No. 18-107

In the
# Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
*Petitioner*,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
*Respondent*,

and AIMEE STEPHENS,
*Respondent-Intervenor*.

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF *AMICI CURIAE* FAMILY POLICY GROUPS IN SUPPORT OF PETITIONER

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## INTERESTS OF *AMICI*[1]

Your *amici* are groups dedicated to considering the effect of government policy on family. Parents have a fundamental right to teach and bring up their children. A decision by this Court that "transgender status" is merely a byword for "sex," or that the sexes are a kind of "stereotyping," will limit and unsettle parents' fundamental rights in new and dangerous ways.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court will decide whether a claim to be "transgender" makes an employer's even-handed policies based on natal sex a form of "sex discrimination." It will also decide whether "gender" is a set of sexual stereotypes under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

As noted in the Petition for Certiorari, the Sixth Circuit treats sex — a person's status as male or female based on reproductive anatomy and physiology — as an illicit, ungrounded stereotype. Pet. at 11. And once sex itself is an ungrounded stereotype, it becomes impossible to apply the sex-specific policies that the law allows, at least against any objector. *Id.* Under this reading, a law meant to protect the sexes from bias would make the claim to be of the male or female sex vague and unintelligible. *But see United States v. Davis*, 139 S.Ct. 2319 (2019)(addressing when laws

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[1] No one other than *amici* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk or provided a written consent.

are unconstitutionally void for vagueness). It would subject pre-political definitions and rights to the veto of any individual desiring to be within a class.

The case here involves no children. But it asks the Court to declare, for the first time, that sex and gender – and terms like 'girls' and 'boys' – lack any "fixed external referent." *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 n. 4 (6th Cir. 2018). Sex would be unmoored from testable ideas of biology and law. Instead, laws that are supposed to help parents — who care for boys and girls — would turn into Kafkaesque traps. In one fell swoop, "mother," "father," "son," and "daughter" would lose their legal meanings.

Compassion for those experiencing discomfort with a male or female body is not a reason to overthrow pre-political, biological ideas of male or female bodies. The Sixth Circuit's rule would alter and undermine parents' fundamental rights.

Section I shows how such a decision would upset and limit parental rights in educational and school activities regulated by Title IX, with special reference to areas beyond athletics.

Section II addresses why treating transgender status as a matter of "sex" or "sex stereotyping" may limit fundamental parental rights with respect to the medical care of children.

Section III explains why treating transgender status as merely an expression of sex or sex stereotyping may limit fundamental parental rights in other aspects.

## ARGUMENT

### I. HOLDING THAT TRANSGENDER STATUS IS MERELY A MATTER OF SEX OR SEX STEREOTYPING UNDER TITLE VII WOULD INTERFERE WITH PARENTS' INTERESTS CURRENTLY PROTECTED UNDER TITLE IX.

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," *Troxel v. Granville*, 530 U.S. 57, 65 (2000)(plurality), *citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925).

"This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

#### A. TITLE VII AND TITLE IX BOTH PROHIBIT DISCRIMINATION BASED ON "SEX."

Like Title VII, Title IX prohibits certain discrimination based on sex: "[n]o person in the United States shall, on the basis of **sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. § 1681 (emphasis added).

Lower courts explicitly draw from Title VII caselaw when evaluating Title IX claims. *See, e.g., Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). Therefore, this Court's decisions concerning the definitions of "sex" and "gender identity" will change interpretations of corresponding terms in Title IX.

### B. TITLE IX PROTECTS THE RIGHTS OF SCHOOLS AND THE INTERESTS OF PARENTS TO HAVE "SINGLE SEX" FACILITIES AND PROGRAMS.

Title IX protects schools that choose to have some facilities differentiated by *sex*. These laws also protect legitimate parent interests; parents can organize or choose educational institutions with such facilities. These protections include:

- Single-sex, nonvocational classes; 34 C.F.R. § 106.34(b).
- Single sex charter schools; 34 C.F.R. § 106.34(c).
- Human sexuality classes; 34 C.F.R. § 106.34.
- Toilets; 34 C.F.R. § 106.33.
- Locker rooms; 34 C.F.R. § 106.33.
- Showers; 34 C.F.R. § 106.33.
- Living/sleeping accommodations (dormitories); 34 C.F.R. § 106.32.
- Traditional admissions policies; 20 U.S.C.A. § 1681(a)(5).
- Social fraternities or sororities; 20 U.S.C.A. § 1681(a)(6).
- Voluntary youth service organizations; 20 U.S.C.A. § 1681(a)(6).
- Boy or Girl conferences; 20 U.S.C.A. § 1681(a)(7).

