No. 23-16031

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

AURORA REGINO,
PLAINTIFF-APPELLANT,

v.

KELLY STALEY, SUPERINTENDENT,
DEFENDANT-APPELLEE

AND

CAITIN DALBY; REBECCA KONKIN; TOM LANDO;
EILEEN ROBINSON; MATT TENNIS,
DEFENDANTS.

On appeal from the United States District Court for the Eastern District of California, Case No. 2:23-cv-00032-JAM-DMC

MOTION FOR LEAVE TO FILE AMICI BRIEF OF LIBERTY JUSTICE CENTER, WISCONSIN INSTITUTE FOR LAW & LIBERTY, AND DR. ERICA E. ANDERSON, PhD, SUPPORTING APPELLANT AND REVERSAL

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(a), Liberty Justice Center states that it is a nonprofit corporation registered in the State of Illinois, and has no parent company and no stockholders.

Wisconsin Institute for Law & Liberty states that it is a nonprofit corporation registered in the State of Wisconsin, and has no parent company and no stockholders.

Dr. Erica E. Anderson states that she is a person, and is not publicly traded company or corporation.

MOTION FOR LEAVE TO FILE AMICI BRIEF OF LIBERTY JUSTICE CENTER, WISCONSIN INSTITUTE FOR LAW & LIBERTY, AND DR. ERICA E. ANDERSON[1]

Amici Liberty Justice Center, Wisconsin Institute for Law & Liberty, and Dr. Erica E. Anderson hereby seek leave to file the attached amici brief in support of Appellant and reversal. The grounds for this motion are as follows:

1. The Liberty Justice Center and Wisconsin Institute for Law & Liberty are both nonprofit, nonpartisan, public-interest litigation firms that seek to protect economic liberty, private property rights, free speech, and other fundamental rights, including the fundamental right to parent under the Fourteenth Amendment.

2. Dr. Erica E. Anderson, PhD, is a clinical psychologist practicing in Berkeley, California, with over 40 years of experience, and is transgender herself. Between 2019 and 2021, Dr. Anderson served as a board member for the World Professional Association for Transgender Health (WPATH) and as the President of USPATH (the United States

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

arm of WPATH). Since 2016, Dr. Anderson's work has focused primarily on children and adolescents dealing with gender-identity-related issues, at the Child and Adolescent Gender Clinic at Benioff Children's Hospital at the University of California, San Francisco (2016 to 2021), and at her private consulting and clinical psychology practice (2016 to present). She has seen hundreds of children and adolescents for gender-identity-related issues in that time, many of whom transition, with her guidance and support.

3. As a practitioner serving children and adolescents experiencing gender incongruence, Dr. Anderson has a strong interest in ensuring that such children receive the best possible support and assistance (whether or not they ultimately transition), which, in her view, requires involving their parents.

4. The District Court's decision has significant implications both in this circuit and throughout the country.

5. To aid this Court's decision, the proposed amici brief provides an overview, including from a practitioner's perspective, as to why a social transition at school is a serious mental-health-related decision. The brief also surveys additional, in-circuit and out-of-circuit precedent related to

the "shocks-the-conscience" test for some Fourteenth Amendment claims, as well as provides an overview of parents' decision-making authority with respect to their own minor children.

6. The proposed amici brief complies with F.R.A.P. 29 and 32 and this Court's local rules.

7. Plaintiff-Appellant have consented to the filing of this brief.

8. Amici made a good faith effort to obtain the consent of Defendants-Appellees, however counsel for Defendants-Appellees declined to consent.

For the foregoing reasons, Amici respectfully request permission to file the attached amici brief in support of Appellant and reversal.

Dated: November 6, 2023

Respectfully Submitted,

LIBERTY JUSTICE CENTER

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify the following:

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this motion contains 476 words.

