NO. 24-1509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMBER LAVIGNE,
Plaintiff-Appellant,

v.

GREAT SALT BAY COMMUNITY SCHOOL BOARD, SAMUEL ROY, in his official capacity as a social worker at the Great Salt Bay Community School; KIM SCHAFF, in her official capacity as the Principal at the Great Salt Bay Community School; LYNSEY JOHNSTON, in her official capacity as the Superintendent of Schools for Central Lincoln County School System; JESSICA BERK, in her official capacity as a social worker at the Great Salt Bay Community School,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maine
The Honorable Jon D. Levy
Case No. 2:23-cv-00158-JDL

BRIEF OF TAMMY FOURNIER, A WISCONSIN MOTHER, AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

Amicus curiae is Tammy Fournier, a mother in Wisconsin. When Tammy and her husband first learned that their daughter—then 12 years old—had begun to struggle with anxiety and depression and to question her gender, the couple was understandably concerned. They immediately started researching how best to help her. Based on their research, the Fourniers decided that it would harm their daughter to treat her as a boy—in particular, to refer to her with a masculine name and male pronouns. Doing that would likely perpetuate her gender confusion, not resolve it. So they instructed her school district to refer to her only by her legal name and with female pronouns.

The district refused. Notwithstanding the Fourniers' instructions, it told them district policy required it to treat their daughter as a boy upon her request. In response, Tammy and her husband withdrew their daughter from the district. Under their care, their daughter soon decided she would no longer ask others to refer to her as a boy. In a new school district, she has dramatically improved.

Last year, a Wisconsin state trial court concluded that the Fourniers' former school district had violated their fundamental rights as parents. *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL

[*] No counsel for a party authored this brief in whole or in part; no one, other than *amicus* and her counsel, made a monetary contribution for its preparation or submission; and all parties have consented to its filing.

6544917, at *5–8 (Wis. Cir. Ct. Oct. 3, 2023). It enjoined that school district "from allowing or requiring staff to refer to students using a name or pronouns at odds with the student's biological sex, while at school, without express parental consent." *Id.* at *10. But Tammy still worries. Her daughter's new school district has a policy regarding the use of names and pronouns similar to the former school district's policy.

Parents around the Nation share those concerns. Many other school districts have policies empowering school employees to decide whether to treat children as the opposite sex. These policies often don't require parental notification or consent; in fact, they often prohibit disclosing the school district's decisions to a minor student's parents without the student's permission.

Reliable information is the raw material for good decisions—about parenting no less than any other topic. Without it, parents can't exercise their "primary role … in the upbringing of their children," a role long "established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). A fundamental "right to make decisions about the education of one's children" or other important childrearing decisions means little if schools can simply refuse to give parents the information they need to make those decisions. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022).

Tammy would have a much different story to tell if the school district had first discovered her daughter's struggles and withheld information from Tammy about those struggles. In that alternate story, the district would have robbed a mother of the chance to help her daughter at a pivotal moment in the girl's life. Grateful that the government did not stand between her and important information about her daughter, Tammy supports Plaintiff's right as a parent to receive information about how her public school district is treating her children. Because the district court did not properly analyze that right, she respectfully asks this Court to reverse and remand for further proceedings.

ARGUMENT

I. Parental rights are fundamental, so strict scrutiny applies to state action infringing them.

When a plaintiff claims the government has violated an unenumerated right protected by the Fourteenth Amendment, the analysis has two steps: First, a court asks whether the asserted right is one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up). Second, if the challenged conduct "interferes with a fundamental right," then "generally speaking," it "will be reviewed for strict scrutiny." *Kenyon v. Cedeno-Rivera*, 47 F.4th 12, 24 (1st Cir. 2022); *see Dep't of State v.*

Muñoz, No. 23-334, 2024 WL 3074425, at *7 (June 21, 2024) (articulating that certain implied fundamental rights trigger strict scrutiny).

