No. 23-1534

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

PARENTS PROTECTING OUR CHILDREN, UA,
PLAINTIFF-APPELLANT,

v.

EAU CLAIRE AREA SCHOOL DISTRICT, WISCONSIN, TIM NORDIN, LORI BICA, MARQUELL JOHNSON, PHIL LYONS, JOSHUA CLEMENTS, STEPHANIE FARRAR, ERICA ZERR, and MICHAEL JOHNSON,
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the Western District of Wisconsin, Case No. 3:22-CV-508
the Honorable Stephen L. Crocker, Magistrate Judge

REPLY BRIEF OF APPELLANT PARENTS PROTECTING OUR CHILDREN, UA

WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.

RICHARD M. ESENBERG
LUKE N. BERG
Counsel of Record

330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Fax: (414) 727-6385

AMERICA FIRST LEGAL FOUNDATION

NICHOLAS R. BARRY
REED D. RUBINSTEIN

300 Independence Ave SE
Washington, DC 20003
Phone: (202) 964-3721

Attorneys for Plaintiff-Appellant

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Regulations

ARGUMENT

The issue here is whether parents have standing to protect their constitutional right to raise their own children. The District's gender transition Policy usurps parental authority by transferring decision-making authority from a parent to the staff of a government school. This Policy presently harms Plaintiff's members and creates a substantial and imminent risk of serious harm to them and their children.

Defendants' main response, understandably, is to redirect attention away from the portions of the Policy that enable a transition at school without the parents' knowledge and consent—but they do not dispute that the Policy allows this. Their other theme is that parents must wait until the District has secretly transitioned their child at school, but, of course, by then it will be too late, and Defendants have no good answer as to how Plaintiff's members are supposed to discover what has been hidden from them. Fortunately, Article III standing is not so rigid. A favorable decision would redress multiple present injuries, restoring parents' rightful role and ensuring that parents have access to information about what is happening with their own children at school. And it will prevent long-term, psychological harm to their children from a secret transition. Plaintiff's members have standing.

I. The Loss of Parental Authority Is a Present Injury; Defendants Have No Response Other Than Redirection.

As Plaintiff explained, the District's Policy transfers their decision-making authority over whether a gender-identity transition is in their child's best interests from them to school staff and/or minor students themselves, and the loss of their

parental authority over this decision is a *present* injury, because it prevents them from saying no to a transition. Pl's Br. 21–26.

The District's only response is that Plaintiff has "complete[ly] misrepresent[ed]" the Policy, Resp. Br. 19–20, but they do not explain how. The District does not dispute that the Policy allows and enables gender-identity transitions at school without parental notice and consent; as Plaintiff noted, that is how *Defendants* characterized the Policy to the District Court. Pl's Br. 12.

As an example, supposedly, of how Plaintiff "misrepresented" the Policy, Defendants emphasize that the Policy requires "parent/guardian permission" to change names "*in the District's system*." Resp. Br. 20. But that is not the portion of the Policy Plaintiff is challenging. The portion at issue is changes to name, pronouns, and intimate facilities in day-to-day use (without making changes to the District's systems), which indisputably *does not* require parent/guardian permission under the Policy. Pl's Br. 11–12. Indeed, the way the Policy emphasizes parent/guardian permission for record changes, unlike for day-to-day usage, highlights the distinction. SA 30 ("ECASD will only make name changes in Skyward after the completion of a Gender Support Plan and with parent/guardian permission.") (emphasis in original); *compare* SA 28 ("Administrators and staff should respect the right of an individual to be addressed by a name and pronoun that corresponds to their gender identity. … *[T]he student need not change their official records*.") (emphasis in original).

The District further argues that the Policy "does 'not *mandate* the exclusion of parents and guardians.'" Resp. Br. 20. That is partially true,[1] but beside the point. The Policy *allows* a gender transition at school in secret from parents, without notice to them or their consent, solely upon a child's request (with input from staff). A minor child's desire is not sufficient to usurp parents' right to parent. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Simply because the decision of a parent is not agreeable to a child … does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."). Thus, the Policy does transfer authority over this decision away from parents.

Defendants also cannot meaningfully distinguish *Arizona State Legislature*. They argue that the Court's "finding of standing was premised on the fact that the change in law was a concrete action that actually stripped authority from the Legislature and those effects had a present impact." Resp. Br. 22. The same is true here—the District's adoption of its Policy was a "concrete action" that "presently strip[s] [parents] of [their] prerogative to initiate [or say no to] a [social transition of their child]." Resp. Br. 21–22. The "present impact" that supported standing in *Arizona State Legislature* was the Legislature's loss of control over redistricting—it did not matter that the Legislature had not yet "implement[ed] a competing redistricting plan." *Arizona State Legislature v. Arizona Indep. Redistricting Com'n*,

[1] It is also partially false. The Policy does "mandate" excluding the parents from the decision-making process if a student "do[es] not want [their] parents to know," SA 33, as confirmed by various portions of its Policy, its training, and its representations to the District Court. Pl's Br. 11–15.