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this motion has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: November 6, 2023

/s/ Dean McGee
DEAN MCGEE

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, I filed the foregoing Amici Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: November 6, 2023

/s/ Dean McGee
DEAN MCGEE

No. 23-16031

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No. 23-16031, *Regino v. Staley*

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IDENTITY AND INTEREST OF AMICI[1]

The Liberty Justice Center and Wisconsin Institute for Law & Liberty are both nonprofit, nonpartisan, public-interest litigation firms that seek to protect economic liberty, private property rights, free speech, and other fundamental rights, including the fundamental right to parent under the Fourteenth Amendment.

Dr. Erica E. Anderson, PhD, is a clinical psychologist practicing in Berkeley, California, with over 40 years of experience, and is transgender herself. Between 2019 and 2021, Dr. Anderson served as a board member for the World Professional Association for Transgender Health (WPATH) and as the President of USPATH (the United States arm of WPATH). Since 2016, Dr. Anderson's work has focused primarily on children and adolescents dealing with gender-identity-related issues, at the Child and Adolescent Gender Clinic at Benioff Children's Hospital at the University of California, San Francisco (2016 to 2021), and at her private consulting and clinical psychology practice (2016 to present). She has seen hundreds

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of children and adolescents for gender-identity-related issues in that time, many of whom transition, with her guidance and support.

As a practitioner serving children and adolescents experiencing gender incongruence, Dr. Anderson has a strong interest in ensuring the best possible support and assistance for those children. In her view, appropriate care requires parental involvement.

STATEMENT OF THE ISSUE

Whether the District Court erred in dismissing Appellant's complaint, which alleges a violation of her fundamental right to parent her child.

INTRODUCTION

The Chico Unified School District requires all staff to abide by any student's request to adopt a new gender identity without parental consent or notice. Staff are even directed to conceal the new public gender identity from parents. Many mental-health professionals believe that a gender-identity transition during childhood is a profound and difficult treatment decision, and that parental involvement is critical for many reasons: to properly assess the underlying sources of the child's feelings; to evaluate the risks and benefits of a transition; to identify and address

any coexisting issues; to provide ongoing support; and ultimately, to decide whether a transition will be in their child's best interests.

The District applied its Policy to Appellant's child, facilitating a social transition at school without her notice or consent, in violation of her fundamental interest to oversee the care, custody, and education of her minor child, including the right to make health-related decisions. Yet the District Court dismissed her complaint on the grounds that usurping her parental role over this major decision did not "shock the conscience." That is not the test for violations of a parent's fundamental rights; regardless, the District's actions here *were* conscience-shocking. This Court should reverse.

SUMMARY OF ARGUMENT

I. A social transition to a different gender identity during childhood or adolescence is a significant and psychologically impactful health-related decision. And social transition is not the best approach for all children experiencing gender incongruence. A child or adolescent who exhibits a desire to change name and pronouns should receive a careful professional assessment prior to transitioning. Given the significance of this decision,

parents must be involved and must ultimately decide what is best for their child.

II. Parents have a well-established, fundamental right under the Fourteenth Amendment to make decisions for their minor children. A school district violates that right when it usurps the parents' role in significant, health-related decisions, like how their child will be addressed at school.

III. The "shocks-the-conscience" test does not apply to claims of a violation of an established, fundamental right, including the parental right to make decisions for one's own children. Even if that test does apply in this context, a school district secretly making decisions reserved for parents, over their objection, *does* shock the conscience.

ARGUMENT

I. The Social Transition of a Minor Child Is a Major and Potentially Life-Altering Mental-Health Treatment Decision That Requires Parental Involvement.

Whether children and adolescents socially transition to a different gender identity (i.e., to change their name and pronouns to ones at odds with their natal sex) is not a trivial decision. It can be a major turning

point in that child's life, requiring careful thinking about the youth's best interests. Parents must be involved in this decision, for many reasons.

