.

First, and most applicable to the case before the Court, is *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008). This Court upheld in part Florida's law requiring *all* public-school students, whether elementary school students or high school students, to recite the Pledge of Allegiance, unless a student provided the school with a written excusal from the student's parent (this Court struck down the requirement in the Florida law that students stand at attention when the Pledge of Allegiance was recited). This Court wrote strongly in favor of the parental rights of their own children in public schools:

"We see the statute before us now as largely a parental-rights statute. ... The State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents: an interest which the State may lawfully protect. ... Although we accept that the government ordinarily may not compel students to participate in the Pledge, we also recognize that a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest. And this Court and others have routinely acknowledged parents as having the principal role in guiding how their children will be educated on civic values. We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech. Even if the balance of parental, student, and school rights might favor the rights of a mature

high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a substantial number of instances—particularly those instances involving elementary and middle school students—relative to the total number of students covered by the statute.”

*Frazier*, at 1284-1285 (cleaned up).

The *Frazier* decision is critically relevant for several reasons. It shows that this Court has a history of protecting the rights of parents over their own children in public schools. It shows that this Court understands that the protection of parental rights may even be more important than a minor’s own rights. And it shows that this Court recognizes that there is a difference between an elementary or middle school student (like the then-thirteen-year-old child in the case before this Court) and a mature high school student. Under *Frazier*, the parents in the case before this Court should prevail, and the District Court’s dismissal of the parents’ suit should be reversed.

Second, this Court has long recognized that parental rights are fundamental. In addition to *Frazier*, other key cases are *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 313 (11th Cir. 1989), *abrogated by Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (“Within the constitutionally protected realm rests the parental freedom to inculcate one’s children with values and standards which the parents deem desirable.”); *Doe v. Kearney*, 329 F.3d 1286, 1292 (11th Cir. 2003) (“Parents have a fundamental right

to the custody of their children, and the deprivation of that right effects a cognizable injury.”); *Lofton v. Secretary of Dept. of Children and Family Services*, 358 F.3d 804, 812 (11th Cir. 2004) (“...Supreme Court precedent has long recognized that “the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); *Maddox v. Stephens*, 727 F.3d 1109, 1118-1119 (11th Cir. 2013) (quoting favorably many of the parental rights cases from the U.S. Supreme Court discussed *supra* in this *amicus curiae* brief); and *Crider v. Williams*, No. 21-13797, 2022 WL 3867541, at \*9 (11th Cir. Aug. 30, 2022) (parental rights are clearly established “given the Supreme Court’s continued emphasis on the paramount importance of parents’ fundamental liberty interest in raising their children.”).

Under these strong precedents, the District Court’s conclusion that the case should be dismissed because “[p]arental liberty interests under the U.S. Constitution are a ‘murky area of unenumerated constitutional rights,’” (*Littlejohn*, 2022 WL 18670372 \*9 (N.D. Fla. Dec. 22, 2022) (quoting *Maddox v. Stephens*, 727 F.3d 1109, 1120 (11th Cir. 2013)) fundamentally misunderstands not only the history of parental rights in our nation, but this Court’s own precedents, and should be reversed.

## CONCLUSION

This Court should reverse the District Court and enter a preliminary injunction in favor of the parents.

Respectfully submitted this 30<sup>th</sup> Day of May, 2023,

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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(a)(5) because:

Pursuant to Fed. R. App. P. 32(g)(1), this brief contains 4,894 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: May 30, 2023

/s/ William A. Estrada  
*Counsel for Amicus Curiae*  
*Parental Rights Foundation*



