Testimony Before the House Judiciary Subcommittee on the Constitution and Limited Government

on

Free Speech: The Biden Administration's Chilling of Parents' Fundamental Rights

by

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Dear Chairman Johnson, Ranking Member Scanlon, and Members of the Committee:

The family is a pre-political institution. Protecting the lives and liberties of people—who come into being through families—is the purpose of our political system. Speech, in turn, is the primary way we participate in our political system. Our founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile."[1] Thus, when parents speak to their elected officials about matters affecting their children, they engage in perhaps the highest form of political expression. The present administration has acted to suppress this expression and, in doing so, struck at "[t]he fundamental theory of liberty upon which all governments in this Union repose."[2]

In the spring of 2020, nationwide school closures led to widespread remote learning. This, in turn, gave parents a new, direct perspective on school practices, curricula, and exercises. Many parents learned that schools were acting and teaching in ways that were counter to their child's best interest or undermined the values they sought to transmit. So, exercising their constitutional rights, they went to their local school board meetings to express their views. Some of the most vocal opposition centered on Covid-19 policy, curriculum infused with Critical Race Theory, and policies implementing radical gender ideology, especially as it related to social transition of children and access to sex-separated spaces like locker rooms and restrooms.

While some school boards were receptive to parents' concerns, others ignored them, refused them the opportunity to peacefully speak, or even lashed out against parents simply pleading for a return to normalcy for their child. The hostility toward caring parents began to grow, organize, and nationalize. The National School Boards Association coordinated with Biden Administration officials to send a letter to President Biden describing parental objections as "acts of malice" that "could be the equivalent to a form of domestic terrorism."[3] Days later, Attorney General Merrick Garland issued a memorandum casting parents' speech as "efforts to intimidate individuals based on their views" and mobilizing federal law enforcement officials to "discourage" and "identify" such activity and coordinate with local authorities in "addressing threats against school administrators" and "board

[1] *Whitney v. California*, 274 U.S. 357, 375 (1927).
[2] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).
[3] National School Boards Association, *Letter to President Joseph R. Biden*, 2 (Sept. 29, 2021), *archived version available at* http://bit.ly/3JVuQqY (accessed March 20, 2023).

members."[4] In addition, President Biden has used his executive authority to legally and financially support (or even require) the very policies and classroom instruction that parents objected to, especially through the proposed revision of Title IX and reinterpretation of Title VI of the Civil Rights Act of 1964. These actions have broad implications for parents' rights to speak and to raise their children consistent with their values and beliefs. This Subcommittee should resist the Administration's assault on parents' rights.

The Legal Rights of Parents

Parental Rights

The Constitution protects "the liberty of parents and guardians to direct the upbringing and education of children under their control."[5] This right extends to all matters implicating a parent or guardian's "care, custody, and control of their children."[6] It is "perhaps the oldest of the fundamental liberty interests recognized" by the Supreme Court.[7] Indeed, parental rights precede our political institutions themselves: "[t]he fundamental theory of liberty upon which all governments in this Union repose" presumes that parents are responsible for the education and upbringing of their children and "excludes any general power of the State to standardize its children."[8] "The child is not the mere creature of the State;"[9] rather, the child is part of the natural order that precedes the state and whose content gives shape to all other rights.[10]

While the Supreme Court has consistently described parental rights as "fundamental,"[11] its reasoning in its most recent parental rights decision has left the applicable legal standard open to some question and, as a result, presents an opportunity for congressional action to guarantee parental rights.

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[4] Office of the Attorney General, *Memorandum re: Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Board Administrators, Board Members, Teachers, and Staff* (Oct. 4, 2021), http://bit.ly/3yQvlvN (accessed March 20, 2023).
[5] *Pierce*, 268 U.S. at 534–35.
[6] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).
[7] *Id.*
[8] *Pierce*, 268 U.S. at 535.
[9] *Id.*
[10] *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("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."). *See also Budd v. New York*, 143 U.S. 517, 550 (1892) (Brewer, J., dissenting) ("Men are endowed by their Creator with certain unalienable rights . . . and to "secure," *not grant or create*, these rights governments are instituted") (emphasis added).
[11] *See Troxel*, 530 U.S. at 65 (plurality opinion); *Yoder*, 406 U.S. at 232.