- Father-son or mother-daughter activities; 20 U.S.C.A. § 1681(a)(8).
- Physical education activities involving bodily contact; 34 C.F.R. § 106.34.
- Men's and Women's athletics. 34 C.F.R. § 106.41.

### C. TITLE IX WOULD NO LONGER PROTECT THE RIGHTS OF SCHOOLS AND PARENTS TO AGREE TO HAVE "SINGLE SEX" FACILITIES AND PROGRAMS AS DETERMINED BY NATAL SEX.

If sex has no external referent in biology as held below at *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, n. 4 (6th Cir. 2018) a mother cannot select an all-girl or all-boys educational experience for their child, even though that experience is supposedly a choice protected by law. "All-girls" and "all-boys" would have no externally agreeable meaning. A parent could make major life decisions to give their child access to this choice, only to find it illusory. No parents could reasonably agree with others about what it means to be a girl or boy; they could merely agree to mutually accept each child as a boy or girl.

Unless sex and gender have external referents in biology, a father cannot send a child to summer camp confident that the camp can separate sleeping accommodations by gender. The girl's dorm would not be defined by an external referent; girls are those who mutually accept each other as girls.

Indeed, unless sex and gender have external referents in biology or law, neither father nor mother

has a shared meaning. Black's says a "mother" is a "woman who has given birth to, provided the egg for, or legally adopted a child" – a term from *before the 12th century*. BLACK'S LAW DICTIONARY 1106 (9th ed. 2009). A "father" is a "male parent." *Id.* at 682. But if "woman" and "man," "female and male," are unfixed and stereotypical, one can only ever be sure that one is a parent.

Under the meaning of "sex" suggested by the 6th Circuit, mothers and fathers will lose the right to choose long-protected educational experiences for their boys and girls.

## II. DECIDING THAT TRANSGENDER STATUS IS MERELY A MATTER OF SEX OR SEX STEREOTYPING UNDER TITLE VII WOULD INTERFERE WITH PARENTS' RIGHTS IN THE MEDICAL CARE OF THEIR CHILDREN.

Other aspects of parenting would be impacted by the 6th Circuit's rule, as well.

For example, if sex lacks an external referent in biology or law, consider the impact to parents' right to direct their child's healthcare. This Court observed that our family law 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." *Parham v. J. R.*, 442 U.S. 584, 602 (1979). The "natural bonds of affection" more reliably lead to decisions in the best interests of the child. *Id.* A parent's healthcare decisions will usually control, even in questions of hospitalization and surgery. *Id.* at 604.

Yet a growing number of parents report losing this presumption in practice. Doctors face legal and activist pressure to "affirm" children's claims, without considering whether a child might accept an identity consistent with their male or female sex.

### A. GENDER IDENTITY IS NOT FIXED IN ALL CHILDREN

In 2015, Eric Vilain and J. Michael Bailey published an op-ed in the *Los Angeles Times*, asking "[w]hat should you do if your son says he's a girl?" Eric Vilain and J. Michael Bailey, *What Should You Do If Your Son Says He's a Girl?* L.A. Times, May 21, 2015 at https://www.latimes.com/opinion/op-ed/la-oe-vilain-transgender-parents-20150521-story.html) (last accessed August 16, 2019). Vilain is director of UCLA's Center for Gender-Based Biology, and Bailey is a professor at Northwestern University. *Id*.

They hypothesized a five-year old boy who tells his parents that he wants to be a girl. Should the parents affirm the child's internal referent? Or encourage acceptance of his birth gender? *Id*.

Vilain and Bailey were frank: "As scientists who study gender and sexuality, we can tell you confidently: **At this point no one knows what is better for your son … we don't yet know whether it's better to encourage adjustment or persistence**." *Id*. (emphasis added).

