No. 17-2279

United States Court of Appeals for the Eighth Circuit

ANMARIE CALGARO
Plaintiff-Appellant,

v.

ST. LOUIS COUNTY; LINNEA MIRSCH, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS INTERIM DIRECTOR OF ST. LOUIS COUNTY PUBLIC HEALTH AND HUMAN SERVICES; FAIRVIEW HEALTH SERVICES, A MINNESOTA NONPROFIT CORPORATION; ST. LOUIS COUNTY SCHOOL DISTRICT; MICHAEL JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF THE CHERRY SCHOOL, ST. LOUIS COUNTY SCHOOL DISTRICT; AND E.J.K.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Civil No. 16-cv-3919

BRIEF OF THE FOUNDATION FOR MORAL LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to supporting family government as it was originally intended and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in preserving the authority of parents over their children by defending against state intrusion into the parents' governing authority. Further, the Foundation firmly believes in the value of judicial restraint in furtherance of the preservation of state sovereignty. U.S. Const. amends IX & X.[1]

SUMMARY OF THE ARGUMENT

The fundamental right to parent has deep historical roots and reinforces the fact that the family is a form of government in itself, not to be interfered with by the state. Minnesota state officials have usurped Ms. Calgaro's parental responsibility and rights, rights that precede any proclamation of a court or even the provisions of the United States Constitution. The State's denial of the "natural law" right of Ms. Calgaro as a parent is consistent with the assistance it has given to her son to

[1] The Foundation has not sought or received consent of all parties to file this brief; consequently the accompanying motion has been filed. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. Rule 29(a)(4)(E), Fed. R. App. P.

unnaturally alter his gender. Therefore, the Defendants have not only abridged Ms. Calgaro's natural and fundamental rights as a parent, but have also committed child abuse by encouraging and facilitating the mutilation of her son's body in a futile attempt to change him from a boy to a girl. In their actions in this case, the Defendants have defied natural law, the U.S. Constitution, and nature's God Himself.

ARGUMENT

I. The right of a parent to direct the upbringing of her child is a fundamental right under the Fourteenth Amendment to the United States Constitution.

In support of this proposition the Foundation offers for the edification of the Court the following historical analysis excerpted from the special writing of Alabama Supreme Court Justice Tom Parker in *Ex parte E.R.G. and D.W.G.*, 73 So. 3d 634 (Ala. 2011).

> The family was the first of all human institutions. One man and one woman came together in covenant before God, and they, with the children God gave them, became the first human social structure. As William Blackstone wrote, "single families ... formed the first natural society," becoming "the first though imperfect rudiments of civil or political society." 1 William Blackstone, *Commentaries on the Law of England* *47 (1765).
>
> ....
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> In the century before American independence, prominent legal scholars discussed the rights and responsibilities of parents in their writings on the law. For example, Hugo Grotius, often considered the founder of modern international law, affirmed the authority of parents

> to make decisions regarding their own children. John Locke, whose works formed an essential part of the intellectual foundation for the American quest for liberty, stated that "parents have a sort of rule and jurisdiction over [their children]," a right that "arises from that duty which is incumbent on them, to take care of their off-spring."
>
> ....
>
> Post-revolutionary American law continued to respect the rights of parents. Chancellor Kent, for example, discussing the liability of parents for the contracts of their children, stated that "[w]hat is necessary for the child is left to the discretion of the parent; ... there must be a clear omission of duty ... before a third person can interfere...." 2 James Kent, *Commentaries on American Law* *192-93 (1826).

Ex parte E.R.G., 73 So. 3d at 650-54 (Parker, J., concurring specially) (footnotes omitted).

The United States Supreme Court has repeatedly and uniformly upheld parental authority. In a 1925 case the Court recognized "the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *See similarly Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Stanley v. Illinois*, 405 U.S. 645 (1972) the Court reiterated that parental rights "undeniably warrant[] deference and, absent a powerful countervailing interest, protection." *Id.* at 651. Peter Stanley was an unwed father whose children were taken from him at the death of their mother. Under governing Illinois law the children of unwed fathers became wards of the State upon the death of the mother. Stanley sued, claiming he was entitled to a hearing to determine his

fitness as a parent. The State contended that no hearing was necessary because Illinois law presumed that unwed fathers were unfit to raise their children. But the Court concluded:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent, and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.