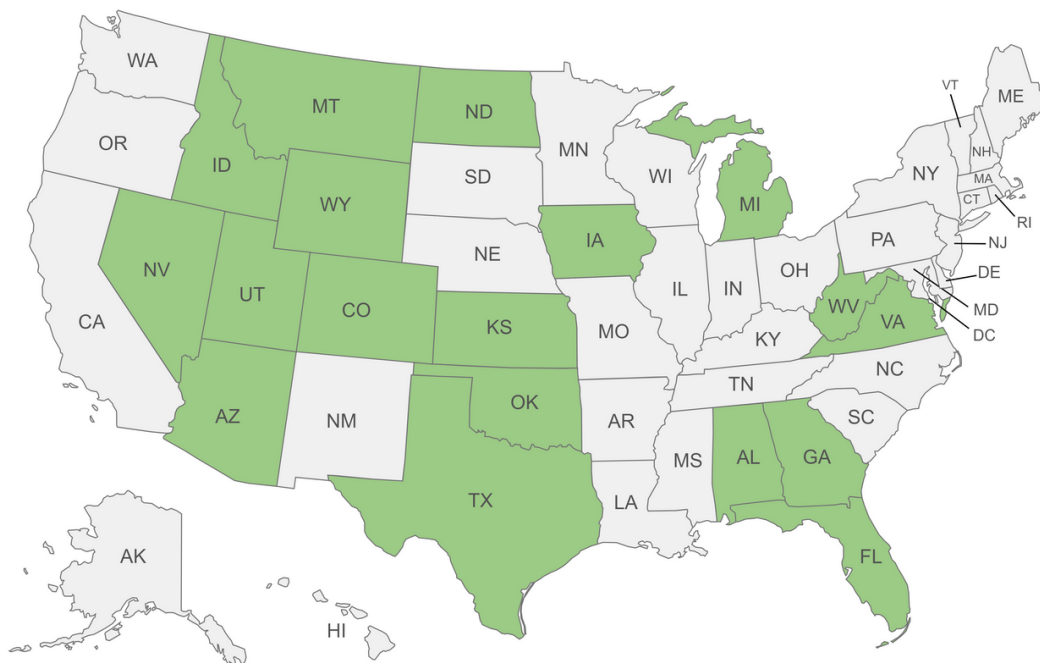
## CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> Day of May, 2023, I electronically filed the foregoing Brief of *Amicus Curiae* Parental Rights Foundation in Support of Plaintiffs – Appellants and in Support of Reversal 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: May 30, 2023

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*Counsel for Amicus Curiae*  
*Parental Rights Foundation*





- **WV:** 1931: W. Va. Code § 44-10-7, as extended by *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (WV 1973); *see also* W. Va. Code § 49-1-1(a) and W. Va. Code § 49-6D-2(a)
- **KS:** 1996: Kan. Stat. Ann. § 38-141(2)(b); *see also* Kan. Stat. Ann. § 60-5305(a)(1)
- **MI:** 1996: Mich. Comp. Laws § 380.10
- **TX:** 1999: Texas Family Code § 151.003
- **UT:** 2000: Utah Code Ann. § 62A-4a-201; *see also* Utah Code Ann. § 30-5a-103
- **CO:** 2003: Colo. Rev. Stat. § 13-22-107(1)(a)(III)
- **AZ:** 2010: Ariz. Rev. Stat. § 1-601
- **NV:** 2013: Nevada Rev. Stat. Ann. § 126.036
- **VA:** 2013: Va. Code Ann. § 1-240.1
- **OK:** 2014: Okla. Stat. tit. 25, § 2001–2005
- **ID:** 2015: Idaho Code § 32-1012 – 1013
- **WY:** 2017: Wyo. Stat. Ann. § 14-2-206
- **FL:** 2021: Fla. Stat. § 1014.03
- **MT:** 2021: Mont. Code Ann. § 40-6-701
- **GA:** 2022: Ga. Code Ann. § 20-2-786
- **ND:** 2023: House Bill 1362 signed May 18, 2023
- **IA:** 2023: Senate File 496 signed May 26, 2023
- **AL:** 2023: House Bill 6 signed June 16, 2023

## **“Constitutional and Statutory Issues in K-12 Education”**

Virginia Continuing Legal Education

Tuesday, August 8, 2023

Daniel Masakayan and Ryan Bangert

### **Title IX Portion**

#### **Presidential Actions**

- I. On January 20, 2021, President Biden issued Executive Order 13,988, entitled “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”
  - a. The Executive Order recounted the *Bostock* ruling and observed that “[u]nder *Bostock’s* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972[]—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”
  - b. The Order further directed federal agencies to “consider whether to revise, suspend, or rescind [] agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination” and the policy set forth in the Order.
- II. Executive Order 13,988 led to substantial federal rulemaking activity, with a special emphasis on the education context.