In general, state action that burdens a fundamental right is unconstitutional unless it passes the familiar "strict scrutiny standard"—that is, the action is unconstitutional unless it is "narrowly tailored to serve a compelling state interest."[12] Despite the repeated affirmation that parental rights are "fundamental," the Court's most recent decision in *Troxel v. Granville* in 2000 did not apply this test.[13] As Justice Thomas remarked in his concurring opinion in that case, "curiously none of [the opinions] articulates the appropriate standard of review."[14] This has resulted in both federal and state courts applying different tests to ascertain whether a particular government action infringes the parents' fundamental right to direct the care and upbringing of their child. Thus, the level of protection given parental rights can vary dramatically from state to state and circuit to circuit. The importance of parental rights, combined with the judicial uncertainty surrounding their protection, calls for special attention wherever Congress acts in this area.

Freedom of Speech

Parents, like all citizens, enjoy freedom of speech. This liberty is "valued . . . both as an end" in itself and "as a means" for carrying out our free system of government.[15] When directed toward elected representatives on matters of public concern, speech serves both functions, "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government."[16] "Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[17] Speech, especially speech on matters of public concern, does not lose its protection because it is expressed in offensive terms or tones. "Such speech cannot be restricted simply because it is upsetting or arouses contempt."[18] Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[19]

The government must remain "viewpoint neutral" toward speech, no matter the forum in

[12] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (cleaned up).
[13] 530 U.S. at 72–74.
[14] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).
[15] *Whitney*, 274 U.S. at 375.
[16] *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).
[17] *Connick v. Myers*, 461 U.S. 138, 145 (1983) (cleaned up).
[18] *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).
[19] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

which the speech occurs.[20] Just as much as the government cannot directly prohibit protected speech, it also cannot take any action that has a concrete "deterrent, or 'chilling' effect" on speech.[21] The Supreme Court has rejected, for example, a wide array of governmental attempts to root out subversive ideologies by direct or indirect retaliation for the exercise of First Amendment rights of speech or association.[22] The Constitution also protects against efforts to suppress or intimidate individuals or groups from engaging in constitutionally protected speech.[23]

The Biden Administration's Hostility Toward Parents' Rights

Over the past several years, the Biden Administration has repeatedly and consistently abused its power to both chill and directly curtail parents' rights.

The Garland Memorandum: Painting Parents as Threats

During the spring and summer of 2021, many parents exercised their constitutional rights to express their displeasure about Covid-19 policies, curricular materials and exercises infused with racially discriminatory tenets of Critical Race Theory, and policies advancing and implementing radical views of sex and gender in local schools. In Loudoun County, Virginia, the school superintendent attempted to cover up a young woman's sexual assault by a male student in the women's restroom as the school board moved to advance a policy that would permit students to access whichever restroom accords with their subjective (or even fluid) "gender identity."[24] This deception, compounded with the board's decision to shut down a comment period and to impose new, illegal restrictions on public participation, rightfully frustrated parents who felt their legitimate questions and concerns were being ignored by their elected representatives.[25] No one was more distraught by the Board's indifference than the parents of the sexual assault victim who were at the meeting trying to get answers. Yet when one attendee began shouting at the victim's father—Scott Smith—and even threatened to ruin his

[20] *Cornelius v. NAACP Legal Defense & Ed. Fund., Inc.*, 473 U.S. 788, 806 (1985) (observing that, even in a *nonpublic* forum, the government must remain "viewpoint neutral").
[21] *Laird v. Tatum*, 408 U.S. 1, 11 (1972).
[22] *See, e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, (1972); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964).
[23] *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021).
[24] *See* Max Eden, *Meet the Media's Top 'Domestic Terrorist,'* REALCLEARPOLICY.COM (Oct. 18, 2021), http://bit.ly/42qoGWW (accessed Mar. 21, 2023).
[25] *See* Nathaniel Cline, *Loudoun judge finds School Board violated open meetings laws; dismisses claims against Superintendent*, LOUDOUNTIMES.COM (May 2, 2022), http://bit.ly/40jPBlm (accessed March 21, 2023).

