Case No. 23-1069

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

STEPHEN FOOTE, individually and as Guardian and next friend of F.F. and G.F., minors and MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors,

Plaintiffs-Appellants,

vs.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, former Superintendent; LISA NEMETH, Interim Superintendent; STACY MONETTE, Principal, Baird Middle School; MARIE-CLAIRE FOLEY, school counselor, Baird Middle School; JORDAN FUNKE, former librarian, Baird Middle School; TOWN OF LUDLOW,

Defendants-Appellees.

BRIEF AMICUS CURIAE OF THE GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL FILED WITH CONSENT OF ALL PARTIES

Appeal from the United States District Court for the District of Massachusetts
Springfield Division
Case No. 3:22-cv-30041-MGM

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CORPORATE DISCLOSURE AND FINANCIAL INTEREST STATEMENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Proposed amicus Goldwater Institute ("GI") is a nonprofit, nonpartisan public policy and research foundation established in 1988, and is dedicated to advancing the principles of limited government, economic freedom, and individual liberty. GI advances these principles through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are directly affected. GI has also appeared as an amicus in cases implicating parental rights. *See, e.g.*, Amicus Brief, *McElhaney v. Williams*, 2022 WL 17995423 (6th Cir. Dec. 21, 2022) (No. 22-5903).

In 2002, GI initiated a project devoted to public-school transparency, which, among other things, hosts instructional meetings across the country to explain to parents how to obtain information about the materials used in public-school classrooms. GI Scholars have also published extensive research on how public schools have attempted to limit the rights of parents in the educational context. *See, e.g.*, Matt Beienburg, *De-Escalating the Curriculum Wars: A Proposal for*

[1] The Goldwater Institute's counsel authored this brief in its entirety. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no other person—other than the amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

Academic Transparency in K-12 Education, Goldwater Institute (Jan. 14, 2020).[2] This case presents a situation where a public school and its officials took affirmative steps to hide information from parents about their children—a matter of significant concern to GI.

SUMMARY OF ARGUMENT

Parents have a right to control and direct the education, upbringing, and healthcare decisions of their children. They cannot exercise this right if government hides important information about their children from them. Here, Defendants have done just that. Acting in accordance with the Ludlow School Committee's official policy, Defendants *concealed* from Plaintiffs that their children had requested to be known by names and pronouns that matched their asserted gender identity, which was different from their biological sex.

Parents cannot exercise their right—and duty—to oversee the education, upbringing, and healthcare of their children if school officials hide information from them. A policy whereby school officials hide information from parents inhibits parents' ability to meaningfully exercise their parental rights.

This is all the more true in situations like this where such concealment is a *blanket* policy decision. That is, the decision to hide information from these parents was not an aberration, or an oversight, or the result of reasoned decision-

[2] https://www.goldwaterinstitute.org/policy-report/curriculum-wars/

making based on the circumstances of this specific situation. Instead, it was in accordance with a blanket policy that prohibits school officials from telling parents that their child is asserting a gender identity different from their biological sex, absent the *child's* explicit consent. The policy therefore requires not just silence, but active concealment: school officials must take affirmative steps to hide vitally important information from parents.

That is unacceptable. Schools can make decisions about what to teach students and how to teach students. But a government decision to conceal crucial, intimate information in this way places it in a position between children and parents. There are obviously times when the government must intervene to protect children from abusive parents. But even those situations require careful balancing and analysis of the specific circumstances. Those situations also generally require some measure of due process. Here, though, there is no individual balancing. There is no process for parents. There is simply a blanket policy that empowers the school to step into the shoes of parents.

Even absent slippery-slope concerns, this policy and the actions of Defendants in accordance with this policy violate the constitutional rights of parents. Even assuming the policy serves some legitimate government interest, the absence of any individualized determination that hiding information from their parents is necessary shows that there is not adequate tailoring.

When bringing a claim under 42 U.S.C § 1983, Plaintiffs must prove that the Defendant's actions were so egregious that they "shock the conscience." Plaintiffs have done just that. In the First Circuit, Plaintiffs need only show that the Defendants acted with deliberate indifference in causing Plaintiffs' injuries. That is obvious. Defendants offered no evidence that they even considered the fundamental rights of parents in adopting this policy or acting in accordance with it. Defendants also presented no compelling government interest that justifies the burden on those fundamental rights.

While Defendants argue that hiding this important information from parents is necessary to comply with Massachusetts' anti-discrimination laws, this argument misses two key points. First, *informing* parents that the school is complying with their child's requests with respect to gender identity would simply not be a form of government discrimination. Second, the presence of a state law obligation is not sufficient to overcome a constitutional right.

