MATTHEW J. PLATKIN Attorney General of New Jersey, and SUNDEEP IYER, Director of the New Jersey Division on Civil Rights, Complainants, v. MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, and MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT, Respondents.	STATE OF NEW JERSEY DIVISION OF LAW AND PUBLIC SAFETY DIVISION ON CIVIL RIGHTS DOCKET NO.: P2023-900005 ADMINISTRATIVE ACTION

AMICUS BRIEF ON BEHALF OF SENATORS MICHAEL L. TESTA and DOUGLAS J. STEINHARDT

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PRELIMINARY STATEMENT

Our children are life's most precious gifts, and we, as parents, are entrusted to nurture them, to direct their upbringing, and to prepare them for the perils of adulthood. This sacred duty arises from the natural order of things and is enshrined in the Constitution of the United States. Child rearing is not some privilege granted to us by the State, which may be denigrated by the whims of overreaching politicians. No, it is a fundamental human right, which shall not be abridged by the State.[1]

In this matter, the State seeks to deprive parents of their constitutional autonomy under the guise of protecting transgendered children from hypothetical discrimination that they might suffer in their own homes. See Verified Complaint. The Middletown Township Board of Education and the Middletown Township Public School District ("Respondents") face charges of violating the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* ("LAD"), for enacting a policy to notify parents when their children request a public social transition accommodation.[2] The State contends that this policy

[1] See U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

[2] The term "public social transition accommodation" includes a public name/identity/pronoun change, bathroom/locker room accommodation, or

constitutes unlawful "gender identity or expression" discrimination because it supposedly places children at serious risk of physical and emotional harm at the hands of their own parents. This allegation is a travesty, and it fails legally for many reasons.

First, the State may not interfere with parents' fundamental right to control the inculcation of values in their children, especially those which strike at a core parental interest in forming the identity of their children. Allowing a school to conceal information about a child's gender dysphoria from his or her own parents would unlawfully place the State squarely in control of forming a child's gender identity.

Second, the State may not breach the sanctity of familial privacy. The Constitution of the United States protects the solidarity of the family unit from governmental intrusion. Intentionally concealing information about a child's gender identity from his or her parents constitutes unlawful interference with the family unit, because it encourages children to trust the State above their own parents, and to believe that their parents could be wrong about core family values.

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club/sports accommodation, among other things, on the basis of a child's gender identity. See Verified Complaint ¶ 26.

Third, the State improperly discredits the most likely result of notifying a child's parents about his or her gender dysphoria: *overwhelming love and support*. Almost all parents love their children beyond comprehension for who they are, and parents are certainly not the monsters that the State makes them out to be. It is an absolute outrage for the State to accuse all parents of contributing to the psychopathology – *and even suicidality* – of their transgendered children.

Fourth, the State makes a fatally flawed assumption about the genesis of gender dysphoria. The State assumes that transgenderism is always the result of some natural biological process, totally unrelated to any underlying psychopathology. However, scientific research reveals that in at least some children, gender dysphoria is likely the result of a child's response to an underlying psychiatric or social condition.[3] If this is the case, then parents must be given the opportunity to redress the problems that are causing discord in their family.

Lastly, if transgendered children are truly placed at such a high risk of discrimination, maltreatment, and even death, at the hands of their own parents,

[3] See, Lisa Littman, Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria, Department of Behavioral Health and Social Science, Brown University School of Public Health (2018) (at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0202330).

then surely all transgendered children must immediately be removed from their homes under the State's *parens patriae* power and placed into foster care. This is patently absurd, yet this is exactly what the State argues for – a world where the State raises all children because their parents cannot be trusted.

For these reasons, and for those that follow, the State's Complaint against Respondents alleging violations of the LAD must be dismissed.

ARGUMENT

I. REVISED POLICY 5756 DOES NOT VIOLATE THE NEW JERSEY LAW AGAINST DISCRIMINATION, N.J.S.A., 10:5-1, ET SEQ., BECAUSE THE CONSTITUTION OF THE UNITED STATES PROTECTS PARENTS' RIGHT TO DIRECT THEIR CHILDREN'S UPBRINGING.

The Verified Complaint is an outrageous and unconstitutional attack on the modern family. The State necessarily alleges that all New Jersey parents are evil, and that the Respondents are somehow complicit in the physical and emotional abuse that parents will supposedly unleash upon their transgendered children.

These heinous allegations are a slap in the face to the wonderful parents across this State who sacrifice everything to feed their children, to help their children with schoolwork, to enroll their children in extracurricular activities, to buy their children birthday and holiday gifts, to attend their children's milestone moments, and to provide their children with overwhelming love and support in every way possible. Not only are the State's allegations the gravest insult to New Jersey parents, but also, they fly in the face of the rights enshrined in the Constitution of the United States. The supreme law of the land dictates that parents are presumed to be fully competent to care for their children, and that there is normally "no reason for the State to inject itself into the private realm

of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel v. Granville, 530 U.S. 57, 68 (2000).

Indeed, pursuant to the Privileges or Immunities Clause of the Fourteenth Amendment, the State may not interfere with parents' fundamental right to control the inculcation of values in their children, especially those which strike at a core parental interest in forming the identity of their children. "[P]arents, not schools, have the primary responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship in their children." Tatel v. Mt. Lebanon School District, 637 F.Supp.3d 295, 323 (W.D. Pa. 2022) (citing C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005)). The right to maintain the sanctity of familial privacy and solidarity is also protected by the Fourteenth Amendment, and it prevents the government from subverting parental authority – *as the State attempts to do here*. Id. at 328-29.