business, it was Scott who ended up being dogpiled and arrested by local police.[26] Was Scott passionate about the wrong done to his daughter under the Board's watch? Of course, as any parent would be. But Scott never threatened violence against the Board or anyone else at the meeting, and the obstruction of justice charge was rightly thrown out by a judge.[27]

Yet this caring father become the "villain" of the national campaign against parents. Using this incident to paint objecting parents with a broad brush, the National School Boards Association coordinated with Biden Administration officials to draft a letter to President Biden petitioning for a federal response.[28] The letter deceitfully equated a handful instances unlawful behavior at public meetings—all of which were appropriately handled by local law enforcement—with protected passionate expression by concerned parents. It encouraged the government to regard the pleas of outspoken parents as "acts of malice" that are "the equivalent to a form of domestic terrorism" and to take a "proactive approach" to these "extremist hate organizations"—the NSBA's label that it callously applied to organized parents merely advocating for the children.[29]

Attorney General Merrick Garland acknowledged that Department of Justice officials were also involved in these discussions.[30] A few days later, A.G. Garland issued a memorandum citing "efforts to intimidate individuals based on their views" and mobilizing federal law enforcement officials to "discourage" and "identify" such activity by coordinating with local authorities in "addressing threats against school administrators" and "board members."[31] Substantial outcry followed, as the public widely recognized that this was a mobilization of federal power against primarily peaceful, constitutionally-protected expression because of the political viewpoints that were being expressed.[32] Less than a month after sending the letter, the NSBA published a memorandum saying, "we regret and apologize for the letter" and acknowledging that "there was no justification for

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[26] *See supra* note 24.
[27] Evan Goodenow, *Hamilton man acquitted over failing to leave LCPS meeting*, LOUDOUNTIMES.COM (Jan. 6, 2023), http://bit.ly/42qguG6 (accessed Mar. 21, 2023).
[28] *See* Brian Doherty, *Biden Administration, School Board Association Colluded to Direct FBI Scrutiny at Parents Who Were Critical of School Boards*, REASON.COM (Nov. 12, 2021), http://bit.ly/3Z3Yka5 (accessed March 18, 2023).
[29] *See supra* note 3 at 2–3.
[30] Office of the Attorney General of Indiana, Letter to President Joseph R. Biden, 2 (Oct. 26, 2021) http://bit.ly/3Z0dnSj (accessed March 20, 2023).
[31] *See supra* note 4 at 1.
[32] The NSBA itself admitted, "there has been extensive media and other attention recently around our letter to President Biden regarding threats and acts of violence against school board members." Kyle Morris & David Spunt, *National School Boards Association sorry for 'language' in letter that likened parents to domestic terrorists* (Oct. 23, 2021), https://fxn.ws/3JNywLg (accessed March 18, 2023).

some of the language we included in the letter."[33] A.G. Garland, however, did not retract the memorandum.[34]

Rewriting Title IX: Erasing Sex and Elevating Radical Gender Ideology

The Administration did not stop with intimidating parents for their speech. Instead, it moved to directly codify in law many of the very policies that motivated parents to speak out in the first place. One of the most destructive moves has been the proposed redefinition of the word "sex" in Title IX of the Civil Rights Act of 1964 to include "sexual orientation" and "gender identity."[35] This sweeping reinterpretation burdens parental rights, free speech, and bodily privacy and inflicts real harm on students.