Id. at 654.

Because the integrity of the family was at stake, the Court explained, the State may not "insist[] on presuming, rather than proving, Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause, that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658. Therefore, the Court concluded that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id. See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (upholding "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

II. Under color of state law, Defendants have violated Ms. Calgaro's parental rights, depriving her of due process in violation of the Fourteenth Amendment to the United States Constitution.

As stated in Ms. Calgaro's Complaint before the District Court:

> [H]er minor child J.D.K. received, and continues to receive, major elective medical services provided by Park Nicollet — and paid by St. Louis County – for a sex change without her consent or court order of emancipation. Similarly, Fairview prescribes narcotics to J.D.K. without her consent and without a court order. As with the St. Louis School District, Park Nicollet and Fairview Health Services did not provide Ms. Calgaro notice or a hearing that resulted in the loss of her parental rights.

Verified Complaint for Declaratory Relief and Injunction, at 3 (Nov. 16, 2016).[2]

The District Court emphatically insisted that, contrary to Ms. Calgaro's repeated assertions in her complaint, none of the named Defendants "determined E.J.K. emancipated." This might be a question of terminology. Whether Defendants made a determination that constituted a legal act that emancipated J.D.K or only made a determination in their own minds that E.J.K. had already been effectively emancipated, the fact remains that Defendants provided medical treatment to E.J.K. that they could not provide to an unemancipated minor without

[2] The Complaint referred to the boy as J.D.K., his given male name. The district court in its opinion rejected that style of the case and on its own initiative substituted "E.J.K." in the caption. *Memorandum and Order*, at 1 & n.1. According to the Complaint, Minnesota courts, noting lack of parental authorization, rejected J.D.K.'s efforts to change his name to E.J.K. *Complaint*, ¶¶ 68-74. The Foundation does not concede that the district court acted properly in unilaterally altering the caption nor that a boy can become a girl. Nonetheless, because both the notice of appeal and Calgaro's principal brief use "E.J.K." in the style, the Foundation will also use those initials in this brief to avoid confusion.

the parent's consent. They denied Ms. Calgaro the rights to notice, due process, and inspection of records to which a parent is legally entitled. In either event, they violated Ms. Calgaro's fundamental rights as a parent, thus depriving her of a Fourteenth Amendment liberty interest without the notice and hearing that are essential to due process of law. And they did so based on unverified allegations in a letter from the Mid-Minnesota Aid Clinic that had no legal status whatsoever. Ms. Calgaro was not even given the courtesy of receiving a copy of that so-called "emancipation" letter.

The District Court acknowledges, in fact firmly asserts, that E.J.K. has not been emancipated.

> Defendants therefore did not emancipate E.J.K. and Calgaro continues to have sole physical and joint legal custody of E.J.K. Second, even assuming Defendants determined E.J.K. emancipated—as the Court must do at this state of the litigation—Defendant's emancipation determination did not terminate Calgaro's parental rights over E.J.K. Only a court order can do so. Absent that, Calgaro's parental rights over E.J.K. remain intact.
> ....
>
> As previously discussed, E.J.K. has not been emancipated by a Minnesota court. And the other three ways E.J.K. could be considered legally emancipated under the statute are likewise inapplicable.

Memorandum and Order, *Calgaro v. St. Louis County*, No. 16-cv-3919 (D. Minn. May 23, 2017), at 4-5, 10.

The District Court interpreted the phrase "determined E.J.K. emancipated" to mean Ms. Calgaro was alleging that Defendants had performed some sort of legal

act adjudicating E.J.K.'s emancipation. But that is not what Ms. Calgaro meant. She was concerned that they had deprived her of her parental rights. Calgaro's pleading used the word "determined" not in the sense of performing a judicial act, but in the sense of reaching a conclusion. She did not mean that Defendants had emancipated E.J.K.; she meant that they had reached the conclusion that E.J.K. had already been emancipated, and therefore they could pursue a course of medical treatment for E.J.K. without his mother's knowledge or consent. Calgaro was not using the word "determined" as though the Defendants were judges adjudicating a case of emancipation. She used the word "determined" to demonstrate that they had hastily reached a conclusion that E.J.K. had been emancipated and had recklessly acted, all the while ignoring Calgaro's fundamental right as a parent. That is what Calgaro meant by the word "determined," but the District Court misconstrued that word.