First, there is an ongoing debate in the mental health community about how quickly and under what conditions children and adolescents who experience gender incongruence (a mismatch between their natal sex and perceived or desired gender identity) should transition socially. Childhood social transitions were "[r]elatively unheard-of 10 years ago," but have become far more frequent in recent years.[2] There is a recent trend, in some circles, to immediately "affirm," without question, every child's and adolescent's expression of a desire for an alternate gender identity. But a robust body of research—multiple studies across different locations and times—has previously found that, for the vast majority of children (roughly 80-90%), gender incongruence does not persist.[3] As one researcher summarized, "*every* follow-up study of GD [gender diverse]

[2] Rae, James R., et al., *Predicting Early-Childhood Gender Transitions*, 30(5) Psychological Science 669–681, at 669–70 (2019), https://doi.org/10.1177/0956797619830649.

[3] *See, e.g.*, The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* ("WPATH SOC7") at 11 (Version 7, 2012), *available at* https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

children, without exception, found the same thing: Over puberty, the majority of GD children cease to want to transition."[4]

These studies were conducted before the recent trend to quickly transition, whereas some newer studies of youth who *have* socially transitioned show much higher rates of persistence. A study in 2013 found that "[c]hildhood social transitions were important predictors of persistence, especially among natal boys."[5] Another recent study of 317 transgender youth found that 94% continued to identify as transgender 5 years after transitioning.[6]

In light of the vastly different rates of persistence between youth who transition and those who do not, many experts in the field are concerned that a social transition may causally affect the likelihood that a child's or

[4] Cantor, James M., *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 46(4) Journal of Sex & Marital Therapy 307–313 (2019), https://doi.org/10.1080/0092623X.2019.1698481.

[5] Steensma, T. D., et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52(6) Journal of the American Academy of Child & Adolescent Psychiatry 582–590, at 588 (2013), https://doi.org/10.1016/j.jaac.2013.03.016.

[6] Olson, Kristina R., et al., *Gender Identity 5 Years After Social Transition*, 150(2) Pediatrics (Aug. 2022), https://doi.org/10.1542/peds.2021-056082.

adolescent's experience of gender incongruence will persist. Dr. Kenneth Zucker, who for decades led "one of the most well-known clinics in the world for children and adolescents with gender dysphoria," has argued publicly that a social transition can "become[ ] self-reinforcing," because "messages from family, peers, and society do a huge amount of the work of helping form, reinforce, and solidify gender identities."[7] Dr. Zucker elsewhere has written that, in his view, "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence."[8]

The U.K.'s NHS is currently reconsidering its model of transgender care,[9] and the doctor in charge of the review, Dr. Hilary Cass, wrote in her interim report:

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[7] Singal, Jesse, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016), https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html.

[8] Zucker, K., *The myth of persistence: Response to "A critical commentary on follow-up studies and 'desistance' theories about transgender and gender non-conforming children" by Temple Newhook et al.*, 19(2) International Journal of Transgenderism 231–245 (2018), available at https://www.researchgate.net/publication/325443416.

[9] *See Independent review into gender identity services for children and young people*, NHS England, https://www.england.nhs.uk/

> "[I]t is important to view [social transition] as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning. There are different views on the benefits versus the harms of early social transition. Whatever position one takes, it is important to acknowledge that it is not a neutral act, and better information is needed about outcomes."[10]

Based on her report, "Britain now appears to be changing tack," moving away from the "affirmative approach" and the "hurry to affirm gender identity," instead recognizing that "gender incongruence ... may be a transient phase" for young people.[11]

The Endocrine Society's guidelines similarly recognize that:

> "Social transition is associated with the persistence of GD/gender incongruence as a child progresses into adolescence. It may be that the presence of GD/gender incongruence in prepubertal children is the earliest sign that a child is destined to be transgender as an adolescent/adult (20). However, social transition (in addition to GD/gender

commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/gender-dysphoria/independent-review-into-gender-identity-services-for-children-and-young-people/.

[10] Cass, H., *Independent review of gender identity services for children and young people: Interim report* (Feb. 2022), https://cass.independent-review.uk/publications/interim-report/.