ADF has canvassed these harms and submitted comments to the Department of Education describing them in full.[36] But one particularly egregious harm that warrants special attention is the compelled facilitation of "social transition" of students. The Biden Administration interprets the rule against discrimination "on the basis of sex" to include "gender identity."[37] In turn, the Administration claims that, to avoid discrimination on the basis of "gender identity," schools *need* to facilitate the "social transition" of students at school by addressing the students with the names and pronouns the students adopt to communicate their transition and by making facilities and activities available on the basis of the student's subjective identity rather than the student's objective sex.[38] Shockingly, the Administration's proposed rule would even require school staff to keep all of this secret from parents.[39]

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[33] National School Boards Association, *Message to NSBA Members* (Oct. 22, 2021), http://bit.ly/3TqyAnb (accessed March 21, 2023).
[34] *See supra* note 28.
[35] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (Jul. 12, 2022).
[36] ADF's comment on the proposed rule's implications for parental rights is available here: http://bit.ly/3yR5aFr. ADF's comment on the proposed rule's implications for freedom of speech is available here: http://bit.ly/3loPUwt.
[37] *Supra* note 35.
[38] For example, the Administration cites a policy from Washoe County School District (Nevada) as examples of policies that are consistent with the proposed rule. *See supra* note 35, 87 Fed. Reg. at 41561. That policy (available here: http://bit.ly/3n6YksT) *prohibits* staff from "question[ing]" whether a "student's asserted gender identity is genuinely held" and requires (1) use of preferred names and pronouns, (2) access to bathrooms consistent with identity sex, (3) access to sports (in most cases) consistent with identity rather than sex and (4) requires staff to keep all of this confidential from parents.
[39] *See id.*

As medical practitioners recognize, social transition is "not a neutral act," it is "an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning."[40] Under the Biden Administration's proposed reinterpretation of Title IX, schools are undertaking dramatic psychiatric interventions in a student's life—changing everything about the way the student is treated at school to validate and reinforce a new gender identity inconsistent with the student's sex—without informing the parents, let alone obtaining their consent. This, all by itself, is an unprecedented assault on parental rights.

But this is only the beginning. These policies include presentation of radical, unscientific, and harmful gender ideology to even the youngest children, telling first graders things like, "You might feel like you're a boy even if you have body parts that some people might tell you are 'girl' parts."[41] Under the Biden Administration's view of Title IX, school children would be subjected to deprivations of physical privacy, disciplinary threats for using the wrong name or pronoun when addressing a classmate, risk of physical harm in sports competitions, lost opportunities to compete for athletic awards and scholarships, and more.[42]

Just as "social transition" is not "neutral" with respect to the psychological functioning of the student, it is also not neutral with respect to the free speech rights of everyone required to perform the "social transition." As the Sixth Circuit Court of Appeals recently recognized, "[p]ronouns can and do convey a powerful message implicating a sensitive topic of public concern."[43] The reason schools seek to *require* use of names and pronouns as a part of a social transition is the same reason that many seek to *avoid* using those terms: because of "their power to validate—or invalidate—someone's perceived sex or gender identity."[44] The Biden Administration has sought to purge all views

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[40] Hilary Cass, *Independent review of gender identity services for children and young people: Interim report*, 62–63 (Feb. 2022) *available at* http://bit.ly/3LB9m3C (accessed March 20, 2023).

[41] This sentence comes from sample lesson plans offered as examples to comply with New Jersey Department of Education standards and generated substantial public protest. The Department has removed the standards from its website, but the archived document is available here: http://bit.ly/3ZZkiN2. The sample lesson plan is available here: http://bit.ly/3Tr0teZ.

[42] *See B.P.J. v. West Virginia State Bd. of Ed.*, No. 2:21-cv-00316, 2023 WL 111875, at *8 (S.D.W. Va. Jan. 5, 2023) (granting summary judgment for state law separating sports programs on the basis of sex); *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 804 (11th Cir. 2022) (en banc) (upholding school policy separating bathrooms on the basis of sex and recognizing that "protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective"). *See also supra* note 24.

[43] *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021).