Vilain and Bailey went on to criticize a statement by the then-Obama White House that decried "conversion therapy" for sexual orientation and sex identity. *Id*. But Vilain and Bailey said the science

shows these to be *two different conditions*. They believed "banning all therapists from helping families trying to alleviate children's gender dysphoria would be premature, a triumph of ideology over science." *Id.*

Gender dysphoria during childhood does not inevitably continue into adulthood. The vast majority of research backs Vilain and Bailey's position. According to the World Professional Association for Transgender Health's standards of care, a supermajority of prepubescent children seeking help from a clinic will *not* have dysphoria in adulthood:

> Rather, in follow-up studies of prepubertal children (mainly boys) who were referred to clinics for assessment of gender dysphoria, the dysphoria persisted into adulthood for only 6–23% of children (Cohen-Kettenis, 2001; Zucker & Bradley, 1995). Boys in these studies were more likely to identify as gay in adulthood than as transgender (Green, 1987; Money & Russo, 1979; Zucker & Bradley, 1995; Zuger, 1984). Newer studies, also including girls, showed a 12–27% persistence rate of gender dysphoria into adulthood (Drummond, Bradley, Peterson-Badali, & Zucker, 2008; Wallien & Cohen-Kettenis, 2008).
>
> In contrast, the persistence of gender dysphoria into adulthood appears to be much higher for adolescents. No formal prospective studies exist.

WPATH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-

NONCONFORMING PEOPLE, 7th ed. 11. (2012) (available at https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf) (Last accessed August 11, 2019).

Thus, the studies show a full 77% to 94% of prepubertal boys who are actually referred to clinics for dysphoria will *not* be dysphoric in adulthood. Similarly, the current best evidence is that, including girls, 73% to 88% of children will "desist" in any gender dysphoria by adulthood. While WPATH states that persistence is "much higher" for adolescents, it admits that *no* formal prospective studies exist. *Id*. The claim in the standards are based on a single, retrospective study of just 70 children. *Id.*

### B. CONVERSION THERAPY BANS INHIBIT EFFORTS TO ENCOURAGE NATAL SEX ACCEPTANCE.

Despite Vilain and Bailey's cautious, scientific approach, the literature issued by activist groups shows overwhelming pressure to treat gender identity as immutable, to satisfy the idea that professionals have treated the LGBTQ community properly.

The desire to treat all forms of sexuality, gender expression, and gender identity as *fixed* has led to demands to ban "conversion therapy." Yet repeated scientific studies show gender expression is not fixed. In those cases, it is not immoral to ask whether a female body can be accepted as fully dignified, or whether a male body can be accepted without disgust, discomfort, or dysphoria. This is not to suggest that dysphoria is made-up; rather, science seems to tell us that some dysphoria changes or resolves. And that fact of change is especially true among children.

The human internal compass does not reliably point to a true north. Part of the maturity, experience, and capacity for judgment that accrues to parents is the hard-earned wisdom that ideals change. Some individuals may never experience a sense of acceptance about their natal male or female body. But many children with dysphoria do come to accept their bodies. Parents can help children realize that dignity and human worth accrues to each human body, male or female.

However, a rule like the one proposed by the 6th Circuit, which makes the internal compass the only factor in determining legal sex, would undermine parents and professionals as they seek to explore whether a particular child's dysphoria may resolve.

### C. PRESSURE TO AVOID "REPARATIVE THERAPY" AND UNPROVEN "SUICIDALITY" CLAIMS CAN LEAD TO OVERRIDING PARENTS.

Are medical professionals free to give parents and children unbiased advice on these issues, as Professors Vilain and Bailey did in 2015? Increasingly, the answer is no.

Nineteen states have enacted "conversion therapy" bans. In many cases the bans include language banning therapy targeted at *acceptance* of male or female sex. For example, Maryland's law prohibits "any effort to … change gender expression." Md. Code Ann., Health Occ. § 1-212.1. It allows "coping," but only when it does not "change gender identity." Md. Code Ann., Health Occ. § 1-212.1(a)(2).

But as Vilain and Bailey noted, a five-year old girl who says she is a boy *might* desist. Most similarly-situated children *do* desist. Professionals in such states, however, cannot legally suggest the five-year old girl might benefit from therapy that would encourage accepting the fundamental goodness of a female identity.