But even though E.J.K. had not been legally emancipated and Ms. Calgaro's parental rights had not been terminated, the Defendants—state officials with state agencies—made an official determination, based upon a state legal aid society letter, that they could provide a sex-change operation to E.J.K. without notifying his mother or seeking her permission. They further determined that they did not need to consult with E.J.K.'s mother about educational decisions affecting E.J.K.'s future or share his school records with her.

If the District Court's and Defendants' descriptions of Minnesota law concerning emancipation and termination of parental rights are accurate, then Minnesota can invade the relationship between Ms. Calgaro and her child without providing notice or a hearing in a non-emergency matter fraught with very serious moral and medical consequences. This result clearly is contrary to the requirements of the Due Process Clause of the Fourteenth Amendment.

Ms. Calgaro's situation is similar to that of Mr. Stanley. The State of Illinois took his children and made them wards of the State without providing a hearing to contest that action. Defendant acting under color of the laws of the State of Minnesota (1) arranged for E.J.K. to have a sex-change operation to which his mother strongly objects, (2) refused to allow Ms. Calgaro to examine county records concerning her child, (3) provided government aid to that child that, as the Court acknowledges, can be provided only to an emancipated child, and (4) refused to allow Ms. Calgaro to examine her child's school records and participate in educational decisions for that child. All those actions were taken without giving Ms. Calgaro the notice and hearing that are requisite for due process. Regardless of whether the Defendants have properly determined that E.J.K. was legally emancipated, they have effectively treated him as emancipated without giving Ms. Calgaro notice of their actions or a hearing to contest that determination.

III. Arranging for E.J.K. to undergo transgender surgery without Ms. Calgaro's knowledge or consent is a particularly egregious violation of her Fourteenth Amendment Due Process rights.

If a doctor had performed emergency heart surgery upon E.J.K. after E.J.K. had gone into sudden cardiac arrest without a parent nearby, that operation would have been a justifiable exception to the normal requirement of parental consent.

If a doctor had performed necessary but non-emergency knee surgery to enable E.J.K. to walk or run better, that operation would have required parental consent.

If a doctor or other person had pierced E.J.K.'s ears, such a minor non-emergency non-essential procedure would also have required parental consent.

But that is not what happened here.

In this case without parental consent or even parental notification, Defendants arranged and paid for a sex-change operation and related treatment that was not only non-emergency and non-essential, but is extremely controversial and in the sincere belief of many, including Ms. Calgaro, egregiously wrong.[3]

[3] Defendants contend that under Minnesota Statute § 144.341, medical service providers may provide services without parental consent to "any minor who is living separate and apart from parents or legal guardian ... and managing personal financial affairs." Even if this Court were to conclude that this statute as interpreted by Defendants does not violate Ms. Calgaro's parental rights when applied to routine medical services, it clearly does violate Ms. Calgaro's parental rights when applied to a procedure as controversial and permanently life-altering as a sex-change operation. By outwardly changing E.J.K. from a boy into a girl, Defendants have clearly altered the parent-child relationship between this mother and her child.

Ms. Calgaro and others have solid reasons for objecting to sex-change operations. Even surgical alteration of one's sexual organs does not and cannot change the basic DNA with which a person was born. "It is physiologically impossible to change a person's sex, since the sex of each individual is encoded in the genes—XX if female, XY if male. Surgery can only create the *appearance* of the other sex."[4] Dr. George Burou, a surgeon who has performed over 700 sexual reassignment surgeries, stated, "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind."[5]

Advocates of the illusion that a person may change one's sex do not want to acknowledge that some who act on those thoughts later have regrets or unpleasant results. They often cite a Swedish study that found that only 2.2 percent of such persons suffered from sex change regret.[6] One commentator observes:

> This study shows a "regret rate" of 2.2%. However what are they actually measuring? What they are actually measuring is the rate of "legal detransition." They measure what percentage of people who undergo a legal name and gender change then undergo a second legal name and gender change. They don't measure people who have regrets but don't detransition legally, or don't detransition at all. It is also possible to detransition and not regret the original transition.

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[4] Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of "Sex Reassignment" Surgery*, Nat'l Catholic Bioethics Q. (April 2009), at 118.

[5] Quoted in Janice C. Raymond, *The Transsexual Empire* 10 (1979).