[44] *Id.* at 509.

about sex and "gender identity" other than its own viewpoint—the idea that what makes a person male or female is exclusively that person's declaration of identity rather than the person's sex—from public schools. These questions about what it means to be male or female (or whether those categories have any meaning at all) are the questions "that touch the heart of the existing order" over which the Constitution protects the "freedom to differ," including in America's public schools.[45] The Biden Administration is claiming to "wield alarming power to compel ideological conformity" and harming teachers, students, and parents in the process.[46]

Neutering Title VI: Promoting Racism in the Guise of "Diversity, Equity, and Inclusion"

On his first day in office, President Biden issued an executive order heralding an "ambitious, whole-of-government equity agenda."[47] Verbally, the Administration's ubiquitous efforts to replace "equality" with "equity" in the American lexicon represents a small change—just the deletion of two letters. In fact, the Administration is trying to accomplish a monumental shift in law, education, economics, and culture by changing the fundamental terms of the American social contract. Where once we saw treatment of each person as an individual as an essential component of liberty consistent with law and order, the Administration seeks to empower the state to focus on group membership and comparative power dynamics as the basis for state action.

Policies implementing the shift from "equality" to "equity" commonly style themselves as promoting "diversity, equity, and inclusion."[48] In practice, they introduce racial discrimination, neo-segregation, and racially hostile environments.[49] Students are taught that membership in some social or racial groups renders them "oppressed," while membership in other groups makes them "oppressive."[50] Schools do not stop at teaching these ideas in the abstract. Rather, they force specific students to apply these labels to themselves in front of their peers,[51] create patronizingly-titled "safe spaces" for "students of color,"[52] or tell children that their race determines what kind of success they

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[45] *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).
[46] *Meriwether*, 992 F.3d at 506.
[47] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).
[48] *See* U.S. Department of Education Office for Civil Rights, *Fact Sheet: Diversity & Inclusion Activities Under Title VI* (Jan. 2023) http://bit.ly/3LBNCEH (accessed March 20, 2023).
[49] *See*, e.g., Compl., *Clark v. State Pub. Charter Sch. Auth., et al.*, No. 2:20-CV-02324-RFB-VCF, ECF No. 1 (Dec. 22, 2020).
[50] *Id.* at ¶¶ 32–33.
[51] *Id.* at ¶ 35.
[52] *See* Compl. ¶ 164, *R.I. et al. v. Albemarle Cnty. Sch. Bd.*, No. CL2100-1737-00 (Va. Cir. Ct. Dec. 22, 2021) *available at* http://bit.ly/3JVo7xb (accessed March 20, 2023).

can aspire to in life.[53]

Despite these blatant threats to students' rights to free speech and an educational environment free of racism, the Biden Administration has issued guidance directly supporting these types of programs and opining that they do not violate Title VI of the Civil Rights Act of 1964.[54] As part of the justification for this interpretation, the Administration cited President Biden's executive orders announcing the "whole-of-government" pursuit of "equity."[55]

ADF Cases Dealing with the Biden Administration's Legal Fallout

Alliance Defending Freedom is actively countering the Biden Administration's infringement of parents' freedom throughout the country in state and federal court.

The Garland Memorandum and Speech to School Boards

A few weeks before Scott Smith was unjustly arrested in Loudoun County for passionately pleading for answers to his daughter's tragic sexual assault, local officials engaged in another act that generated nationwide coverage: the retaliatory suspension of elementary school teacher Tanner Cross after he spoke at a school board meeting. Cross expressed his opposition to a proposed policy—the same proposed policy for which the superintendent tried to offer political cover by concealing the facts about the sexual assault in the girl's restroom—because his own faith and his love for his students would keep him from following that proposed policy.[56] Less than 48 hours later, Cross was suspended.[57] ADF filed a lawsuit on Cross's behalf, securing an order of reinstatement from the trial court that was upheld by the Virginia Supreme Court and an eventual settlement of his retaliation claim.[58] The school board eventually adopted the policy to which Cross objected, and litigation over the validity of that policy is ongoing.