#### **Recent Actions by U.S. Department of Education**

Below is a summary of recent actions taken by the U.S. Department of Education regarding Title IX and the treatment of transgender students. Even though the amendments listed below are not yet effective as of the date of this publication, practitioners should closely monitor these developments as they will potentially drastically alter the landscape for Title IX enforcement and litigation.

- I. **June 22, 2021, Interpretation of Title IX (86 FR 32637):**
  - a. On June 22, 2021, the U.S. Department of Education issued an interpretation, expressly stating that Title IX’s prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity.
  - b. The U.S. Department of Education has thus clarified that “OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department.”
  - c. Subject of litigation in federal court in Tennessee. U.S. District Court for the Eastern District of Tennessee preliminarily enjoined and restrained the U.S.

Department of Education from implementing the June 22, 2021, interpretation in several states:

- |              |                      |
|--------------|----------------------|
| i. Alabama   | xi. Mississippi      |
| ii. Alaska   | xii. Missouri        |
| iii. Arizona | xiii. Montana        |
| iv. Arkansas | xiv. Nebraska        |
| v. Georgia   | xv. Ohio             |
| vi. Idaho    | xvi. Oklahoma        |
| vii. Indiana | xvii. South Carolina |
| viii. Kansas | xviii. South Dakota  |
| ix. Kentucky | xix. Tennessee       |
| x. Louisiana | xx. West Virginia    |

## **II. Pending Amendments to Title IX Regulations:**

- a. On July 12, 2022, while the case regarding the U.S. Department of Education's interpretation was pending, the Department issued a notice of proposed rulemaking, seeking among other things to clarify that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. The period to comment on the proposed rules closed Sept. 12, 2022.
- b. The Department's regulatory agenda indicates that it may issue Title IX final regulations, defining sex discrimination to include discrimination on the basis of gender identity and sexual orientation, in October 2023. The Department has not yet clarified the effective date of the new regulations, but it is likely that schools will have to implement them for the 2023-2024 academic year.

## **III. April 2023 Pending Amendments Regarding Transgender Students and Athletics:**

- a. On April 6, 2023, the U.S. Department of Education issued a notice of proposed rulemaking on athletic eligibility under Title IX, which proposed express recognition that it is a violation of Title IX to impose any categorical ban that prohibits transgender athletes from participating on sports teams consistent with their gender identity.
- b. The proposed rulemaking comes in response to inquiries from various schools, athletic associations, parents and students seeking clarity on how schools can meet Title IX's nondiscrimination requirement with respect to transgender student-athletes.
- c. The new proposed regulations would add:

“(2) If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and

(ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”

d. Implications for K-12 entities:

- i. The proposed regulations, if implemented, would prohibit a policy that requires all students to participate on a sports team based on their biological sex. The proposed rules, however, give schools flexibility to develop team eligibility criteria that serve important educational objectives, including ensuring fairness in competition or preventing sports-related injury. When schools develop team eligibility criteria, the proposed regulations would require any criteria “to minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.” Accordingly, the criteria must account for:
  1. the type of sport;
  2. the level of competition; and
  3. the grade or education level to which they apply.
- ii. To illustrate, the U.S. Department of Education’s Office for Civil Rights (OCR) stated that it expects elementary school students generally would be able to participate on athletic teams consistent with their gender identity because elementary schools offer sports to teach teamwork, leadership, fitness and basic athletic skills. On the other hand, OCR expects that sex-related criteria limiting transgender students’ participation in athletic teams at the high school and college levels may be permissible because athletic programs at these levels are more focused on competitive success. Additionally, the type of sport is a relevant consideration when developing sex-related criteria. For example, OCR recognized that the National Collegiate Athletic Association recently adopted a sport-specific approach for eligibility criteria for male and female teams in college-level competitive leagues.

### **Key Case Updates Under Title IX**

Below is an overview of the key cases practitioners should be aware of when addressing the interplay of Title IX and the treatment of transgender students in Virginia K-12 schools.

I. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

- a. In *Bostock*, the Court held that Title VII’s prohibition on discrimination on the basis of sex in the workplace includes discrimination on the basis of sexual orientation and/or gender identity.
- b. The Court explained that to discriminate on the basis of sexual orientation or gender identity “requires an employer to intentionally treat individual employees differently because of their sex.” 140 S. Ct. at 1742.

- c. The Court further stated that when an employer discriminates against a person for being gay or transgender, the employer necessarily discriminates against that person for “traits or actions it would not have questioned in members of a different sex.” *Id.* at 1737.
- d. The Court provided examples to illustrate why “it is impossible to discriminate against a person” because of their sexual orientation or gender identity “without discriminating against that individual based on sex.” *Id.* at 1741.
- e. Although this is not an education or Title IX case, it is important because Title IX’s prohibition on sex-based discrimination in educational programs or activities that receive federal funding is written very similarly to the prohibition in Title VII.
- f. On March 26, 2021, the U.S. Department of Justice, Civil Rights Division, issued a Memorandum to Federal Agency Civil Rights Directors and Division Counsels entitled “Application of *Bostock v. Clayton County* to Title IX of the Education Amendments Act of 1972.” In the Memorandum, the DOJ opined that like Title VII, “Title IX’s prohibition of discrimination ‘on the basis of’ sex prohibits recipients from discriminating against an individual based on that person’s sexual orientation or transgender status.
- g. The U.S. Department of Education relied on *Bostock* in making its June 22, 2021 interpretation of Title IX. As stated by the U.S. Department of Education: “Consistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department interprets Title IX’s prohibition on discrimination ‘on the basis of sex’ to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court’s Title VII analysis in *Bostock*, this interpretation flows from the statute’s ‘plain terms.’ See *Bostock*, 140 S. Ct. at 1743, 1748-50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR’s responsibility to enforce Title IX’s prohibition on sex discrimination.”
- h. The Fourth Circuit in *Grimm* cited and applied *Bostock* saying: “[a]fter the Supreme Court’s recent decision in *Bostock*..., we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex.’ Although *Bostock* interprets Title VII... it guides our evaluation of claims under Title IX.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020).

## II. *Gavin Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020).

- a. Fourth Circuit held that the equal protection clause and Title IX protect transgender students from school bathroom policies that prohibit them from selecting a restroom based on their gender identity. The court held that Gloucester County School Board’s policy violated the equal protection clause

because it constituted sex discrimination, as applied to the transgender student in this case.

- b. The court explained that the policy constituted sex discrimination because it was not supported by an exceedingly persuasive justification — i.e., it was not substantially related to the declared underlying interest of protecting students’ privacy. According to the court, the policy revealed a bias that privileged the sex one is assigned at birth over a student’s consistent and persistent gender identification. Similarly, the court held that the application of the restroom policy violated Title IX because excluding this student from using the boys’ restrooms constitutes discrimination on the basis of sex.
  - c. Practitioners should be aware that the Fourth Circuit came to the opposite conclusion from the Eleventh Circuit in *Drew Adams, by and through Erica Adams Kasper v. School Board of St. Johns County, Tim Forson, et al.*, 57 F.4th 791 (11th Cir. 2022)
    - i. In that case, as in *Grimm*, the plaintiff in *Adams* challenged a school board’s policy that precluded a transgender boy from using the boys’ restrooms.
    - ii. The Eleventh Circuit held the policy did not violate either the equal protection clause or Title IX. The court determined that the policy advanced the important governmental objective of protecting students’ privacy in a manner that is substantially related to the objective. Similarly, the court held that the policy did not violate Title IX because the term “sex” in Title IX meant biological sex, and the implementing regulations of Title IX expressly permitted separating the sexes when it comes to the provision of bathroom and other living facilities.
- III. *West Virginia, et al. v. B.P.J., by her next friend and mother, Heather Jackson*, No. 22A800, 598 U.S. \_\_\_\_ (2023).
- a. In this case, the U.S. Supreme Court declined to vacate the U.S. Court of Appeals for the Fourth Circuit’s injunction, enjoining the enforcement of a West Virginia law that restricts participation in women’s sports based on an athlete’s genes or physiological or anatomical characteristics.
  - b. The underlying cases in *Jackson* concern the issue of whether Title IX of the Education Amendments of 1972 or the Fourteenth Amendment’s equal protection clause allows a school to prohibit a transgender girl from participating on a middle-school sports team.
  - c. In April 2021, West Virginia enacted the Save Women’s Sports Act, which separated school athletic teams according to biological sex. As a result of this law, a transgender minor could not participate in the middle school’s girls’ cross-country and track teams. The student filed suit, seeking to enjoin the application of the law and initially seeking a preliminary injunction for an



opportunity to compete on the middle school's girls' cross-country team while the case was pending.