Although, the district court used the word "fundamental" to describe parental rights, it focused its entire opinion on *Monell* liability. *See* Order re Mot. to Dismiss 5, ECF No. 26 ("MTD Order"). The court failed to properly analyze Plaintiff's parental-rights claim and bypassed any analysis on the proper scrutiny afforded by the Supreme Court to parental rights altogether, thereby failing to acknowledge the century of constitutional precedent—buttressed by centuries more of common-law history—supporting the fundamental nature of a parental-rights claim. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality) (tracing that precedent back to *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *see also* 1 William Blackstone, *Commentaries on the Laws of England* *446–53 (describing the rights of parents at common law), https://bit.ly/3leX7za. In so doing, the district court failed to analyze whether the policy Plaintiff challenged is narrowly tailored to serve any compelling state interest, as required by strict scrutiny. *Glucksberg*, 521 U.S. at 721. Instead, it insisted that it "need not" reach the parental rights question based on its conclusion that the Complaint failed to plead facts plausible to "support municipal liability under section 1983." *See* MTD Order 8.

This Court should confirm that parents' rights are fundamental. And it should reaffirm that state action infringing parents' rights receives strict scrutiny, as it would if it infringed any other fundamental right. Therefore, this Court should reverse.

A. Because parental rights are deeply rooted in our Nation's history and tradition, the Supreme Court has long held that the Due Process Clause protects them.

This lawsuit implicates Plaintiff's right to make decisions about how best to raise her child. The fundamental nature of that right—the right to "direct the education and upbringing of [her] children"—is well settled. *Glucksberg*, 521 U.S. at 720.

Over 25 years ago in *Glucksberg*, the Supreme Court reaffirmed that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* Most relevant here, the Court *specifically included* the right to "direct the education and upbringing of one's children" on its list of unenumerated fundamental rights. *Id.* Because that right is fundamental, the government may not infringe it "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721 (cleaned up).

Three years after *Glucksberg*, the Supreme Court reaffirmed that parents have a "fundamental liberty interest[]" in the "care, custody, and control of their children." *Troxel*, 530 U.S. at 65 (plurality); *see id.*

at 80 (Thomas, J., concurring) (agreeing with "plurality that [the] Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case"). That liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Id.* at 65 (plurality). And as the plurality expressly acknowledged, the Due Process Clause "provides heightened protection against government interference with [such] fundamental rights and liberty interests." *Id.* (citation omitted); *accord id.* at 80 (Thomas, J., concurring) (endorsing "strict scrutiny" as the correct test for claims that government action infringes the "fundamental right of parents to direct the upbringing of their children").

Relying on *Glucksberg* and *Troxel*, this Court has held, time and again, that "parents have a fundamental interest in their relationships with their children." *Walsh v. Walsh*, 221 F.3d 204, 216 (1st Cir. 2000). Echoing *Troxel*, this Court said over 20 years ago that "[a] parent's liberty interest in the care and custody of her child was established long before the facts of this case arose." *Suboh v. Dist. Att'y's Off. of Suffolk Dist.*, 298 F.3d 81, 93 (1st Cir. 2002).

Because the district court's analysis focused entirely on the scope of municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), it didn't discuss *Glucksberg* or *Troxel*—or, for that matter, this Court's repeated application of their clear teachings about parental rights. MTD Order 8–9. The Court's decision in *Dobbs*

reaffirmed yet again that parental rights are fundamental. 597 U.S. at 256. *Dobbs* relied on the *Glucksberg* framework to make clear that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history." *Id.* at 300. In reaching that holding, it also distinguished abortion from other rights that do in fact have a basis in "[o]ur Nation's historical understanding of ordered liberty." *Id.* at 256. Among those rights, the Supreme Court included "the right to make decisions about the education of one's children." *Id.*

In reversing the district court's *Monell* analysis, this Court should make clear that, on remand, the district court must treat Plaintiff's parental rights as fundamental.

B. Like other fundamental rights protected by the Due Process Clause, parental rights trigger strict scrutiny.

Once the fundamental nature of the right is established, the standard of review clicks into place: "[G]enerally speaking, under the federal Due Process Clause, a state action will be reviewed for strict scrutiny only where it interferes with a fundamental right; otherwise, it is reviewed under the more lenient rational basis standard." *Kenyon*, 47 F.4th at 24. As the Supreme Court has said, the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the

infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Other federal and state courts regularly discuss how strict scrutiny protects fundamental rights, including parental rights. Federal courts hold that "[g]overnment actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny." *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000); *see id.* at 574–75 (including the right "to direct the education and upbringing of one's children" in a "list of fundamental rights"); *accord, e.g.*, *Stewart v. City of Okla. City*, 47 F.4th 1125, 1138 (10th Cir. 2022) (recognizing parental rights as fundamental and acknowledging this would trigger strict scrutiny but for the plaintiffs' "fail[ure] to introduce any evidence of a direct and substantial burden on any family or marital interests"); *Arnold v. Bd. of Educ. of Escambia Cnty.*, 880 F.2d 305, 313 (11th Cir. 1989) ("[T]he Constitution protects a private realm of family life which the state cannot enter without compelling justification."), *unrelated holding abrogated*, *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 838 (11th Cir. 2004).