576 U.S. 787, 800–01 (2015). Here, as there, Plaintiff's members are presently injured by the loss of their parental authority over this decision; and they have no way to regain that authority other than this lawsuit.

As Plaintiff already explained, *Deanda* and *Parents United* did not, as Defendants argue, rely exclusively on the loss of a *state law* right to consent. Resp. Br. 22–23; Pl's Br. 24–25 and n.12. Regardless, parents in Wisconsin have a similar right to consent to medical treatment under Wisconsin common law. Pl's Br. 24 n.12. The District has no response to either point.

A favorable decision requiring parental consent before staff begin treating a child as the opposite sex at school would redress this injury by restoring parental authority, so that, if the parents believe a transition is against their child's best interest, they can decline to consent.

II. Defendants Cannot Distinguish *Parents Involved.*

Defendants have no persuasive response to *Parents Involved*. Pl's Br. 26–27. They concede that the parents' children in that case "had not yet been prevented from choosing their preferred school," but argue that the injury "was bound to occur" to them eventually. Resp. Br. 17. That mischaracterizes the case. The Court specifically noted that the plaintiff's members' children "[may] *not* be denied admission to a school based on their race," but this nevertheless "d[id] not eliminate the injury claimed." *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 718–19 (2007) (emphasis added). Nor was the sole injury being "forced to compete in a race-based system," Resp. Br. 17, as Plaintiff already explained, Pl's Br. 27–28.

Characterizing the harm in *Parents Involved* as "systemic" does not help Defendants either, because it is equally systemic here. All minor students in the Eau Claire Area School District are subject to the District's Policy and invited to secretly meet with staff about their gender identity struggles and develop a transition plan without their parents' involvement or knowledge. SA 34. As in *Parents Involved*, some children will be ensnared by that process and others will not, but it is impossible to know in advance which children will be harmed, so all are at risk. Even more, unlike *Parents Involved*, parents will not even know *after the fact* that the Policy has been applied to their child, due to the lack of notice.

Plaintiff's members do not "merely disagree[ ] with" the Policy. Resp. Br. 17. They have children in District's schools and are subject to a Policy that presently eliminates their parental authority and prerogative to decide whether a transition is in their child's best interest, and, due to the Policy, they cannot know whether it has already been applied to their child. SA 17 ¶ 82.

III. The Lack of Prior Notice Presently Harms Plaintiff's Members.

As Plaintiff explained, the lack of notice to parents (or their prior consent) before District staff facilitate a gender transition at school presently deprives Plaintiff's members of information to which they are entitled—namely whether District staff are currently treating their children as the opposite sex. Pl's Br. 28–31.

Without prior notice, Plaintiff's members cannot know if the Policy has already been or is currently being applied to their child.[2] SA 16–17, ¶¶ 75, 82.

Here too, Defendants' main response is that Plaintiff has "mischaracterize[d]" the Policy. Resp. Br. 23–25. But again, Defendants do not dispute that, under its Policy, the District will facilitate a transition at school without notifying parents or obtaining their consent, solely upon a child's request. Pl's Br. 11–13 (summarizing the relevant portions of the Policy); *e.g.*, SA 33–34 (Gender Support Plan form asking whether the "parents/guardians of this student [are] aware of their child's gender status," and requiring certain warnings to students "if the parents are not involved in creating this plan" and students "do not want parents to know"); SA 38 (training to staff that "parents are not entitled to know their kids' identities").

Defendants emphasize that parents can obtain the Gender Support Plan form after the fact, if they ask for it, Resp. Br. 25, but, as Plaintiff explained, the Policy does not require a Gender Support Plan for a transition at school, so if there is no Plan, parents have no way to determine if the Policy is currently being applied to their child. Pl's Br. 13–14 and n.9, 39. Defendants do not disagree with this point. That lack of information about a major decision involving their own children is a present injury that can be remedied by a court ruling in Plaintiff's favor.

[2] At one point, Defendants assert that "the Guidance has never been utilized with any of Plaintiff's members' children." Resp. Br. 3. That is not known yet, because this case was dismissed on a motion to dismiss. It is also contrary to the well-pleaded allegations that Plaintiff's members are "prevented … from knowing if the school has already applied this policy to their children" due to the Policy. SA 17, ¶ 82.