[11] *Britain changes tack in its treatment of trans-identifying children*, The Economist (Nov. 17, 2022), https://www.economist.com/britain/2022/11/17/britain-changes-tack-in-its-treatment-of-trans-identifying-children.

> incongruence) has been found to contribute to the likelihood of persistence."[12]

The World Professional Association for Transgender Health (WPATH), which takes a decidedly pro-transitioning stance, has acknowledged that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views," that "[f]amilies vary in the extent to which they *allow* their young children to make a social transition to another gender role," and that there is insufficient evidence "to predict the long-term outcomes of completing a gender role transition during early childhood." WPATH SOC7, *supra* n.3, at 17.[13] WPATH encourages health professionals to *defer to parents* "as they work through the options and implications," *even* "[i]f parents do not allow their young child to make a gender role transition." *Id*.

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[12] Hembree, Wylie C., et al., *Endocrine Treatment of Gender-Dyshporic/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, Endocrine Society, 102(11) J Clin. Endocrinol. Metab. 3869–3903, at 3879 (2017), https://doi.org/10.1210/jc.2017-01658.

[13] The latest version of WPATH's standards of care guidelines (version 8), which was released last fall, continues to acknowledge that "there is a dearth of empirical literature regarding best practices related to the social transition process." *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, WPATH, 23 International J. Trans. Health 2022 S1–S258, S76 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644.

In short, when a child or adolescent expresses a desire to change name and pronouns to an alternate gender identity, mental health professionals do not universally agree that the best decision, for *every such* child or adolescent, is to immediately "affirm" their desire and begin treating that child or adolescent as the opposite sex. And whether transitioning will be helpful or harmful likely depends on the individual child or adolescent. As WPATH emphasizes, "an individualized approach to clinical care is considered both ethical and necessary." WPATH SOC8, *supra* n.13, at S45.

Every major professional association recommends a thorough professional evaluation to assess the underlying causes of the gender incongruence and whether a transition will be beneficial. The American Psychological Association ("APA"), for example, recommends a "comprehensive evaluation" and consultation with the parents and youth to discuss, among other things, "the advantages and disadvantages of social transition during childhood and adolescence."[14] The Endocrine

[14] APA, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70(9) APA 832–64, at 843 (2015), https://www.apa.org/practice/guidelines/transgender.pdf.

Society likewise recommends "a complete psychodiagnostic assessment." *Supra* n.12, at 3877. WPATH, too, recommends a comprehensive "psychodiagnostic and psychiatric assessment," covering "areas of emotional functioning, peer and other social relationships, and intellectual functioning/school achievement," "an evaluation of the strengths and weaknesses of family functioning," any "emotional or behavioral problems," and any "unresolved issues in a child's or youth's environment." WPATH SOC7, *supra* n.3, at 15.[15] WPATH also recommends that mental health professionals "discuss the potential benefits and risks of a social transition with families who are considering it." WPATH SOC8, *supra* n.13, at S69.

A professional assessment is especially important given the "sharp increase in the number of adolescents requesting gender care" recently, particularly among adolescent girls ("2.5-7.1 times" adolescent boys). WPATH SOC8, *supra* n.13, at S43. As WPATH acknowledges, an increasing number of "adolescents [are] seeking care who have not

[15] WPATH SOC8, *supra* n. 13, at S45, likewise states that "a comprehensive clinical approach is important and necessary," "[s]ince it is impossible to definitively delineate the contribution of various factors contributing to gender identity development for any given young person."

seemingly experienced, expressed (or experienced and expressed) gender diversity during their childhood years," indicating that "social factors also play a role," including "susceptibility to social influence." *Id*. at S44–S45.