The Third Circuit has even applied strict scrutiny to a claim similar to Plaintiff's claims. In *Gruenke v. Seip*, a swim coach violated the rights of a girl's parents by not notifying them before forcing her to undergo a pregnancy test, though the coach received qualified immunity. *See* 225 F.3d 290, 306–07 (3d Cir. 2000). But *Gruenke* also

relied on the coach's infringement of the parents' rights, not just the student's. The court said, "a school's policies might come into conflict with the fundamental right of parents to raise and nurture their child." *Gruenke*, 225 F.3d at 305. "But when such collisions occur, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest." *Id.*

Because of *Gruenke*, "a reasonable defendant" in the Third Circuit is now "on notice" that failing to notify parents of important information about their child "would—absent a compelling interest—plausibly infringe" parental rights. *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295, 332 (W.D. Pa. 2022), *reh'g denied*, 675 F. Supp. 3d 551, 576-77 (W.D. Pa. 2023). Plaintiff's claims that Defendants here committed a similar violation of her parental rights should also receive strict scrutiny.

State courts, like their federal counterparts, routinely apply the rule that "[w]here a . . . fundamental right is at issue, the state action must satisfy strict scrutiny." *Adoption of Riahleigh M.*, 202 A.3d 1174, 1184 (Me. 2019); *see also Pitts v. Moore*, 90 A.3d 1169, 1174 (Me. 2014) ("When the State does interfere with the fundamental right to parent, we must evaluate that interference with strict scrutiny. . . ."). For example, *Blixt v. Blixt* relied on *Troxel* to apply strict scrutiny to a parental-rights claim. 774 N.E.2d 1052, 1059 (Mass. 2002). Indeed, "the majority of courts" to apply *Troxel* have understood it to require strict

scrutiny. *In re A.A.L.*, 927 N.W.2d 486, 494 (Wis. 2019) (collecting cases from state courts of last resort); *accord Jones v. Jones*, 359 P.3d 603, 610 n.10 (Utah 2015) ("Other courts have reached similar conclusions."); *Hiller v. Fausey*, 904 A.2d 875, 885, 885 n.18 (Pa. 2006) (same).

Because parental rights are fundamental, a robust consensus of federal and state authority supports applying strict scrutiny here. *Cf. Irish v. Fowler*, 979 F.3d 65, 76 (1st Cir. 2020) (holding that "a robust consensus of cases of persuasive authority" can show a right is clearly established for qualified-immunity analysis (cleaned up)).

C. Parental rights trigger strict scrutiny even when asserted against school officials.

The district court failed to follow the lead of the many federal and state courts that have held that fundamental rights in general—and parental rights in particular—trigger strict scrutiny.

According to Defendants, before determining whether Plaintiff has invoked a fundamental right, the district court needed to determine whether Defendants' conduct was "truly outrageous, uncivilized, and intolerable, and the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." Mot. to Dismiss 10, ECF No. 12 (quoting *Harron v. Town of Franklin*, 660 F.3d 531, 536 (1st Cir. 2011)). But that test was devised to hold executive officers—usually police officers—accountable for "conduct that shocks the conscience," no matter whether it implicates a fundamental right.

Rochin v. California, 342 U.S. 165, 172 (1952); *see* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 319 (2010) ("[C]onscience-shocking behavior that deprives a person of liberty itself violates substantive due process.").

In *County of Sacramento v. Lewis*, for example, the Supreme Court considered "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." 523 U.S. 833, 836 (1998). Despite following only a year after *Glucksberg*, *Lewis* never asked whether the police officer's deliberately or recklessly indifferent action violated a fundamental right; the term "fundamental rights" appears only in a concurrence. *See* 523 U.S. at 860–61 (Scalia, J., concurring in the judgment). *Lewis* asked only whether the high-speed chase in question was an "abuse of power" that "shocks the conscience." *Id.* at 846 (majority opinion).