Moreover, as Plaintiff explained, parents would not know to ask for a Gender Support Plan if they were excluded from the meeting where one was adopted, and by then, significant harm already would have been done. Pl's Br. 39–40. Defendants have no response to these points either. Plaintiff's claim is that its members are entitled to *prior* notice (and the opportunity to withhold their consent) *before* staff begin treating their child as the opposite sex; that is the information withheld from them to which they are entitled.

Finally, as Plaintiff explained, requiring parents to periodically ask for a Gender Support Plan to check whether one has been implemented for their child without prior notice to them is *itself* a present and ongoing injury that can be remedied by a court order requiring prior parental notice. Pl's Br. 40. Such repeated requests are time-consuming and would breed distrust with school officials. They are also impractical, as any child may begin experiencing feelings of gender dysphoria at any time, seemingly out of the blue. SA 14, ¶¶ 58–59. To ensure they are kept abreast of what is happening at school, parents would be required to make multiple requests over the course of a single semester. Defendants have no persuasive response to this point, except to assert that this is "not a concrete and particularized harm," Resp. Br. 15 n.11, but that defies common sense. Accepting this argument also does not, as Defendants assert, "require[ ] speculation that a hypothetical parent would have no indication or knowledge that their child had gender identity issues." *Id.* It simply requires accepting the well-pleaded allegations in the complaint that "Parents have no way to know, in advance, if or when their children will begin to wrestle with their

gender identity, experience discomfort with their biological sex, or experience gender dysphoria," and that "The first indications that a child may be dealing gender identity issues or gender dysphoria may arise at school, unbeknownst to parents." SA 14, ¶¶ 58–59.

Interspersed with their response, Defendants separately argue that Plaintiff "mischaracterizes the scope of any rights at issue"—in other words, that parents are *not* entitled to prior notice—but that goes to the merits, not to standing, which are not before this Court given that the case was dismissed on a Rule 12(b)(1) motion. Pl's. Br. 3. And while "standing 'often turns on the nature and source of the claim asserted,' … it 'in no way depends on the merits' of the claim." *Arizona State Legislature*, 576 U.S. at 800 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Plaintiffs claim the right to prior notice, and the Policy does not provide that. Plaintiff's members have standing to pursue that claim, whether or not it ultimately succeeds on the merits. *Id.*

IV. Plaintiff's Members Have Standing to Pursue the PPRA Claim.

Relatedly, as Plaintiff explained in its opening brief, its members also have standing because the Policy fails to provide notice and an opportunity to consent, to which parents are entitled under the PPRA, before their child is subjected to the evaluation contained in the Gender Support Plan form. Pl's Br. 30–31. The lack of

notice and prior consent is a present injury to Plaintiff's members, for the reasons explained above in Part III.[3]

Defendants have two responses, neither of which have merit. First, they argue that the *Akins* line of cases only applies when a party is unable to obtain information subject to *public* disclosure. Resp. Br. 35. But these cases are not so limited.

Indeed, this Court has applied them more broadly, recognizing that "[a]n informational injury can be concrete when the plaintiff is entitled to receive and review substantive information." *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 697 (7th Cir. 2018). In *Robertson,* the plaintiff had standing because she was denied the opportunity to review an adverse background report. According to the court, "[t]hat Robertson has not pleaded what she may have said if given the chance to respond, or that she may not have convinced Allied to honor its offer, is immaterial…Article III's strictures are met not only when a plaintiff complains of being deprived of some benefit, but also when a plaintiff complains that she was deprived of a chance to obtain a benefit." *Id.* (citations omitted). There is absolutely no requirement that the information in question be publicly available for Article III standing, as Defendants contend. Resp. Br. 35.

The PPRA unambiguously mandates that parents have absolute rights to notice and consent before their child is subjected to a "survey" (defined at 20 U.S.C.

[3] Plaintiff has not "abandoned" its claim under the PPRA. *See* Resp. Br. 35 n.15. It did not address the merits in its opening brief because the merits are not before this Court. Plaintiff's PPRA standing argument is in Part I.C. of its opening brief. Pl's Br. 28–31.