There is also growing awareness of adolescents who come to "regret gender-affirming decisions made during adolescence" and later "detransition," which many find to be a "difficult[ ]" and "isolating experience." *Id*. at S47. In one recent survey of 237 detransitioners (over 90% of which were natal females), 70% said they realized their "gender dysphoria was related to other issues," and half reported that transitioning did not help.[16]

Another reason for professional involvement is to assess whether the child or adolescent needs mental-health support. Many transgender youth experience dysphoria—psychological distress—associated with the mismatch between their natal sex and perceived or desired gender identity. Indeed, the APA's Diagnostic and Statistical Manual of Mental

[16] Vandenbussche, E., *Detransition-Related Needs and Support: A Cross-Sectional Online Survey*, 69(9) Journal of Homosexuality 1602–1620, at 1606 (2022), https://doi.org/10.1080/00918369.2021.1919479.

Disorders' (DSM-V) official diagnosis for "gender dysphoria" is *defined by* "clinically significant distress" associated with the mismatch.[17]

Gender incongruence is also frequently associated with other mental-health issues. WPATH's SOC8 shows that transgender youth have higher rates of depression, anxiety, self-harm, suicide attempts, eating disorders, autism spectrum disorders, and other emotional and behavioral problems than the general population. *Supra* n.13, at S62–63. All major professional organizations recommend screening for these coexisting issues and treating them, if needed. *Id.*; APA Guidelines, *supra* n.14, at 845; Endocrine Society Guidelines, *supra* n.12, at 3876.

Finally, professional support can be vital during any transition. A transition can "test [a young] person's resolve, the capacity to function in the affirmed gender, and the adequacy of social, economic, and psychological supports," and "[d]uring social transitioning, the person's feelings about the social transformation (including coping with the responses of others) is a major focus of [ ] counseling." Endocrine Society Guidelines, *supra* n.12, at 3877.

[17] APA, *What is Gender Dysphoria?* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

It should go without saying, but parents cannot obtain a professional evaluation, screen for dysphoria and other coexisting issues, or provide professional mental-health support for their children, if their school maintains a policy of deception regarding their children.

To summarize, no professional association recommends that teachers and school officials—who lack any expertise in these issues—should facilitate a social transition at school while preventing parents from accessing information needed to care for their children.

II. Parental Decision-Making Authority Over Their Minor Children Includes the Right to be Involved in How School Staff Refer to Their Child While at School.

A long line of cases from the United States Supreme Court establishes that parents have a constitutional right "to direct the upbringing and education of children under their control." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)). This is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court," *Troxel*, 530 U.S. at 65 (plurality op.), and is "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Indeed, it is a "basic civil right[ ] of man," *Skinner v. Oklahoma*, 316 U.S.

535, 541 (1942), "far more precious … than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953).

This line of cases establishes four important principles with respect to parents' rights that are relevant to the case at hand.

First, parents are the primary decision-makers with respect to their minor children—not their school, or even the children themselves. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Troxel*, 530 U.S. at 66 (plurality op.) ("[W]e have recognized the fundamental right of parents to *make decisions* concerning the care, custody, and control of their children.") (emphasis added); *Yoder*, 406 U.S. at 232 (emphasizing the "primary role of the parents in the upbringing of their children"). Parental decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602, and that "natural bonds of affection lead parents to act in the best interests of their children," far more than anyone else. *Parham*, 442 U.S. at 602; *Yoder*, 406 U.S. at 232 ("The

history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.")

Second, parental rights reach their peak, and thus receive the greatest constitutional protection, on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (calling this "the heart of parental decision-making authority"); *Yoder*, 406 U.S. at 233–34. Among those important matters are medical and health-related decisions: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603.

Third, a child's disagreement with a parent's decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 603–04. *Parham* illustrates how far this principle goes. That case involved a Georgia statute that allowed parents to voluntarily commit their minor children to a mental hospital (subject to review by medical professionals). *Id.* at 591–92. A committed minor argued that the statute violated his due process rights by failing to provide him with an adversarial hearing, instead giving his parents

substantial authority over the commitment decision. *Id.* at 587. The Court rejected the minor's argument, confirming that parents "retain a substantial, if not the dominant, role in the [commitment] decision." *Id.* at 603–04. "The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority." *Id.* at 604.