Thus, Plaintiffs have stated a cognizable substantive due process claim alleging that school officials violated their parental rights to control and direct the education, upbringing, and healthcare decisions of their children by actively taking steps to hide information about children from their parents.

ARGUMENT

I. Defendants violated Plaintiffs' fundamental parental rights by actively hiding from parents that school officials were honoring their children's request to assert a gender identity different from their biological sex.

The Fourteenth Amendment prohibits states from: "depriv[ing] any person of life, liberty, or property, without due process of law." The Supreme Court has long recognized that this restriction protects certain rights from arbitrary government interference. It "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citation omitted).

One of those certain fundamental rights or liberty interests protected by the Due Process Clause are parental rights. Specifically, the Clause protects the right of parents to control and direct the education, upbringing, and healthcare decisions of their children. *See id.; see also Parham v. J.R.*, 442 U.S. 584, 602 (1979). The Supreme Court has recognized and upheld this right for a century. The Defendants here violated that right by *actively hiding* crucially important information about their children's gender identity from parents. This intentional concealment inhibits parents' ability to make informed decisions about their children's education, upbringing, and healthcare.

Further, Defendants did so in accordance with a blanket policy that did not take into consideration *any* individual circumstances. That is, rather than seeking to determine, on a case-by-case basis, whether such active concealment was warranted, the Defendants imposed an across-the-board policy of purposely hiding this exceptionally important information from parents. The fact that Defendants have offered no reason to believe that this policy is necessary for the achievement of a compelling government interest should *alone* be enough for Plaintiffs to prevail.

Unfortunately, the Supreme Court and this Circuit have advanced an apparently separate test for determining whether a fundamental right exists under the Fourteenth Amendment's Due Process Clause: the "shock the conscience" test. That test requires an individual to prove that a government action was so egregious, that it "shocks the conscience," before they can plead a substantive due process claim. But that test is riddled with confusion, particularly with respect to how it relates to the "history and tradition" test for recognizing fundamental rights under the Fourteenth Amendment. To avoid the illogic of having two separate tests for determining the existence of a fundamental right under the same constitutional clause depending on what statute an individual brings a claim under, a better approach would be to follow Justice Kennedy's concurring opinion in *County of Sacramento v. Lewis*, 523 U.S. 833, 857-58 (1998) (Kennedy, J., concurring),

explaining that the "history and tradition" test provides the starting point for the analysis—to determine the existence of a right—and that the "shock the conscience" test applies, for claims brought under Section 1983, for determining whether the challenged action violated that right.

As parental rights have been repeatedly upheld as fundamental, as there is no *individualized* government interest here that would counterbalance that right, and because the Defendants have shown a deliberate indifference to the rights and role of parents, Plaintiffs have pled a cognizable substantive due process claim.

A. The Supreme Court has long recognized a parent's right to control and direct the education, upbringing, and healthcare decisions of their children as "fundamental."

The Supreme Court has consistently recognized that the right of parents to control and direct the education, upbringing, and healthcare decisions of their children is one of the "liberty interests" protected by the Fourteenth Amendment's Due Process Clause. In fact, the Court has called it "perhaps the oldest of the fundamental liberty interests" recognized in constitutional law. *Troxel*, 530 U.S. at 65. It is this liberty interest, this fundamental right, that Plaintiffs assert here.

The Supreme Court first recognized parental rights as "fundamental" in 1923, characterizing it as the right "to control the education of their [children]." *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). It reaffirmed that right two years later, holding that "the liberty of parents and guardians" includes the right "to

direct the upbringing and education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). In *Pierce*, the Court further explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations." *Id.* at 535 (emphasis added). And in 1944, it reiterated that parental rights had a constitutional dimension, explaining, "the custody, care and nature of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The Court has repeatedly upheld parental rights over states' attempts to interfere with their choices. It has gone as far as to say that the "primary role of the parents in the upbringing of their children is now established *beyond debate* as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (emphasis added). It is clear, then, that this right is "objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal marks and citations omitted). That makes it clear that the right Plaintiffs assert is not only constitutionally protected, but is protected by the very highest degree of legal scrutiny.