§ 1232h(c)(6) to also include an "evaluation"), an "analysis," or an "evaluation" that reveals "mental or psychological problems of the student," "sex behavior or attitudes," or "critical appraisals" of "close family." *See* 20 U.S.C. § 1232h(b), (c)(2)(C)(ii). Thus, the PPRA requires parental notice and consent before a child may be subjected to the District's sexual identity counseling or information gathering, including but not limited to the evaluative questionnaire conducted with the District's Gender Support Plan form and process. SA 33–36; Pl's Br. 30–31; 20 U.S.C. § 1232h(c)(2)(c)(ii). It further requires the District to ensure that parents may opt their children out of *all* the District's sexual identity evaluations and Gender Support Plan surveys. *See* 20 U.S.C. § 1232h(c)(2)(A)(ii), (c)(2)(B), (c)(2)(C)(ii). The Policy facially deprives Plaintiff's members of their statutory rights, which presently harms them by making it impossible for them to withhold consent from the application of the Gender Support Plan and process to their child.[4]

Second, Defendants argue that the PPRA's parental notification requirements do not apply to a local school district, but only if the *Secretary of Education* is administering a psychiatric or psychological examination. Resp. Br. 38. They are wrong. The PPRA is but one of many strings attached to federal money received by

[4] Parents may "presumptively" rely on § 1983 to enforce the informational and opt-out rights "unambiguously" conferred by the statute. *See Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. ___, ___, 2023 WL 3872515, at *3, *8 (June 8, 2023) (Jackson, J.); 20 U.S.C. § 1232h(c)(2). Only if a private right of action would thwart any enforcement mechanism that the rights-creating statute contains for protection of the rights that it has created may a defendant avoid potential liability under § 1983. *Id.* at ___; 2023 WL 3872515, at *3 (citations omitted).

Districts like Eau Claire. SA 23 ¶¶ 120–21. It imposes conditions on the District's federal funds from "applicable programs" administered by the Secretary of Education. *See e.g.,* 20 U.S.C. § 1232h(a), (b), (c)(1); 34 CFR § 98.1; *see also* 20 U.S.C. §§ 1221(c)(1); 1221e; 1232c; 1232e; 34 CFR § 81.2. "Applicable programs" include the General Education Provisions Act; the Elementary and Secondary Education Act of 1965; the Individuals with Disabilities Education Act; and the Elementary and Secondary School Emergency Relief Fund that was established in the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (March 27, 2020), and further funded under the Coronavirus Response and Relief Supplemental Appropriations Act, 2021, Pub. L. No. 116-260 (December 27, 2020) and the American Rescue Plan Act of 2021, Pub. L. No. 117-2 (March 11, 2021). 20 U.S.C. § 1221(c)(1). *See* 34 CFR § 98.1.

To support its argument that the PPRA does not apply, they cite *Herbert v. Reinstein*, 976 F. Supp. 331, 340 (E.D. Pa. 1997) and *Newkirk v. E. Lansing Pub. Sch.,* 1993 U.S. Dist. LEXIS 13194 (W.D. Mich. 1993). But *Reinstein* involved a law student's claim and is factually irrelevant. *See* 20 U.S.C. § 1232h(c)(6)(C) (definition of "local educational agency" does not include "postsecondary institution[s]"). *Newkirk* is legally inapposite—the PPRA was amended twice thereafter—and wrongly decided in any event. Plain text and statutory context make it clear that the PPRA protects *parental* rights and that it applies in this case. If the District uses any federal money from any applicable program administered by the Secretary of Education, then it must comply with the law. *See* 20 U.S.C. § 1232h(c)(1).

V. The Existence of a Policy Allowing Secrets at School From Parents Necessarily Undermines Parent-Child Relationships.

The Policy presently harms parent-child relationships by inviting children to withhold information from their parents, and to come to District staff first, rather than their parents, with gender-identity issues. Pl's Br. 32–33. As noted, the District's training that "parents are not entitled to know their kids' identities" has already led one teacher to communicate to students, "If your parents aren't accepting of your identity, I'm your mom now." SA 8, 10–11 ¶¶ 36, 48. Discovery could reveal more communication and instruction to students about gender transitioning that is openly hostile to parents, but such details are, again, intertwined with the merits. What matters at this stage of this litigation is that Plaintiff has plausibly alleged that the District's policy undermines parents and causes concrete and particularized harm.

Defendants' only response is to argue that state-fomented conflict between parents and their children does not sufficiently harm parent-child relationships. This defies history and common sense, not to mention the well-pleaded allegations in the complaint, which are to be taken as true at this stage of the litigation. SA 14, ¶ 60.

VI. Defendants Conflate "Substantial Risk" Standing With Pre-Enforcement Cases; the Complaint Adequately Alleges a Substantial and Imminent Risk.