- d. The U.S. District Court for the Southern District of West Virginia initially granted the preliminary injunction, allowing the student to continue playing on the athletic teams consistent with gender identity. However, on Jan. 5, 2023, the district court held that the Save Women's Sports Act is lawful and dissolved the preliminary injunction. The student appealed the court's judgment to the U.S. Court of Appeals for the Fourth Circuit, where the case remains pending.
- e. In the meantime, the student sought an order to continue playing pending the appeal. On Feb. 7, 2023, the district court refused to stay its judgment or grant the injunction pending appeal, which meant the student could not continue playing on the girls' cross-country and track teams. The student renewed the request with the Fourth Circuit and that court granted an injunction pending appeal.
- f. On appeal of the district court's refusal of the stay pending appeal, the U.S. Court of Appeals for the Fourth Circuit reversed the district court's ruling and stayed the district court's order dissolving the preliminary injunction. In *Jackson*, the U.S. Supreme Court denied West Virginia's application to vacate the injunction, meaning that Pepper-Jackson would be allowed to participate in girls' cross country and track in the spring of 2023.
- g. The Supreme Court's refusal to vacate an injunction pending appeal in *Jackson* does not resolve the merits of the student's appeal. Even the lower court's ruling likely affects only the specific plaintiff and school district involved in the case. But the case serves as an important reminder for all educational institutions to carefully consider their policies affecting transgender students and track the evolution of state and federal laws on these issues. Schools should note that some states have enacted bans, while other legislatures are debating prohibitions, and other courts are considering pending cases.
- h. Justice Alito foreshadowed in *Jackson* that whether Title IX or the Fourteenth Amendment's equal protection clause prohibits a state "from restricting participation in women's or girls' sports based on genes or physiological or anatomical characteristics" will be an important issue that the Supreme Court "is likely to be required to address in the near future"

#### IV. *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300 (4th Cir. 2021).

- a. In this case, a Virginia public high school teacher brought a Virginia state court action against school board and school officials, alleging violation of the teacher's constitutional, statutory, and contractual rights by terminating him for speaking in a manner that communicated his beliefs regarding gender identity.

- b. The teacher was disciplined and ultimately terminated after the teacher refused to refer to a student by their preferred pronouns, and on one occasion, used the incorrect pronouns.
- c. The teacher claimed that his termination by the board after his refusal to use the student's preferred pronouns violated his due process, free speech and free exercise rights under the Virginia Constitution and Virginia statutory free exercise protection.
- d. The School Board removed to federal court, arguing that the case posed a federal question -- whether Title IX prohibits discrimination on the basis of gender identity. In addition, they argued, because Virginia interprets its due process, free speech and free exercise provisions as co-extensive with its federal counterparts, those claims also raised substantial federal questions. The teacher filed a motion to remand.
- e. The District Court granted the teacher's motion to remand.
- f. The Fourth Circuit affirmed the District Court's decision, finding that none of the teacher's claims assert any federal causes of action. Moreover, the Court found that none of the claims contained any federal cause of action or fell into the "narrow class of state-law actions" that necessarily raise substantial federal questions.
- g. Though the School Board argued that the case implicated Title IX, the Court stated that plaintiff could "establish all of his state law claims without resolving any federal questions; it is the defense that may hinge on the Title IX issue." *Vlaming*, 10 F.4th at 307.