This legal pressure, combined with uncertain medical literature on the issues, works to deprive parents of their right to understand and direct their children's medical care.

A recent study highlights these concerns. Assistant Professor Lisa Littman, of Brown University's School of Public Health, published a descriptive study proposing a clinical phenomenon she termed "Rapid Onset Gender Dysphoria" (ROGD).[2] The study hypothesizes that some gender dysphoria is a phenomenon and that social influences, parent-child conflict, and maladaptive coping mechanisms may be contributing factors for some individuals. It collected parent reports, which sometimes described traumatized youth repeating online information to overeager healthcare providers.

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[2] Lisa Littman (2018) *Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria*. PLoS ONE 13(8): e0202330. https://doi.org/10.1371/journal.pone.020233; PLoS ONE conducted an editorial review, and issued more detailed information about the processes, but left the Results section unchanged. *See* Lisa Littman, *Correction: Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria*." PLoS ONE 14(3): e0214157. https://doi.org/10.1371/journal.pone.0214157 (Last accessed August 10, 2019).

Littman published short summaries to show representative responses. Many included social trauma. For example, one respondent said:

> "A 12-year-old natal female was bullied specifically for going through early puberty and the responding parent wrote 'as a result she said she felt fat and hated her breasts.' She learned online that hating your breasts is a sign of being transgender."

Another respondent:

> "a 14-year-old natal female and three of her natal female friends were taking group lessons together with a very popular coach. The coach came out as transgender, and within one year, all four students announced they were also transgender."

One of the major themes of bullying was animosity toward those who are heterosexual or cisgender. *Id.* at 17. "The groups targeted for mocking by the friend groups are often called "heterosexual…." *Id.* One participant explained, "[t]hey are constantly putting down straight, white people for being privileged, dumb and boring…" *Id.* Another elaborated: "[i]n general, cis-gendered people are considered evil and unsupportive, regardless of their actual views on the topic." *Id.* at 17.

When asked what sources were influential for these children, 63.6% identified "YouTube transition videos." *Id*. at 20. 61% identified "Tumblr," a microblogging site. *Id.* 42.9% identified an online group of friends. *Id*. One parent wrote: "we feel she was highly influenced by the 'if you are even questioning

your gender – you are probably transgender' philosophy." *Id*. at 20.

Some parents also reported that their children seemed to treat online information as more important or reliable than mainstream doctors and psychologists. *Id*. at 23. 16% of parents reported that their child defended the practice of lying or withholding information from therapists or doctors to obtain hormone therapy. *Id*.

Finally, parents reported what seemed to be a clinical rush to judgment. Of those parents who knew the content of their child's visit, 23.8% said hormone therapy was offered on the first visit. *Id.* at 24. One parent reported "[w]hen we phoned the clinic, the doctor was hostile to us, told us to mind our own business. Our family doctor tried to reach our son's new doctor, but the trans doctor refused to speak with her." *Id*. at 25.

Perhaps worse, 84% of the parents were reasonably sure or positive that their child had misrepresented or omitted parts of their history. *Id.* at 25. Parents also reported that children had access to online communities that told them what to say to obtain a diagnosis. Said one parent: "[a]t [the] first visit, [my] daughter's dialogue was well-rehearsed, fabricated stories about her life told to the [the] outcome she desired. She parroted people from the internet." *Id*. at 27. Said another: "I overhead my son boasting on the phone to his older brother that 'the doc swallowed everything I said hook, line and sinker …." *Id.*

Littman clarified that her study is a proposed phenomenon meriting more study. It is not "proof" of a distinct kind of dysphoria. "It is unlikely that friends and the internet can make people transgender. However, it is plausible that the following can be initiated, magnified, spread, and maintained via the mechanisms of social and peer contagion: (1) the *belief* that non-specific symptoms…should be perceived as gender dysphoria and their presence as proof of being transgender; (2) the *belief* that the only path to happiness is transition; and (3) the *belief* that anyone who disagrees with the self-assessment … is transphobic, abusive, and should be cut out of one's life." *Id.* at 32.