Fourth, the fact that "the decision of a parent is not agreeable to a child or … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603. Likewise, the unfortunate reality that some parents "act[ ] against the interests of their children" does not justify "discard[ing] wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602–03. The "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is "statist" and "repugnant to American tradition." *Id.* at 603 (emphasis in original). Thus, if a parent is fit, "there will normally be 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*, 530 U.S. at 68–69 (plurality op.).

Consistent with these principles, courts have recognized that a school violates parents' constitutional rights if it usurps their role in significant decisions.

Several federal district courts have granted preliminary injunctions against similar policies, recognizing that parents' decision-making authority necessarily attaches to issues of gender identity in school. *Mirabelli v. Olson*, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992, at *31 (S.D. Cal. Sept. 14, 2023); *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022).

The *Mirabelli* court emphasized that a district's "policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise." 2023 WL 5976992, at *31. And as the *Ricard* court correctly noted, "[i]t is difficult to envision why a school would even claim—much less 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." 2022 WL 1471372, at *8.

Likewise, a Wisconsin trial court recently granted summary judgment to parents in a similar case. *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL 6544917 (Waukesha Cnty., Wis., Cir. Ct., Oct. 03, 2023). There, a school district refused to respect the parents' decision about how their 12-year-old daughter should be addressed at school, forcing them to withdraw her from the District to protect her. Within weeks of being removed from environments with adults "affirming" that she was really a boy, she ceased wanting to transition, realizing that her parents had been right. *Id.* at *1. The court held that the District violated the parents' right "to make medical and healthcare decisions for [their] child," because social transition is "undisputedly a medical and healthcare issue." *Id.* at *3, *5. The court summarized: "The School District could not administer medicine to a student without parental consent. The School District could not require or allow a student to participate in a sport without parental consent. Likewise, the School District [cannot] change the pronoun of a student without parental

consent without impinging on a fundamental liberty interest of the parents." *Id.* at *6.

The District's actions alleged in this case violated Appellant's constitutional right to make the major decision about whether a social transition was in their child's best interest. The empirical evidence and legal precedent discussed above establishes that when children or adolescents experience gender incongruence, whether they should socially transition is a significant and impactful healthcare-related decision that falls squarely within "the heart of parental decision-making authority," *C.N.*, 430 F.3d at 184; *Parham*, 442 U.S. at 603.

The District took this life-altering decision out of the parents' hands and placed it with their minor child, who lacks the "maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 602. By enabling the Appellant's child's social transition at school without her knowledge or involvement, the District effectively made a treatment decision without requisite legal authority or informed consent. Given the significance of changing gender identity, especially at a young age, parents "can and must" make this decision. *Parham*, 442 U.S. at 603.

Teachers and staff do not have the training and experience necessary to properly diagnose children with gender dysphoria or to opine and advise on the treatment options. They cannot provide professional assistance for children dealing with these issues, and they undermined the professional assistance the Appellant was providing by facilitating a transition at school.

A child's fear that his or her parents might not support a transition is not sufficient to override their decision-making authority. Parents' role is sometimes to say "no" to protect their children from decisions against their long-term interests.

III. "Shock the Conscience" Is Not an Overarching Requirement for All Due Process Claims, But Rather an Alternative Test to a Fundamental Rights Analysis.

The District Court erroneously dismissed this case on the grounds that any due process claim must meet a "shocks the conscience" test, and that the conduct alleged does not. It was wrong on both points.

The "shocks the conscience" language found in some substantive due process cases is not the standard for all Fourteenth Amendment claims, but rather an alternative test when the conduct is alleged to be so arbitrary or unreasonable as to violate due process. The United States

Supreme Court—which has never applied a "shocks the conscience" requirement to a parental rights case—has said this explicitly: "'Substantive due process prevents the government from engaging in conduct that 'shocks the conscience,' *or* interferes with rights 'implicit in the concept of ordered liberty.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987). Parental rights cases, like this one, fall into the latter category—they implicate a fundamental right, long recognized by the Supreme Court. *Supra* Part II.