In other words, the shocks-the-conscience test operates to *expand* executive officers' potential liability under the Due Process Clause, not *limit* it. So when suing to challenge executive action—in contrast to legislative action like the policy that Plaintiff challenges—under the Due Process Clause, a plaintiff's failure to invoke a fundamental right does not necessarily consign the claim to "the more lenient rational basis standard." *Kenyon*, 47 F.4th at 24. A plaintiff can still obtain more

searching constitutional review if the officer's conduct shocks the conscience. *Lewis*, 523 U.S. at 846–47.

Just last month, the Supreme Court reaffirmed that fundamental rights usually trigger strict scrutiny. *Muñoz*, 2024 WL 3074425, at *7. In that case, Sandra Muñoz asserted a fundamental, unenumerated right to live with her noncitizen spouse in the United States. *Id.* at *2. The Court reasoned that such a right "is fundamental enough to be implicit in 'liberty;' but, unlike other implied fundamental rights, its deprivation does not trigger strict scrutiny." *Id.* at *2. In so doing, the Court "[e]mphasiz[ed] that substantive due process rights like the right to marriage usually trigger strict scrutiny" and the State would have been required to articulate how its actions were narrowly tailored to serve a compelling state interest. *Id.* at *18 (Sotomayor, J., dissenting). Because Muñoz could not clear *Glucksberg*'s second step, the Court determined that it need not apply strict scrutiny. *Id.* at *2.

This Court's precedent likewise does not support the district court's failure to take account of the fundamental nature of Plaintiff's asserted rights. Consider *Suboh*, where this Court reviewed a parental-rights claim under the procedural and substantive protections of the Due Process Clause brought against a police officer and an assistant district attorney, among others. *See Suboh*, 298 F.3d at 85, 91. Although the Court "focus[ed] [its] analysis primarily on the procedural aspect," *id.* at 91, it described "[t]he constitutional right at issue [t]here" as "the

right to procedural and substantive due process before the state takes a child away from his or her parent," *id.* at 93.

Suboh began by identifying the purported constitutional right at stake; namely, "the interest of parents in the care, custody, and control of their children." *Id.* at 91 (cleaned up). It then noted that "[t]his liberty interest is protected both by the substantive component of the Due Process Clause, which constrains governmental interference with certain fundamental rights and liberty interests," and the procedural component of that clause. *Id.* After holding that "a clearly established constitutional right [was] at stake," *id.* at 94, the Court determined that the assistant district attorney was entitled to qualified immunity, while the police officer was not, *id.* at 95, 97.

Although *Suboh* was decided four years after *Lewis*, *Suboh* nowhere used the term "shocks the conscience" and cited *Lewis* only for the qualified-immunity standard. *See id.* at 90. And *Suboh* did not suggest that the defendants' identities as executive officers affected the analysis of the parental-rights claim in that case. *Id*. at 90–93.

Neither *Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010), nor *Abdisamad v. City of Lewiston*, 960 F.3d 56 (1st Cir. 2020), considered claims that an officer had violated a person's parental rights or another fundamental right. Like the Supreme Court in *Lewis*, this Court in those cases was discussing the standard for liability of an officer even in the *absence* of a fundamental rights claim. *E.g.*, *Abdisamad*, 960 F.3d at

60; *Martinez*, 608 F.3d at 64–66. Because this Court did not consider the question of how to analyze a fundamental-rights claim in *Abdisamad*, the district court was wrong to treat it as dispositive of Plaintiff's fundamental rights claim here. MTD Order 9, 13, 17, 22 n.13; *see* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1263 (2006) ("Among the most common manifestations of disguised dictum occurs where the court ventures beyond the issue in controversy to declare the solution to a further problem—one that will arise in another case, or in a later phase of the same case.").

Following the district court's reading of *Abdisamad* would inject a new complication into an already brewing circuit conflict. The Tenth Circuit, for example, has discussed "two strands of the substantive due process doctrine." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008). "One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." *Id.* According to the Tenth Circuit, "[b]y satisfying either the 'fundamental right' or the 'shocks the conscience' standards, a plaintiff states a valid substantive due process claim under the Fourteenth Amendment." *Id.*; *but see Dawson v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 732 F. App'x 624, 634 (10th Cir. 2018) (Tymkovich, C.J., concurring) ("Our Circuit has settled on the following solution: if the case involves a *legislative act*, only the 'rights' strand

applies." (emphasis in original)). But here, the district court refused to engage in either analysis. Instead, it decided to hang its hat on *Abdisamad*'s analysis of municipal liability as a viable third option to punt on engaging in a fundamental-rights analysis.