## III. DECIDING THAT TRANSGENDER STATUS IS MERELY A MATTER OF SEX OR SEX STEREOTYPING UNDER TITLE VII WOULD DEPRIVE CHILDREN OF PARENTAL INVOLVEMENT IN OTHER WAYS, INCLUDING THE RIGHT TO CUSTODY AND PARENTAL NOTIFICATION.

### A. RIGHT TO CUSTODY

The idea that sex and gender lack any external referent in biology is used to deprive parents of their ultimate right: the right to continued custody of their children.

For example, in Ohio, *In re: JNS*, No. F17-334 X (Hamilton County, Ohio), Hamilton County Job & Family Services petitioned for temporary custody of JNS. JNS had contacted a crisis hotline, claiming that his parents had "told him to kill himself." Kevin Grasha, *Prosecutor: Parents' Refusal of Transgender Treatment Made Teen Suicidal*," CINCINNATI

ENQUIRER, Jan 26, 2018, at https://www.cincinnati.com/story/news/2018/01/26/prosecutor-parent-told-transgender-teen-he-going-hell/1071010001/ (last accessed August 11, 2019).

However, the court found that it was the parents who had brought the child to Cincinnati Children's Hospital for psychiatric treatment of anxiety and depression. The parents were also financially supporting the child's talk therapy. According to the court, "[t]he parents sough appropriate mental health treatment when their child's generalized anxiety and depression reached the point that hospitalization became necessary." *In re: JNS, supra*, at 2.[3]

The court was further concerned that the child's diagnosis "rather quickly" become one of gender dysphoria. *Id*. It noted a lack of reliable data: "[t]he entire field of gender identity and non-conforming gender treatment is evolving rapidly and there is a surprising lack of definitive clinical study available to determine the success of different treatment modalities." *Id*.

The court then expressed concern about the role of the hospital: "It is a concern for the Court that the statistic presented by … the Director of the Transgender Program in her testimony is that 100% of the patients seen by Children's Hospital Clinic who

[3] A copy of the *In re: JNS* order has been republished at several sites, including https://www.wcpo.com/news/local-news/hamilton-county/cincinnati/transgender-boy-from-hamilton-county-wins-right-to-transition-before-college (last accessed August 18, 2019).

present for care are considered to be appropriate candidates for continued gender treatment." *Id*.

The court went on to address the issue of suicidal ideation. While the child had expressed "suicidal ideation," and the parents had stipulated to such ideation, the court found the actual medical records showed the child was *not* at risk of suicide. The court said it would not let claims of suicidal ideation govern the disposition of cases before it. *Id*. at 3.

However, the end result of *JNS* is that caring and supportive parents were pressured to give up their legal rights by doctors and advocates.

This situation will repeat itself, at least in those states that have explicitly instructed child welfare workers to treat non-affirming homes (homes that do not immediately affirm) as a threat to child wellbeing. A decision by this Court that gender is merely a set of stereotypes would encourage these efforts to treat parental involvement as bigoted or unreasonable.

For example, in Vermont, the state's policy is that in the area of LGBTTQQIAPP[4] identity, "Division staff will affirm the … identity of all children to create a supportive environment." Vermont Department for Children and Families, *Policy 76* in FAMILY SERVICE POLICY MANUAL, at 3 (https://dcf.vermont.gov/sites/dcf/files/FSD/Policies/76.pdf)(last accessed August 11, 2019). "Division staff shall not attempt to persuade a[ transgender] individ-

[4] "lesbian, gay, bisexual, trans, two spirit, queer, questioning, intersex, asexual, pansexual, polysexual"

ual to reject or modify their … gender identity, or gender expression. Staff will not impose personal … beliefs onto children and youth served by the division." *Id*. The policy does not require a professional assessment, to determine whether persistence is likely.

Instead, the Division says the *caregiver's* beliefs should be analyzed for risks and dangers. It tells social workers to ask if the caregiver "has not, will not, or is unable to provide care … necessary to protect the child from harm, including self-harm." *Id.* at 4. It later suggests that supportive families always "support children's identities even if it feels uncomfortable." Any rejection "significantly impacts" health risks, including self-harm and suicide. *Id*. at Appx. II.