Defendants' actions undoubtedly interfere with that right. Plaintiffs cannot exercise their right to direct the upbringing of their children, or fulfill their "high duty" to do so, if public schools actively conceal information about their children—information so central to a child's well-being that any conscientious parent would consider it of the gravest significance. Children certainly have certain rights of privacy, *Carey v. Population Svcs. Int'l*, 431 U.S. 678, 693 (1977), but that right is ordinarily served by confidentiality rules that apply on a case-by-case basis, and not by one-size-fits-all policies of actively concealing vital information, including in cases where there is no reason to believe a child would be endangered by the disclosure to the parents. The policy here, by contrast, directly interferes with parents' rights, by purposely hiding information from parents, about matters so central to a child's welfare that any diligent parent would want to know it.

Although the facts in *Phyllis v. Superior Court*, 183 Cal. App.3d 1193 (1986), were more egregious than the facts here, that case is still instructive. There, the school actively "engaged in a 'cover up'" of the fact that a girl had been sexually assaulted at the school. *Id*. at 1197. The court found that this violated not only the child's rights, but also those of the parent, because by "[taking] it upon themselves to withhold that information from [the parent]," the school made it impossible for the parent to exercise her right—and discharge her duty—to protect her daughter. *Id*. at 1196. Thus, the court found that the school had committed a

tort against the parent as well. Similarly, here, by concealing vital information about a child's sexual and psychological state, the Defendants are depriving the parents of their fundamental constitutional right to direct the upbringing of their children.

Plaintiffs have therefore stated "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); Fed. R. Civ. P. 12(b)(6). The court below then was wrong to dismiss Plaintiffs claims.

Unfortunately, this Court has previously stated that when an individual sues under 42 U.S.C. § 1983 alleging that the government violated a "substantive due process" right, the individual must not only show that the right exists, but also "must allege facts so extreme and egregious as to shock the contemporary conscience." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 59–60 (1st Cir. 2020) (internal marks and citation omitted). This two-tiered approach to the recognition of constitutional rights depending on the cause of action long *post*-dates the repeated recognition of parental rights under the Fourteenth Amendment's Due Process Clause. Further, given the types of cases in which the "shock the conscience" standard typically arises, it is arguable that it should apply only to cases where the asserted right is not already recognized. The current "shocks the conscience" standard is confusing and needs clarification.

As the Supreme Court has long recognized the right of parents to control and direct the education, upbringing, and healthcare decisions of their children, it makes little sense to employ the "shock the conscience" test which the Court created to constrain the recognition of *new* substantive due process rights and to ensure that the Constitution does not become a font of ordinary tort law. *Lewis*, 523 U.S. at 848 n.8. Thus, this Court should reverse the lower court's dismissal of Plaintiffs' claims.

B. Defendants' decision to hide information from parents demonstrates a deliberate indifference to the rights, duty, and role of parents that is sufficient to "shock the conscience."

Even if the "shock the conscience" test applies, Plaintiffs have pled sufficient facts to establish deliberate indifference on the part of Defendants at this stage. The "shock the conscience" test was devised to address cases in which plaintiffs challenge *executive* action as violating a substantive due process right; such plaintiffs must prove that "the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847, n.8. [3]

[3] One question that has yet been unaddressed is whether a policy approved by the school committee qualifies an *executive* act. Because the policy itself is actually a *legislative* act, the shock the conscience test should not apply at all. *Lewis*, 523 U.S. at 846 ("criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."); *Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) ("Lewis clarified that the

But the Supreme Court has yet to further explain this test or its interplay with the history and tradition test of *Glucksberg*. One reason is that the latter typically arises in cases that, like this one, involve not mere executive action, but legislation or policy.

What is clear is that the historical recognition of a right is relevant in determining whether an official's action is conscience-shocking. *Lewis*, 523 U.S. at 847, n.8. Here, it is undisputable that the Supreme Court has long recognized parental rights as protected by the Fourteenth Amendment's Due Process Clause. This should serve as the starting point for any analysis as Defendants should have been aware of its existence.

In determining whether a specific action shocks the conscience, this Circuit has said that "negligence, without more, is simply insufficient to meet the conscience-shocking standard while intent to injure in some way unjustifiable by any government interest is likely sufficient." *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010) (internal marks and citation omitted). Government actions that fall "between those two poles" may be a "closer call[]." *Id*. (internal marks and citation omitted). The reason is that in circumstances such as emergencies or police confrontations, where split-second decisions must be made,

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shocks-the-conscience test … governs all substantive due process claims based on executive, as opposed to legislative, action.").

courts do not want to second-guess officers in the field. Thus, plaintiffs must prove that an action was "undertaken maliciously and sadistically for the very purpose of causing harm." *Id.* But in situations where officials have plenty of time to engage in actual deliberations, to reflect and decide upon a course of conduct, the standard of responsibility is higher: "the defendant may be held to have engaged in conscience-shocking activity by exercising deliberate indifference." *Id*. (internal marks and citation omitted).