There can be no doubt that Plaintiff has invoked a fundamental right. *Troxel*, 530 U.S. at 65 (plurality); *Glucksberg*, 521 U.S. at 720. And courts routinely apply strict scrutiny to fundamental rights claims. *See Kenyon*, 47 F.4th at 24. Because the district court failed to acknowledge that standard this Court should reverse.

II. At a bare minimum, parents have a fundamental right to receive notification that their child's school has decided to counsel and treat their child for gender dysphoria.

This case hinges on a narrow question: Does a parent's fundamental right to direct the upbringing, education, and healthcare of her child include the right to receive notification from school officials that they have decided to counsel and treat the child as the opposite sex?

The answer to that question must be "Yes." And it proceeds from two, complementary principles. (1) Minor children are not capable of making certain decisions—especially healthcare decisions—without a parent's consent. (2) Parents, who are presumed to act in their children's best interests, are entrusted to make such decisions on their children's behalf. Both these principles were well established at

common law, are deeply embedded in American statutory law, and have been recognized repeatedly by the Supreme Court. "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.*

Unless this Court ensures that Defendants answer for their treatment of Plaintiff and her daughter, schools would be free to conceal information from parents—even on critical topics like a child's mental health or academic performance. That would mean parents like Tammy Fournier, *amicus curiae* here, might never know about their children's struggles with "matters of the greatest importance," like their identity as young men or women. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005).

That explains why, even today, minors cannot unilaterally consent to most forms of medical and mental healthcare. *E.g.*, Mass. Gen. Laws ch. 112, § 12F (outlining certain exceptions to general rule against minors consenting to healthcare); *accord, e.g.*, Cal. Fam. Code § 6922; 13 Del. Code § 707; 22 Me. Rev. Stat. § 1503; N.Y. Pub. Health Law § 2504. Included within parents' fundamental right and duty to prepare their children for life's challenges and obligations is the duty "to

recognize symptoms of illness and to seek and follow medical advice." *Parham*, 442 U.S. at 602. For centuries, our laws have operated based on the assumption "that natural bonds of affection lead parents to act in the best interests of their children." *Id.* (citing Blackstone and Kent).

Importantly, that has remained true despite the unfortunate reality that *some* parents may at times act against the best interests of their children. *Id.* "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. And "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Id.* "Parents can and must make those judgments." *Id.* And "[n]either state officials nor federal courts are equipped to review such parental decisions." *Id.* at 604.

All of that applies with equal force here. The World Professional Association for Transgender Health (WPATH) is a transgender advocacy organization that has produced guidelines for medical and surgical interventions related to gender. *See generally* E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. of Transgender Health S1 (2022),

https://bit.ly/3JkBDc7. Those guidelines define "gender dysphoria" as the "distress or discomfort that may be experienced because a person's gender identity differs from that which is physically and/or socially attributed to their sex assigned at birth." *Id.* at S252. And a "gender social transition in prepubertal children," like Defendants' use of new chosen names and pronouns for students who identify as transgender, is a "form of psychosocial treatment that aims to reduce gender dysphoria" in children. Kenneth J. Zucker, *Debate: Different Strokes for Different Folks*, 25 Child and Adolescent Mental Health 36 (2020).

Many studies have found that the vast majority of children (roughly 80–95%) who experience gender dysphoria during childhood ultimately find comfort with their biological sex as they enter adulthood; such children are said to "desist." WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 11 (v.7 2011), https://bit.ly/2Qfw2Lx. At the same time, children who *have* transitioned report significantly higher rates of suicidal ideation, suicide attempts, and suicide. *See* Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, 142 Pediatrics 4, 1–3 (2018), perma.cc/3Q5B-CCKG. A heartbreaking 50.8% of adolescents in the study who identified as "female to male transgender" reported having attempted suicide. *Id.* By comparison, 27.9% of all respondents who were "not sure" about their gender identity reported having

attempted suicide, and 17.6% of female respondents who did not identify as transgender or questioning reported the same. *Id.*

Make no mistake, though the use of cross-gender names and pronouns is often labeled "social transition," *see Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1208 (S.D. Cal. 2023) (citation omitted), their use relates to mental health. Granting summary judgment to Tammy and her husband in a lawsuit against their daughter's former school district, a Wisconsin trial court recently explained this relationship. Based on undisputed expert evidence, the court found that "[s]ocial transitioning is a 'powerful psychotherapeutic intervention' that likely reduces the number of children desisting from their transgender identity and can lead them to using puberty blockers and cross-sex hormones, which carry known risks." *Kettle Moraine*, 2023 WL 6544917, at *2.