Thus, Vermont's manual leaves little room to question whether a medical professional has assessed the likelihood of persistence or desistence. Instead, children who "cannot safely remain in their homes" will be placed in an "affirming" transgender environment – regardless of the child's age, mental health, or medical history.

These state agency decisions are being driven by sexual orientation and gender identity advocacy groups. For example, the National Center for Lesbian Parents has organized a section to represent children, or to take the side of affirming parents in child custody cases. *See* NCLP, Transgender Youth Project: Family http://www.nclrights.org/transgender-youth-project-family/ (last accessed August 11, 2019).

### B. RIGHT TO FOSTER PARENT

Well-known LGBTQ advocates now ask government agencies to screen foster and adoptive parents for a willingness affirm even *hypothetical* identities. The Human Rights Campaign's "All Children – All Families" certification program requires foster and adoption groups to tell foster parents that "they may not even be aware of their [Sexual Orientation or Gender Identity] at the time of placement. Therefore, it is possible that any child or youth that a parent adopts or fosters, could ultimately 'come out' one day."

But, of course, this advice glosses over the medical consensus that up to *80 percent* of preadolescent children who express gender nonconformity may desist. HRC's advocacy of Gay, Lesbian, and Transgender identities has pushed them to lump these statuses together, ignoring the reality that Sexual Orientation and Gender Identity are two different issues, requiring different care.

For example, New York City's Administration for Children's Services' Office of LGBTQ Policy and Practice's manual suggests foster parents cannot use their *religious* beliefs when foster parenting: "[d]o not use personal, organizational, and/or religious beliefs to justify discrimination … a [transgender / gender nonconforming] person's gender identity or gender expression. … Furthermore, the Children's Services LGBTQ Policy prohibits staff, providers, volunteers, and foster parents from using these beliefs to negatively impact TGNC children, youth, and adults." J.R. Perry and E.R. Green, *Safe & Respected: Policy, Best Practices & Guidance for Serving Transgender & Gender Non-Conforming Children and Youth Involved in the Child*

*Welfare, Detention, and Juvenile Justice Systems* (2014) (available at https://casala.org/wp-content/uploads/2016/01/Safe-and-Respected_06_23_2014_WEB.pdf) (accessed August 11, 2019).

This kind of policy, advocated by HRC and others, has led to reports of religious parents being blocked from fostering or adopting.

In Edmonton, Canada, an evangelical Christian couple alleged that they were at first recommended as adoptive parents. But then the parents were told their beliefs were "contrary to the 'official position of the Alberta government,'" and revoked. Paige Parsons, *Christian Couple say efforts to adopt rejected over their views on sexuality*, EDMONTON JOURNAL, November 8, 2017, at https://edmontonjournal.com/news/local-news/christian-couple-say-efforts-to-adopt-rejected-over-their-views-on-sexuality (last accessed August 11, 2019).

Likewise, in the United Kingdom, a government agency blocked an evangelical Christian couple from adopting two children they were currently fostering. The couple claims they had expressed interest in adopting two children in their care. A social worker told the parents that a gay couple had expressed interest in the children. The couple expressed their belief that the children would benefit from a "mummy and daddy." The adoption council held that these "views could be detrimental to the long-term needs of the children." The couple's adoption request was refused, and social workers warned their foster status could be put up for review. *See* Chloe Chaplain, *Christian Couple blocked from adopting foster children amid 'gay par-*

*ents' row*, November 6, 2016, at https://www.standard.co.uk/news/uk/christian-couple-blocked-from-adopting-foster-children-amid-gay-parents-row-a3388456.html (last accessed August 11, 2019).

### C. RIGHT TO PARENTAL NOTIFICATION

As in the area of medical care, parents increasingly find that *schools* have adopted policies that prohibit affirming natal sex. And many schools have adopted policies that keep parents in the dark about their child's situation.

For example, in a recent USA TODAY op-ed, Jay Keck reports that his daughter on the autism spectrum "came out" as transgender to her teachers at school. Jay Keck, *My daughter thinks she's transgender. Her public school undermined my efforts to help her*, USA TODAY, August 13, 2019 (available at https://www.usatoday.com/story/opinion/voices/2019/08/12/transgender-daughter-school-undermines-parents-column/1546527001/). Keck's daughter was on the autism spectrum and had experienced social challenges. Rather than contact Keck and his wife, the school immediately started referring to her with a masculine name, using male pronouns, and providing access to a gender-neutral restroom.