The historical recognition of the parent's fundamental right to oversee a child's upbringing helps resolve this case, which may be seen as falling between the two poles. Here, there is no evidence that any Defendant had anything *but* time to engage in actual deliberation. This was not a judgment call in the heat of the moment. This was a deliberate, long-term policy implemented after reflection and consideration of various options. Further, there is no indication that Defendants, when implementing this policy, gave *any* weight or consideration to the rights of parents to control and direct the education, upbringing, or healthcare decisions of their children. The policy includes no such evaluation. That not only proves deliberate indifference, but reveals that the policy—being a *blanket* policy of concealment in all such cases—lacks any form of tailoring to serve a government interest. This is not a case-by-case policy; it is a one-size-fits-all rule.

The Supreme Court has made clear, however, that if there is one area in which blanket rules are not appropriate, it is in the realm of child welfare. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court held it unconstitutional for the state to impose a blanket presumption that unmarried fathers were unfit for custody. The Court emphasized that the fundamental rights of parents are so significant that the state can interfere only for extraordinarily important purposes, such as protecting the best interests of the child, and only through a process that focuses on the facts and circumstances of a particular case. *See id*. at 656–57. Having a blanket policy of presumption instead "risks running roughshod over the important interests of both parent and child," and therefore violates the due process clause. *Id.* at 657.

Here, the district court found that the school had "a strong government interest in providing all students, regardless of age, with a school environment safe from discrimination based on gender identity." *Foote v. Town of Ludlow*, No. CV 22-30041-MGM, 2022 WL 18356421, at *7 (D. Mass. Dec. 14, 2022). There is no debating that the school has that responsibility under Massachusetts law not to discriminate against a child because of the child's gender identity. But it is also irrelevant, for two reasons. There was no evidence that the school *itself* was discriminating, or that it was engaged in some kind of remediation; rather, the school purported to be taking preventative steps to avoid the potential of a

discriminatory environment. That, however, cannot warrant a violation of the constitution. The government cannot excuse an unconstitutional act by claiming a desire to avoid potential future discrimination.

In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court found that a city illegally discriminated against employees when it refused to grant them promotions based on their race. The city explained that it did this because too many white employees had qualified for promotions, based on the tests the city used, and the city therefore feared that if it granted them the promotions, it would be sued on a disparate-impact theory. *Id*. at 585. The Court, however, found that "[f]ear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." *Id.* at 592. For the same reason, the school's baseless assertion that it must conceal information about children from their own parents in order to avoid the risk of being sued for discrimination cannot entitle the Defendants to *actually violate* constitutional rights. The government cannot use its fear of potential liability under one law to allow it to consciously and intentionally violate another.

Here, the district court did not resolve whether state law requires a school to comply with a student's wish to assert a different gender identity, or how that compares with a parent's wish that the child be known by his or her given name, etc. Instead, the court simply accepted the governments' assertion, and held that

the school's concealment policy "was consistent with Massachusetts law and the goal of providing transgender and gender nonconforming students with a safe school environment." *Foote*, 2022 WL 18356421, at *8.

Moreover, the court made no attempt to balance the state's goals with the fundamental rights of parents to control the education, upbringing, and healthcare decisions of their children. As a fundamental right, that right is subject to strict scrutiny. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring); *see also Kenyon v. Cedeno-Rivera*, 47 F.4th 12, 24 (1st Cir. 2022) ("generally speaking, under the federal Due Process Clause, a state action will be reviewed for strict scrutiny only where it interferes with a fundamental right."). The court did not consider the need for a blanket policy that overrides the wishes of parents. It did not consider the age of the children involved. It simply accepted the blanket policy and actions in accordance with that policy as sufficiently important. That would barely suffice under rational basis, let alone strict scrutiny. As *Ricci* made clear, in the absence of any "strong basis in evidence" that the government would be liable for discrimination, the government cannot justify unconstitutional acts. 557 U.S. at 592. The district court's failure to even weigh these various interests establishes precisely the rule that *Ricci* rejected: that "[f]ear of litigation alone" can entitle the government to disregard constitutional boundaries. *Id.* at 592.

In fact, Massachusetts anti-discrimination law is simply irrelevant with respect to parents' right to know about a school's actions with respect to their children—or its concealment of facts relating to the welfare of their children. Such concealment obviously goes beyond affecting the rights of the child and implicates the *parents'* rights—and ability—to adequately direct and control the education, upbringing, and healthcare decisions of their children. *Cf. Phyllis*, 183 Cal. App.3d at 1196–97. While non-discrimination laws *might* implicate the school's decision to comply with the request, they do not implicate the right of *parents* to simply know about that decision. A school policy of concealing information can be justified, if at all, only by a case-by-case determination, not a blanket policy. *Stanley*, 405 U.S. at 656–57.