Tellingly, in the analogous context of alleged violations of familial integrity, the Ninth Circuit has explicitly rejected the heightened "shocks the conscience" standard in favor of an "unwarranted interference" standard. *Crowe v. Cty. of S.D.*, 608 F.3d 406, 441 n.23 (9th Cir. 2010); *see also Kerby v. Sheridan*, No. 2:12-cv-00544-MO, 2015 WL 1004427 at *10 (D. Ore. Mar. 5, 2015) ("Although a number of other circuits apply a 'shocks-the-conscience' test in cases involving the substantive due process protections of familial integrity, the Ninth Circuit does not.")

And while some lower courts have interpreted *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), as imposing a "shock the conscience" requirement for any substantive due process claim involving executive

action, this is a misreading of *Lewis*, which favorably quoted *Salerno* for its alternative framing, that the Fourteenth Amendment is violated *either* by "conduct that 'shocks the conscience,' ... *or* interferes with rights 'implicit in the concept of ordered liberty.'" 523 U.S. at 847. Indeed, "the Court [in *Lewis*] made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims." *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) (listing examples, and concluding that a "fundamental rights analysis," rather than a "shocks-the-conscience" test, would apply to a tortious-interference-with-contract claim involving executive action).

Moreover, the Supreme Court *itself* has not understood *Lewis* as broadly as the District Court, even in subsequent cases involving executive action. In *Chavez v. Martinez*, 538 U.S. 760 (2003), for example, a challenge to a "coercive interrogation"—classic executive action—the plurality opinion (joined by Justices Thomas, O'Connor, and Scalia), treated the "shocks-the-conscience" test as an alternative theory of liability to a violation of a fundamental right. They first analyzed whether the conduct was "egregious" or "conscience shocking," *id.* at 774–75, and then *separately* analyzed whether it violated a fundamental

right, *id*. at 775 (emphasizing that "the Due Process Clause *also* protects certain 'fundamental liberty interest[s]' from deprivation"). Justice Stevens, in his dissent, agreed that these are alternative theories of liability, stating so explicitly: "The Due Process Clause of the Fourteenth Amendment protects individuals against state action that *either* 'shocks the conscience,' *or* interferes with rights 'implicit in the concept of ordered liberty.'" *Id*. at 787. Notably, no Justice in *Chavez* disagreed with this framing—not even Justice Souter, who authored *Lewis*.

Multiple cases have rejected a "shocks the conscience" test when the alleged violation is of a fundamental right—and some even in the context of parents' rights claims involving executive action. *E.g.*, *Seegmiller v. LaVerkin City*, 528 F.3d 762, 768–69 (10th Cir. 2008) (rejecting defendants' argument for an executive/legislative distinction, explaining that "the 'shocks the conscience' and 'fundamental liberty' tests are but two separate approaches to analyzing governmental action under the Fourteenth Amendment," and giving, as an example, a parental rights claim, where the court reversed on that basis (discussing *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir.2003)); *Kolley v. Adult Protective Servs.*, 725 F.3d 581, 585 (6th Cir. 2013) ("There are two types of

deprivations that support substantive due process claims: (1) deprivations of a particular constitutional guarantee; and (2) actions that 'shock the conscience.' [ ] This claim deals with the first type of deprivation—deprivation of a constitutional guarantee, particularly the right to the maintenance of a parent-child relationship.") (citations omitted).

In any event, the school's conduct in this case does shock the conscience: it enacted a policy of deception designed to deprive parents of critical information needed to properly care for their minor children. As the Supreme Court has emphasized, the idea that government actors can override parents solely because they believe they know better is "statist" and "repugnant to American tradition," *Parham*, 442 U.S. at 603—i.e., conscience-shocking.

CONCLUSION

This Court should reverse the judgment of the District Court.

Dated: November 6, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,712 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: November 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, I filed the foregoing Amici Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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