[6] *See* Cecilia Dhejne, et al., *An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960-2010: Prevalence, Incidence, and Regrets*, Arch. Sex. Behav. 43(8), May 2014.

The author continues:

> Because I transitioned 20 years ago, I know many MTF (male-to-female) transitioners that were in my cohort or even 5-10 years before. What I see is concerning. I am the only one of them that has detransitioned, and most of them would not say they regret their transition and continue to go by feminine pronouns and feminine names. In terms of life outcomes, I would say economically they are mostly doing well. However, socially they are struggling. Most of them are alone. I see a lot of social anxiety, people being unwilling to leave the house. In addition, they still continue to deal with dysphoria and have emotional difficulties.[7]

Other studies show that the percentage who experience regret is much higher then 2.2%. The *Guardian*, after reviewing one hundred studies of persons who rejected their birth sex, concluded that 20% of such persons regretted their actions, and that many remain severely distressed and even suicidal.[8] As early as 1979 Dr. Charles Ihlenfeld, who had administered hormone therapy to about 500 such persons, said simply: "There is too much unhappiness among people who have had the surgery. Too many of them end as suicides."[9]

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[7] TWT, *'Regret Rates' Are Not the Sole Measure of Outcomes*, ThirdWayTrans.com (June 29, 2015), https://goo.gl/ICDyT6.

[8] Cited in Walt Heyer, *Transgender Regret Is Real Even if the Media Tell You Otherwise*, TheFederalist.com (Aug. 19, 2015), https://goo.gl/JBgdMX.

[9] *Id.*

While accepting an ESPY Award for exceptional athletic performance in 2015, Bruce/Caitlyn Jenner told the audience that 41 percent of persons who attempt to become the opposite sex also attempt suicide.[10]

Consider other evidence:

- A Swedish study of all 324 persons who had been sex-reassigned between 1973-2003 found that "[p]ersons with transsexualism, after sex-reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population."[11]

- A 2009 study conducted by the Case Western Reserve University Department of Psychiatry concluded that "90 percent of these diverse [transgendered] patients had at least one other significant form of psychopathology."[12]

- A 2003 Dutch survey of board-certified Dutch psychiatrists concluded that, of 359 patients treated for cross-gender identification, 61 percent had other psychiatric disorders and illnesses, notably personality, mood, dissociative, and psychotic disorders.[13]

- In 2013 the University of Louisville conducted a study of 351 individuals who sought to be the opposite sex and found that the rates of depression and anxiety "far surpass the rates of those for the general population."[14]

The 2015 Report of the U.S. Transgender Survey revealed

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[10] *Id.*

[11] Cecilia Dhejne et al., Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden, PLOS/ONE, (Feb. 22, 2011), available at https://goo.gl/tr4ibw/.

[12] *Id.*

[13] *Id.*

[14] *Id.*

> disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the US. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates.[15]

Survey respondents reported that 10 percent experienced family violence because of their gender presentation, 54 percent were verbally harassed in school, 24 percent were physically attacked in school, 13 percent were sexually assaulted in school, and 17 percent left school because of this treatment. Thirty percent reported having been fired, denied a promotion, or otherwise mistreated at work because of their gender identity. Twenty-nine percent were living in poverty, compared to 14 percent of the general population. Fifteen percent were unemployed, compared with 5 percent of the general population. Thirty percent have experienced homelessness; 39 percent have experienced serious psychological distress during the previous month compared to 5 percent of the population; and 40 percent have attempted suicide during their lifetime—nearly nine times the attempted suicide rate in the general population (4.6 percent). 1.4 percent reported living with HIV, compared with only 0.3 percent of the general population.[16] Twenty percent have participated in the "underground economy" for

[15] *The Report of the 2015 Transgender Survey*, National Center for Gender Equality (2016), at 4.

[16] *Id.* at 4-6.

income at some time, including "sex work, drug sales, and other currently criminalized work," nine percent during the past year.[17]

These tragic consequences appear to accompany the desire to be the opposite sex and reflect the general discomfort of the public with behavior the American Psychiatric Association until very recently considered the manifestation of a mental disorder.