II. *Parker v. Hurley* is irrelevant to the claim that Defendants violated Plaintiffs' parental rights by not telling them of the decision to honor their children's asserted gender identity.

In dicta, the lower court addressed whether qualified immunity would protect the Defendants had the Plaintiffs pled a cognizable substantive due process claim. In coming to this determination, the court below relied on the First Circuit's 2008 decision in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). The court explained that under that decision, "Plaintiffs' right to direct the upbringing of their children allows them to 'choose between public and private schools,' but does not give them a right 'to interfere with the general power of the state to regulate

education.'" *Foote*, 2022 WL 18356421, at *9 (citing *Parker*, 514 F.3d at 102). But this mischaracterizes Plaintiffs' claims.[4]

Parents are not attempting to dictate how the state runs its school system. They are instead demanding that the state not actively interfere with their right to direct the upbringing of their children by actively concealing information about their children. A parent's right to oversee the education, upbringing, and healthcare decisions of their children *necessarily* includes a right not to have the state actively hide from them vital information about their children's welfare. This is actually the basic premise of the *Parker* rule. The *Parker* rule—that public schools must be free from unreasonable interference to do their job—is not based on the (false) notion that children are "mere creature[s] of the state," *Pierce*, 268 U.S. at 535. Rather, it is based on the idea that public schools must be given room to operate, and that if parents object to the way they operate, the parents have the freedom to withdraw their children from schools they think are doing a bad job, and send their children elsewhere. The *Parker* court underscored the fact that the parents in that case "have chosen to place their children in public schools," and that they "were

[4] Additionally, the decision rests on an unsupported assumption: that affirmation of a child's asserted gender identity is part of "education." The district court below made no attempt to explain or justify how this was a part of a school's large educational mission within the meaning of *Parker*. The court below simply assumed as much. But the question is not an easy one and one the district court and parties should address on remand.

not precluded from meeting their religious obligation[s]" by, for example, "discuss[ing] the [educational] material and subject matter with their children," or even sending their children to private schools. 514 F.3d at 100, 104, 106. But *purposeful concealment of information from parents* makes it impossible for them to take any of these routes. A parent cannot discuss the subject matter with a child if the school hides the subject matter from the parent. And a parent cannot know if a public school is the right choice for their children if the school can engage in a cover-up. In short, the policy which requires school officials to *lie to parents* falls well outside the circle of discretion that concerned the *Parker* court.

Further, the affirmative hiding of information from parents does not even implicate education. In *Parker*, Plaintiffs sought to exempt their young children from the classroom reading of books that affirmed gay marriage. Plaintiffs there sought a requirement that they be given the opportunity to have their children removed from their classroom when a book that showed gay marriage in a positive light was read. This Court held that that was an attempt to interfere with the state's authority to prescribe a curriculum. While some of the Plaintiffs' claims here *might* be so described, the Plaintiffs' active concealment claims cannot. The right of parents not to have the state purposely hide crucially important information from them about their children's gender identity from them cannot be rationalized under *Parker*, and conflicts with the basic premise that makes *Parker* a viable approach

to the law—namely, that, absent some proof of abuse (which is precluded by the one-size-fits-all nature of the policy at issue here), parents remain the ultimate decision-makers with respect to their children's welfare. They cannot discharge that duty if the state lies to them.

CONCLUSION

Parents have a fundamental right to direct and control the education, upbringing, and healthcare of their children. That should make the "shock the conscience" test unnecessary: the sole questions should be, is there a constitutional right and was the government's action adequately tailored to advance an interest sufficiently important to warrant intruding upon that right?[5] But even if the "shock the conscience" test applies, it was plainly satisfied here. Withholding information of this importance from parents, in the absence of any evidence of a risk that disclosure might result in the parent abusing the child, displayed an indifference to parental rights that is not balanced out by any state interest.

[5] In holding a tax collector liable for the illegal seizure of goods, Justice Story explained "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress" and that it was outside the providence of the Court to determine whether a government official *deserved* to be held liable for their actions. *The Apollon*, 22 U.S. 362, 367 (1824).

The court decision below should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,746 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

3) The text of the electronic copy of this brief filed using the Court's CM/ECF system is identical to the text in the paper copies filed with the Clerk.

Date: March 20, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Adam C. Shelton*
Adam C. Shelton