As Plaintiff explained, the District's Policy not only presently injures Plaintiff's members, it also creates a substantial and imminent risk of harm to them and their children that can be remedied by a favorable court decision. Pl's Br. 33–40. The risk is "substantial" in that a secret transition at school can do "long-term harm" to the

child, and violations of constitutional rights are always substantial. SA 12–14 ¶¶ 52, 61, 63. And the risk is "imminent" given that children may begin struggling with gender incongruence at any time, unbeknownst to parents, SA 14 ¶¶ 58–59, and, due to the lack of notice, Plaintiff's members have no way of knowing when the District facilitates a secret transition of their child at school or *whether it already has*, SA 16–17, ¶¶ 75, 82.

Defendants concede, as they must, that a serious risk of future harm can support standing, *e.g.*, Resp. Br. 19,[5] but argue (at least according to the header in their brief), that the risk is not "sufficiently imminent and substantial." Resp. Br. 27–32. But Defendants do not even attempt to explain why "long-term harm" to minor children is not substantial, or why a Policy that facilitates secrets from parents does not create an imminent risk that the District is presently keeping secrets from them. Instead, Defendants immediately pivot, arguing that this does not fit as a pre-enforcement case, Resp. Br. 27 (a separate theory of standing Plaintiff raised, Pl's Br. 40–42). Defendants are wrong about that too, as explained below, but more fundamentally, the "substantial risk" avenue for standing is not coextensive with pre-enforcement standing. Indeed, this Court's decision in *Remijas* was not a pre-

[5] At points, Defendants argue, citing *Clapper*, that the risk of harm must be "certainly impending." While *Clapper* used that language, it left open that standing can also be based on "a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). And the Court, just a year later, clarified that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (emphasis added, quoting *Clapper*).

enforcement case. Nor was *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 153–54 (2010), the first of multiple cases *Clapper* cited as examples of "substantial risk" cases. *Clapper,* 568 U.S. at 414 n.5.

Plaintiff's complaint more than adequately alleges a substantial risk of harm to them and their children. Plaintiff should have the opportunity to present evidence to support that substantial risk of harm.

VII. Defendants Fail to Rebut the Analogy to Pre-Enforcement Cases.

As Plaintiff explained, this case is analogous to pre-enforcement cases, in that the Policy puts Plaintiff's members to an impossible choice between ceding their parental authority and risking serious harm to their children, or losing their right to a free, public education. Pl's Br. 40–42. Defendants direct most of their response to arguing that this line of cases is inapplicable because there is no threat of criminal or civil penalties here. Resp. Br. 29. Plaintiff has never argued otherwise, but this misses the point; this is an analogy. As Plaintiff noted, even the Supreme Court has analogized to this line of cases outside the straightforward enforcement context. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

Defendants counter that the dispute in *MedImmune* was "definite and concrete," whereas here, they suggest, it is not. Resp. Br. 31–32. But the dispute here is as "definite and concrete" as it was in *MedImmune.* The District's position, on the face its Policy, is that school staff and minor students can make the decision about a gender-identity transition at school without involving the parents; Plaintiff's position

is that parents have the ultimate authority to decide whether a transition is in their child's best interests. Either this is a decision reserved for parents, or it is not.

Defendants' other attacks on the analogy fail as well. The Policy does directly "prevent the parent[s] from taking a[ ] course of action," Resp. Br. 29—it prevents them from saying no to a transition if they believe that would be against their child's best interests, because the District will facilitate one, bypassing the parents, solely at a child's request. And the Policy *does* "punish" parents, like Plaintiff's members, who would not immediately "affirm" a desire for a transgender identity, by excluding them from the decision. Pl's Br. 40–41. Finally, Plaintiff's members do have "concrete fears that [the] policy … will be applied against them," Resp. Br. 28. As their complaint alleges, the Policy "prevent[s] PPOC's members from knowing if the school has already applied this policy to their children." SA 17, ¶ 82.

CONCLUSION

For any or all of these reasons, this Court should reverse the dismissal of Plaintiff's complaint on standing grounds.

Dated: June 21, 2023.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

/s/ Luke N. Berg
Luke N. Berg
Counsel of Record
Richard M. Esenberg
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202

Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Luke@will-law.org
Rick@will-law.org

AMERICA FIRST LEGAL FOUNDATION

Nicholas R. Barry
Reed D. Rubinstein
300 Independence Ave SE
Washington, DC 20003
Telephone: (202) 964-3721
Nicholas.Barry@AFLegal.org
Reed.Rubinstein@AFLegal.org

Attorneys for Parents Protecting Our Children, UA

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

This brief complies with the type-volume limitation of Cir. R. 32(c) because it contains 4,079 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Cir. R. 32(b) for a brief produced with a proportionally spaced font using the 2016 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: June 21, 2023.

/s/ Luke N. Berg
LUKE N. BERG