Once the NSBA sent their letter (referencing the Loudoun County events) and A.G. Garland responded with his memorandum, ADF saw firsthand how these actions chilled parents from

[53] *See supra* note 52 at ¶ 198.
[54] *See supra* note 48.
[55] *See supra* note 48 at note 6 (quoting E.O. 13985, *supra* note 47).
[56] *See* Compl. at ¶ 41, *Cross v. Loudoun County School Board, et al.*, No. CL21-3254 (Va. Cir. Ct. June 1, 2021), http://bit.ly/3FH3W3l (accessed March 20, 2023).
[57] *Id.* at ¶ 7.
[58] The letter opinion of the Loudoun County Circuit Court is available here: http://bit.ly/3TscKzP. The letter opinion from the Supreme Court of Virginia is available here: http://bit.ly/3JTicbG.

exercising their constitutional rights. Our organization received many calls relaying concerns about the ability to continue to speak at school board meetings without incurring some adverse action by federal law enforcement officials. ADF wrote a letter to A.G. Garland notifying him of the fear his action created in parents and explaining why his directive should be rescinded.[59]

Parental Rights

ADF has filed multiple cases seeking relief for the harm caused by actions or policies supported by the Biden Administration. Two cases address the egregious practice of implementing the "social transition" of a student at school without the parents' knowledge or consent. In *Ricard v. USD 475 Geary County School Board*, ADF represented a teacher who objected on religious grounds to complying with a policy that forced her to deceive parents by addressing students by preferred first names and pronouns at school but with their legal names in her communications to parents.[60] In explaining why the school had no legitimate interest in burdening the teacher's free exercise rights, the court observed that the practice likely ran counter to parents' rights, which the government is also obliged to respect. The court said, "[i]t is difficult to envision . . . how a school could establish[] a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns."[61] And, in *B.T.F. v. Kettle Moraine School District*, ADF represented parents challenging a school's policy of facilitating a student's "social transition" at school *even over the direct objection of the parents*.[62] In *Kettle Moraine*, a 12-year-old girl began suffering from significant anxiety and depression along with questions about her gender.[63] The school district immediately treated this young girl as a boy and encouraged her to "transition" to living as a male.[64] The parents took care to seek mental health support for their daughter, who eventually embraced her girlhood and said, "affirmative care really messed me up."[65] But the school admitted that this "affirmative care" was their policy, and it would continue to immediately use new names and pronouns associated with a "social

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[59] Alliance Defending Freedom, *Letter to Attorney General Merrick Garland* (Oct. 6, 2021), http://bit.ly/3ZhDR21 (accessed March 20, 2023).
[60] *See Ricard v. USD 475 Geary County School Board*, No. 5:22-cv-04015cHLT-GEB, 2022 WL 1471372, at *2 (D. Kan. May 9, 2022).
[61] *Ricard*, 2022 WL 1471372, at *8.
[62] *See* Compl. at ¶¶ 15, 35–36, *B.T.F. v. Kettle Moraine Sch. Dist.*, No. 21-CV-1650 (Wis. Cir. Ct. Nov. 17, 2021), http://bit.ly/3lnYnQD (accessed Mar. 20, 2023).
[63] *See id.* at ¶ 28.
[64] *See id.* at ¶ 30.
[65] *See id.* at ¶¶ 30–40.

transition" at school if the student requested it, even over the direct objection of the parents.[66] That case is awaiting a decision on a pending motion for summary judgment.[67]

The Biden Administration has sought to indirectly induce private schools to adopt similar policies on "gender identity" to the ones that it is pushing in public schools. For example, ADF represented a private Christian school in *Grant Park Christian Academy v. Fried*, challenging officials' decision to exclude the school from participation in the National School Lunch Program because of the school's inability (on account of its religious beliefs) to comply with the Biden Administration's reinterpretation of Title IX.[68] That case concluded with the United States Department of Agriculture acknowledging that Title IX's religious exemption permits "an institution to be exempt on religious grounds if there is a conflict between Title IX and a school's governing religious tenets."[69]

ADF has also worked to counter discriminatory practices and the racially hostile environment created by the sorts of policies encouraged by the Biden Administration's interpretation of Title VI. For example, in *Ibanez v. Albemarle County School Board*, school officials began implementing a pilot program implementing so-called "anti-racist" curricular materials and, in the process, planned to segregate participating students on the basis of race.[70] The school presented as true a wide range of discriminatory stereotypes, including a video lesson that taught minority status is such an impediment to success in America that a young Latina child could not attain enough success to live in a large house.[71] This case is on appeal to the Virginia Court of Appeals.[72]