At the next IEP meeting, Keck asked staff to use the child's legal name. The social worker present confirmed their right to make such a request. School staff, however, ignored the parents' request. The district's assistant superintendent blamed "the law," but there was no law. The superintendent was apparently referring to a 2016 "Dear Colleague" letter from the

Obama administration, which was later enjoined and rescinded. *Id*.

This has not stopped the National Education Association from encouraging automatic acceptance of gender claims by students. "The school environment may be the only place a transgender student feels safe enough to be themselves," says the NEA's "Schools in Transition" manual, produced with the help of HRC and ACLU. Asaf Orr and Joel Baum, SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS (2015), http://assets2.hrc.org/files/assets/resources/Schools-In-Transition.pdf Even when a natal male may be sleeping in the same room as females, the guide advises *non-disclosure* to other students and parents. *Id*. at 27.

Keck also says his daughter's counselor refuses to give him written answers or advice. She is willing to make statements off the record, apparently, but fears professional charges if she violates Illinois' "conversion therapy" ban. Illinois' "conversion therapy" law prohibits therapists from questioning the child's professed gender identity, or even exploring whether the child would be comfortable with their sex. Keck, *supra*.

Keck notes that the American Civil Liberties Union has sent schools letters asserting that "it is against the law to disclose a student's sexual orientation or gender identity even to a student's parents or other school administrators." The ACLU claims this right is a constitutional right to privacy, and not, as some might expect, a rule under the Family Educational Rights and Privacy Act (FERPA). *See* ACLU,

*Open Letter to Principals and Superintendents,* December 7, 2015 (available at https://www.aclu.org/sites/default/files/field_document/privacy_open_letter_dec_2015_0.pdf) (last accessed August 12, 2019). FERPA provides parents the right to inspect and review the child's educational records until they are 18; it appears the ACLU alleges a constitutional duty to get around the statute. *Id.*

And the ACLU's materials tell schools that disclosing gender identity to a parent may result in suicide, physical abuse, or homelessness. *Id*.

Keck says his local school refused to put his child's legal name on their diploma. He notes that his child plans to approach Planned Parenthood of Illinois, which now offers "Affirming Hormone Therapy" in all 17 of its Illinois clinics, with no significant new review of mental health. Keck, *supra*.

**D. RIGHT TO FREE SPEECH**

Finally, insisting that sex is merely self-referential can lead to infringements on parental freedom of speech. Once gender is cast as working from "stereotypes," and urging acceptance is linked to suicide and self-harm, parents can be forced to carry the government approved message about the meaning of their child's sex.

For example, consider the recent Canadian case of *A.B. v. C.D. and E.F., et al.*, the subject of two decisions by the Supreme Court of British Columbia. *A.B. v. C.D., et al.,* 2019 B.C.S.C. 254 and *A.B. v. C.D. and E.F.,* 2019 B.C.S.C. 604.

A.B., a natal female, is called "Max" in media coverage. "Max" realized a desire to have a masculine body after watching a YouTube animated video in 7th grade:

> "[T]he Danish short film documents the struggles between Emilie, a transgender boy, and his mother. The film opens in a clothing store. The mom picks out a dress for Emilie, but Emilie prefers military-style clothes.
>
> 'It just kind of clicked right away,' Max says."

Douglas Quan, *Who Gets to Decide When a 14-year Old Wants to Change Gender?*, NATIONAL POST, January 18, 2019 (https://nationalpost.com/news/canada/who-gets-to-decide-when-a-14-year-old-wants-to-change-gender).