V. *Grant Park Christian Academy v. Fried*, No. 8:22-cv-01696 (M.D. Fla. 2022).

- a. In this case, a small charter school in Tampa, Florida, filed suit against the USDA and several federal and state officials challenging the USDA's application of federal DOJ and the Department of Education's interpretation of Title IX to the non-discrimination provision governing the federal school lunch program.
- b. Schools, including private and charter schools, that qualify for and receive federal food assistance funds are subject to Title IX's non-discrimination requirements.
- c. Following President Biden's issuance of EO 13,988, the Department of Agriculture issued on July 27, 2021, a "Department Regulation" regarding "non-discrimination in Programs and Activities Receiving Federal Financial Assistance from USDA." The Regulation aligned the Department's non-discrimination policy with the Executive Order providing that discrimination based on "Sex (including sexual orientation and gender identity)," was prohibited.

- d. The Department subsequently issued a memorandum on May 5, 2022, clarifying the application of *Bostock* to programs overseen by USDA and the Food and Nutrition Service, and directing state agencies and program operators to process discrimination complaints consistent with the memo, which fully adopted DOJ and the Department of Education’s prior Title IX interpretation.
- e. Moreover, schools receiving federal food assistance funds were directed to display a poster stating: “In accordance with Federal law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, this institution is prohibited from discriminating on the basis of race, color, national origin, sex (including gender identity and sexual orientation), age, disability, and reprisal or retaliation for prior civil rights activity.” The poster did not limit application of the non-discrimination rule to administration of school lunch programs.
- f. Grant Park Christian Academy sued, asserting that its religious beliefs prevented it from fully implementing the Department’s new construction of “sex” by, *inter alia*, allowing biological boys into locker rooms and shower designated for girls. Or by supporting gender identity transitions. The school agreed it would feed all children, regardless of sexual orientation or gender identity.
- g. USDA settled the lawsuit by agreeing that Grant Park qualified for a religious exemption. USDA also issued a Q&A document confirming that religious schools are not required to submit a written request to USDA in order to claim a Title IX religious exemption.
- h. However, USDA did not disclaim application of its non-discrimination memo beyond implementation of school feeding programs. Thus, schools (including non-religious charter schools) that receive federal food aid are still potentially subject to Title IX requirements, as applied to gender identity, concerning facilities use, sports, and pronoun use.

## **VI. Future Expectations**

- a. Parties are likely to continue bringing legal challenges to the Administration’s efforts to reinterpret Title IX to conform with *Bostock’s* interpretation of Title VII’s prohibition on sex discrimination. This includes the Department of Education’s imminent Title IX rules. The Court has not yet addressed the specific question of whether *Bostock* applies to Title IX. The question is latent within the cases we’ve reviewed.
- b. The argument in favor of interpreting Title IX consistent with Title VII is superficially straightforward: both prohibit discrimination based on “sex.” The argument against was well articulated in a recent case from Texas that is now on appeal to the Fifth Circuit. That case, *Neese v. Becerra*, No. 2:21-cv-163-Z, 2022 WL 1265925 (N.D. Tex. April 26, 2022).

- c. That case involves a challenge to application of *Bostock* to Section 1557 of the Affordable Care Act, which expressly incorporates Title IX's prohibition on discrimination "on the basis of sex." The plaintiffs included physicians who would not, on principle, prescribe cross-sex hormones or gender-related surgery for minors.
- d. The Court in *Neese* looked to the "ordinary public meaning" of sex "conveyed when Congress enacted" Title IX. The Court observed that, in 1972, "sex" was commonly understood to refer to physiological differences between men and women — particularly with respect to reproductive functions." The Court also pointed to *Bostock*, which "proceeded on the assumption that 'sex' referred only to biological distinctions between male and female."
- e. Going beyond *Bostock*, the Court then sought to read Title IX as a "whole." "As written and commonly construed, Title IX appears to operate in binary terms — male and female — when it references 'sex.'" The Court pointed to Section 1686, which allows for Title IX institutions to "maintain separate living facilities for the different sexes," and its implementing regulation, which allowed for the provision of "separate toilet, locker room, and shower facilities on the basis of sex," provided they are comparable "to such facilities provided for students of the other sex." In the Court's words, "Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'"
- f. Moreover, the operative language of Title IX, which bars discrimination "on the basis of sex," is different than the operative language of Title VII, which bars discrimination "because of sex," which informed the Court's "but-for" analysis.