The 2015 *U.S. Transgender Survey* results should be approached with some degree of caution. Although the number of respondents (27,715) is impressive, one may question whether those who volunteer to participate in an online survey are representative of the target population as a whole. That persons who actively reject their birth sex experience violence, suicide, and other problems on a level disproportionate to the general population does not necessarily mean that their attempts at gender re-identification are the cause of their troubles. Theoretically, it is possible that those persons would have experienced problems regardless of their attempts to imitate the opposite sex. The Survey seems to reflect the belief of many of its participants that society's attitudes toward such persons, rather than their own behavior, are the cause of their problem. But even though the cause-and-effect relationships may be disputed, the correlation between trangenderism and this host of problems is a legitimate cause for concern.

[17] *Id.* at 158.

The fact remains: Parents who object to their children receiving sex-change operations have solid moral, medical, and scientific reasons for their objections. At least as much as with other forms of non-essential non-emergency surgery, and more so because of the moral issues and long-range consequences of transgender surgery, their objections should be respected and honored rather than denigrated and circumvented.

Clearly, Minnesota has no compelling interest that required circumventing Ms. Calgaro's parental rights to provide E.J.K. with so-called transgender surgery. It is difficult to find any type of state interest, much less a compelling one, that could justify Minnesota's actions in denying Ms. Calgaro the fundamental right of a parent to participate in critical decisions affecting her child. Even the Jehovah's Witnesses cases, in which parental rights were overridden, involved essential emergency life-saving measures. *See, e.g.*, *Jehovah's Witnesses in the State of Washington v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967). None of those factors are present here.

If this were simply routine non-essential non-emergency surgery performed without the mother's consent, even then it would be a violation of Ms. Calgaro's parental rights. Because of the controversial nature of transgender surgery and its potential effects, it is an even more egregious violation of her parental rights.

IV. The Defendants not only failed to respect Ms. Calgaro's parental right to direct the upbringing of her child but have willfully engaged in abuse of that child by facilitating very dangerous medical treatment.

Americans are rightly incensed when they learn of parents in certain Islamic cultures who perform female circumcision on their daughters. The mutilation of the bodies of young girls and women shocks us, but the very same thing occurs in our own nation—by disfiguring surgery and lifetime hormonal treatment in the vain attempt to alter the sexual identity bestowed by the Creator at conception. Some of this "medical treatment" results in the sterilization of its subjects. Is this not child abuse?

The harm in this case extends not only to the mother's right to bring up her child as she sees fit, but also to denial of the biological reality that God created each of us to be either male or female. *Genesis* 1:27. Promotion of the transgender delusion by state officials consigns children in their care to a lifetime of misery that often terminates in suicide. In their unnatural zeal to satisfy the child's misguided impulse, Defendants have denied the natural relation of child to parent, as well as the natural gender that God has bestowed upon the child.

In this case the Defendants, rather than intervening to prevent child abuse by the parent, have ignored the parent's wishes in order to engage in child abuse themselves. By the laws of nature and of nature's God, parents are naturally equipped to raise their children.

> Thomas Rutherforth, a lecturer and author whose works were noted for their influence on the development of American law, argued that "since nature cannot be supposed to prescribe a duty to the parents without granting them the means, which are necessary for the discharge of such duty; it follows, that nature has given the parents all the authority, which is necessary for bringing up the child in a proper manner."

Ex parte E.R.G., 73 So. 3d at 653-54 (Parker, J., concurring specially) (quoting Thomas Rutherforth, *Institutes of Natural Law* 166 (3d ed. 1799), and citing Gary L. McDowell, *The Limits of Natural Law: Thomas Rutherforth and the American Legal Tradition* (1992)).

If this case is not reversed, no limits will exist on what state officials may do. If the Defendants can facilitate the mutilation of the bodies of children, ignore parental authority, and defy the laws of nature and of nature's God, they can do anything. "[A]nd now nothing will be restrained from them, which they have imagined to do." *Genesis* 11:6.

CONCLUSION

The District Court's preliminary injunction should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Fed. R. App. P., because it contains 4,169 words, excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii), Fed. R. App. P.

2. This brief complies with the typeface requirements of Rule 32(a)(5), Fed. R. App. P., and the type style requirements of Rule 32(a)(6), Fed. R. App. P., because it was prepared in Microsoft Word 2007 using Times Roman 14-point type.

s/ John Eidsmoe
John Eidsmoe

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on the 9th day of August, 2017, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

s/ John Eidsmoe
John Eidsmoe

Counsel for Amicus Curiae