Max's father shared joint custody with Max's mother. When Max was taken to a local hospital for an evaluation, Max was presented forms that clearly disclosed the uncertain outcomes of treatment: "treatment in young adolescents is a newer development, and the long-term effects are not fully known." *Id.* Hospital staff were ready to begin hormone injections the same day. *Id.* When Max's father, who was not at the meeting, objected to immediate changes, the hospital simply refused his objection. "[W]hile staff always strive to get parents onboard with a proposed course of treatment, 'under these circumstances we are of the view that it is ultimately up to Max to give or withhold consent to his own medical care; neither you nor his mother can make this decision for him.'" *Id.*

On appeal to the Supreme Court of British Columbia, that court held that the father could not talk to the press about the case. The court also held that the father's speech could be "family violence," and so restrained:

> It is declared under the Family Law Act that: …
>
> Attempting to persuade A.B. to abandon treatment for gender dysphoria; addressing A.B. by his birth name; referring to A.B. as a girl or with female pronouns whether to him directly or to third parties; shall be considered to be family violence under s. 38 of the Family Law Act.

2019 B.C.S.C. 604 at ¶ 10.

In an appeal of the original order, the court went further, to prohibit AB from receiving any materials questioning what is in his best interests:

> … *exposing AB to videos and other materials that question whether his gender identity is real or the treatments he seeks are in his best interests*, is an attempt to persuade AB to abandon treatment. While those arguments may be properly advanced in court, they are harmful when made to AB by his father."

*Id.* at ¶ 82-3 (emph. added).

The court acknowledged the father had an "interest" in free expression. But it prevented the father from expressing doubts about the child's treatment. "A parent is expected to act in the best interest of the children, and so may be criticized for distributing the Court's reasons for judgment inappropriately, such as

to children and neighbours." *Id.* at 60. Applying principles of "necessity and proportionality," the court found a protective order necessary and proportional to protect AB from "harm." *Id.* at 64.

In *A.B.,* then, a parent has been prevented from discussing what *might* be in the child's best interest. If the 6th Circuit's rationale is made national law, family courts will face similar situations in the United States. The cultural and professional pressures could limit the speech of parents, who are sincerely driven by the bonds of affection.

## CONCLUSION

This Court recognizes that the child is not the mere creature of the state. Parents must nurture and direct children, to prepare [them] for additional obligations. Children are created out of sexual difference, and parents are in a unique position to explain why men and women are equally valued and important, and not a matter of stereotype.

The Sixth Circuit's blithe assertion that sex, as a legal and scientific matter, is a set of stereotypes without external referent, will unsettle the legal protections that allow this important work to continue. This Court should reject the Sixth Circuit's sweeping attempt to redefine "sex."

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# APPENDIX

## APPENDIX

**APPENDIX I – COMPLETE LIST OF AMICI CURIAE**

1. **Jim Minnery, President**
   **Alaska Family Action**

2. **Nicole Theis, President**
   **Delaware Family Policy Council**

3. **John Stemberger, President**
   **Florida Family Policy Council**

4. **Eva Andrade, President**
   **Hawaii Family Forum**

5. **Bob Vander Plaats, President/CEO**
   **The FAMiLY LEADER**

6. **Ryan McCann, Executive Director**
   **Indiana Family Institute**

7. **Kent Ostrander, Executive Director**
   **The Family Forum**

8. **Gene Mills, President**
   **Louisiana Family Foundation**

9. **Carroll Conley, Executive Director**
   **Christian Civic League of Maine**

10. **Andrew Beckwith, President**
    **Massachusetts Family Institute**

**11. John Helmberger, Chief Executive Officer**
**Minnesota Family Council**

**12. Karen Bowling, Executive Director**
**Nebraska Family Alliance**

**13. Shannon McGinley, Executive Director**
**Cornerstone Action**

**14. Len Deo, Founder & President**
**New Jersey Family Policy Council**

**15. Jason J. McGuire, Executive Director**
**New Yorkers for Constitutional Freedoms**

**16. John L. Rustin, President**
**NC Family Policy Council**

**17. Aaron Baer, President**
**Citizens for Community Values**

**18. Norman Woods, Executive Director**
**Family Heritage Alliance**

**19. David Fowler, President**
**The Family Action Council of Tennessee, Inc.**

**20. Victoria Cobb, President**
**The Family Foundation of Virginia**

**21. Mark Miloscia, Executive Director**
**Family Policy Institute of Washington**

**22. Allen Whitt, President**
**The Family Council & Family Policy Institute**

**23. Julaine Appling, President**
**Wisconsin Family Council**

**24. Jonathan M. Saenz, Esq., President**
**Texas Values**