In Tatel, the court considered the same issues that are squarely before this tribunal; namely, whether a school has the right to keep discussions with children about transgender topics secret from their parents.[4] In that matter,

[4] New Jersey courts frequently rely upon federal courts and their construction of federal laws for guidance in interpreting the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* Victor v. State of New Jersey, 203 N.J.

parents filed suit against the Mt. Lebanon School District under 42 U.S.C. § 1983 alleging violations of their civil rights, after a first-grade teacher acting with the permission of the school pursued her own agenda outside the curriculum, "which included showing videos or reading books about transgender topics and telling the first-grade students in her class (ages six and seven years old) to keep her discussions with them about transgender topics secret from their parents." Id. at 302. The court largely denied the defendants' motion to dismiss the parents' claims, and allowed the parents to proceed on their constitutional claims seeking damages against the school district and the teacher. Id. at 335.

The Tatel court set forth its reasoning in exhaustive detail, and rebuked the defendants, reminding them that "[t]he parental right to custody, control and nurture of their children is deeply rooted and implicit in the United States' concept of ordered liberty[,]" and that "[t]he Supreme Court repeatedly emphasized the fundamental nature of that parental right." Id. at 313 (citing Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158

383, 398 (2010). Additionally, Tatel appears to be the sole published opinion from the Third District to directly consider the issues presented in this matter.

(1944); Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

Moreover, the court explained that the United States Court of Appeals for the Third Circuit specifically recognizes the primacy of parental rights, as follows:

> It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the Court's admonitions that "[t]he child is not the mere creature of the State," Pierce, 268 U.S. at 535, and that it is the parents' responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship." Yoder, 406 U.S. at 233.
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> [Id. at 316 (quoting Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000)).]

In Gruenke, a high school swim coach intruded into the suspected pregnancy of a student swimmer without informing the parents. There, the court cautioned: "Public schools must not forget that '*in loco parentis*' does not mean 'displace parents.'" 225 F.3d at 307.

Following an expansive discussion of the law, the Tatel court further found that the Third Circuit Court of Appeals recognizes "that parental rights are entitled to protection outside the school setting from misguided attempts to

impose moral views by government officials." 637 F.Supp.3d at 316 (citing Miller v. Mitchell, 598 F.3d 139, 150 (3d Cir. 2010)). In C.N. v. Ridgewood Board of Education, 430 F.3d 159 (3d Cir. 2005), the Third Circuit Court of Appeals reaffirmed that "parents, not schools, have the primary responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship." Id. at 185 (citing Gruenke, 225 F.3d at 307). The court recognized that "introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority." Id.

With this authority as a backbone, the Tatel court held as follows:

> In short, the Parents seek to teach their children that sex and gender are synonymous and immutable and that humans are created beings who must accept their place in a larger reality. The transgender movement asserts that human beings are autonomous, self-defining entities who can impose their internal beliefs about themselves on the exterior world. The contradictions between these worldviews are likely beyond the grasp of most first-graders. **The Parents allege that Williams' instruction about gender dysphoria and transgender transitioning caused confusion among students and resulted in one child asking her mom "how do you know that I am a girl?"** Complaint ¶ 92. **Introducing and teaching a child about complex and sensitive gender identity topics before the parent would have done so can undermine parental authority.** Ridgewood, 430 F.3d at 185. **A teacher instructing first graders that the child's parents'**

> **beliefs about gender identity may be wrong and the teacher's beliefs are correct directly repudiates parental authority.** The instruction need not be "pro-transgender"; parental rights could also be implicated if a teacher instructed that an anti-transgender position is correct.
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> [637 F.Supp.3d at 321 (emphasis added).]

Separately from its discussion about primary parental rights, the court held that having secret discussions with children about transgender issues plausibly violates the Fourteenth Amendment right to familial privacy. Id. at 328-29. In Gruenke (involving a school's swim coach who intruded into management of a teen pregnancy), the majority observed that the Supreme Court has recognized a right to familial privacy, explaining as follows:

> As the Court said in Roberts v. United States Jaycees, 468 U.S. 609 (1984), "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." Id. at 618. **Familial relationships are the quintessential "personal bonds" that "act as critical buffers between the individual and the power of the State."** Id. at 619-20.
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> [225 F.3d at 305 (emphasis added).]

The familial privacy right is construed "to encompass only those instances where state official's actions were: (1) directly aimed at the parent-child relationship"; (2) implicated the "right of the family to remain together"; or (3) "eroded the family's solidarity internally and impaired the family's ability to function." Ridgewood, 430 F.3d at 184 (citations omitted).

In light of this line of cases, the Tatel court held that the complaint "plausibly alleges an agenda to encourage young children to believe their parents could be wrong about their gender and an intrusion by Williams, with the permission of the District, into the values being conveyed within the family (particularly with respect to the "grooming" allegations and the instruction that children not tell their parents about the gender identity discussions)." 637 F.Supp.3d at 329-30. The court refused to dismiss the plaintiffs' Fourteenth Amendment familial privacy claims. Id.

Pursuant to Third Circuit jurisprudence, withholding information about a child's gender dysphoria from his or her parents very clearly violates parents' Fourteenth Amendment rights to direct their children's upbringing and to familial privacy, and will at a minimum expose our public schools to civil liability under 42 U.S.C. § 1983 – similar to the claims that the Tatel court refused to dismiss.

The State's Complaint against Respondents alleging violations of the LAD is not only an unconstitutional attack on the modern family, but also, it represents a reckless policy decision made by pandering politicians that will cost honest taxpayers millions of dollars in legal fees and payouts. Parents who are already suffering financially as a result of record high inflation will be further punished by the fanciful pet projects of the politicians in charge. *Enough is enough*.

CONCLUSION

For the foregoing reasons, the State's Complaint against The Middletown Township Board of Education and the Middletown Township Public School District must be dismissed with prejudice.

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By: /s/ *Michael B. Lavery*
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