Free Speech

The Biden Administration's actions, especially its proposed changes to Title IX's implementing regulations, have dramatic free speech implications. In one ADF case, a 14-year-old female student was suspended from her school and her father was suspended from his coaching

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[66] *See supra* note 62 at ¶ 35.
[67] Plaintiffs' brief in support of their motion for summary judgment is available here: http://bit.ly/42u5GGU (accessed Mar. 20, 2023).
[68] *See* Compl. at ¶¶ 5–7, 151–164, *Grant Park Christian Academy v. Fried, et al.*, No. 8:22-cv-01696-MSS-JSS (M.D. Fla. Jul. 27, 2022), http://bit.ly/3JTuvF7 (accessed Mar. 20, 2023).
[69] United States Department of Agriculture Office of the Assistant Secretary for Civil Rights, *Religious Exemptions Under Title IX o the Education Amendments of 1972* (Aug. 12, 2022), http://bit.ly/3Z3Yv5B (accessed Mar. 20, 2023).
[70] *See supra* note 52 at ¶¶ 30, 86, 164.
[71] *See supra* note 52 at ¶ 198.
[72] Merits and *amicus* briefing available here: http://bit.ly/40lUNoJ.

position at the same school because they expressed opposition to the school's policy allowing male students to use the women's locker room.[73]

Litigation over names and pronouns abounds. In addition to *Cross* and *Ricard*, ADF litigated *Meriwether v. Hartop*, in which the Sixth Circuit Court of Appeals issued a resounding opinion condemning the attempt "to compel ideological conformity" by requiring use of titles and pronouns inconsistent with a student's sex in the higher education setting.[74] However, the rules delineating the speech rights of students and teachers, in particular the right to be free from compelled speech, are not as clear or consistent in the K-12 context as they are in the university context. ADF is currently representing another Virginia teacher who was terminated for his religious objection to using pronouns inconsistent with his students' sex.[75] That case has been argued before the Virginia Supreme Court and awaits a decision.[76] In federal court, ADF is representing an Ohio teacher who was forced to resign within two hours of informing school officials that her faith rendered her unable to facilitate her students' "social transition."[77] In both cases, the school defendants argue that Title IX requires them to implement the policies at issue.[78]

Conclusion

The Biden Administration has repeatedly and aggressively encroached on the rights of parents, both when it comes to directing the education and upbringing of their children and to expressing their views on matters of public concern. Our Constitution's protections for speech and parental rights are robust in general, but some unanswered questions—especially the standard of review for parental rights after *Troxel* and about the right to be free from compelled speech in the school context—provide an important opportunity for Congress to counter the Administration's overreach.

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[73] *See* Compl. at ¶¶ 5–6, *Allen v. Millington, et al.*, No. 2:22-cv-197 (D. Vt. Oct. 27, 2022), http://bit.ly/3nb6RuD (accessed Mar. 20, 2023).
[74] *Meriwether*, 992 F.3d at 506.
[75] *See* Compl. at ¶¶ 121–124, 135–138, *Vlaming v. West Point Sch. Bd.*, No. CL19-454 (Va. Cir. Ct. Sept. 30, 2019), http://bit.ly/3LDtjH7 (accessed Mar. 20, 2023).
[76] Merits and *amicus* briefing is available here: http://bit.ly/3JRaWx9.
[77] *See* Compl. at ¶¶ 72–88, *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Ed.*, No. 5:22-cv-2237 (N.D. Ohio Dec. 12, 2022), http://bit.ly/3JTpa0i (accessed Mar. 20, 2023).
[78] *See* Reply Br. of Peter Vlaming at 18, *supra* note 76; Pl.'s Reply in Supp. of Mot. for Prelim. Inj. at 5, 13, *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Ed.*, No. 5:22-cv-2237 (N.D. Ohio Feb. 1, 2023), http://bit.ly/3ZZFQcc (accessed Mar. 20, 2023).