Given the serious implications of treating a child as the opposite sex, parents require information from schools about this issue. As summarized by *Kettle Moraine*, a large body of scientific evidence establishes the need for parental involvement in an important decision like whether to treat a child as the opposite sex. *Id.* at *1–2.

One was Dr. Stephen B. Levine, former WPATH committee chairman. Dr. Levine detailed the findings of one "cohort study by authors from Harvard and Boston Children's Hospital" finding that youth and young adults who self-identified as transgender "had an elevated risk of depression (50.6% vs. 20.6%) and anxiety (26.7% vs.

10.0%)," and a "higher risk of suicidal ideation (31.1% vs. 11.1%), suicide attempts (17.2% vs. 6.1%), and self-harm without lethal intent (16.7% vs. 4.4%) relative to the matched controls." Expert Aff. of Dr. Stephen B. Levine, MD, at 45, *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650 (Wis. Cir. Ct. filed Feb. 3, 2023), https://bit.ly/4bzMoU5.

Summarizing the results of numerous studies, Dr. Levine warned that, "as we look ahead to the patient's life as a young adult and adult, the prognosis for the physical health, mental health, and social well-being of the child or adolescent who transitions to live in a transgender identity is not good." *Id.* at 47. "Meanwhile, *no studies* show that affirmation of pre-pubescent children or adolescents leads to more positive outcomes" later in life compared to other forms of ordinary therapy. *Id.* (emphasis added).

The other expert witness in *Kettle Moraine* was Dr. Erica E. Anderson. For years, Dr. Anderson's clinical psychology practice "has focused primarily on children and adolescents dealing with gender-identity related issues," many of whom "have transitioned—either socially, medically, or both—to a gender identity that differs from their natal sex." Expert Aff. of Dr. Erica E. Anderson, Ph.D. at 1, *T.F. v. Kettle Moraine Sch. Dist.*, No 2021CV1650 (Wis. Cir. Ct. filed Feb. 3, 2023), https://bit.ly/4bUY3wZ.

That long clinical record led Dr. Anderson to emphasize how potentially harmful it can be for school districts not to notify parents

before treating students as the opposite sex. Parents are "a critical part of the diagnostic process to evaluate how long the child or adolescent has been experiencing gender incongruence" and to predict "how likely those feelings are to persist." *Id.* at 27. As a result, "parental involvement is a necessary prerequisite for any kind of treatment by a medical professional, whether for gender dysphoria or any coexisting mental-health condition." *Id.* at 29. Therefore, Dr. Anderson concluded, "[a] school policy that involves school adult personnel in socially transitioning a child or adolescent without the consent of parents or over their objection violates widely accepted mental health principles and practice." *Id.* at 32.

Against this backdrop, Defendants' policy, included in its Transgender Student Guidelines, of counseling and treating students for gender dysphoria *without ever notifying* their parents infringes parents' fundamental right to "direct the education and upbringing of [their] children." *Glucksberg*, 521 U.S. at 720. As shown above, "[t]he common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring and dissenting).

By denying parents their right even to be notified about the school's decision to intervene in their child's mental health, the Transgender Student Guidelines here closely resemble the policy at

issue in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993). There, the reviewing court held that a "plan to dispense condoms" to minor students "without the consent of their parents or guardians, or an opt-out provision," violated parents' fundamental rights. *Alfonso*, 606 N.Y.S.2d at 261.

"Through its public schools," New York "made a judgment that minors should have unrestricted access to contraceptives, a decision which is clearly within the purview of the petitioners' constitutionally protected right to rear their children, and then [had] forced that judgment on them." *Id.* at 266. As a result, after finding the plan failed strict scrutiny, the reviewing court correctly held that it "violate[d] the petitioners' constitutional due process rights to direct the upbringing of their children." *Id.* at 267.

As the court explained, "[a]t common law it was for parents to consent or withhold their consent to the rendition of health services to their children." *Id.* at 262. And distributing condoms was not "an aspect of education in disease prevention." *Id.* at 263. It was a "means" of disease prevention. *Id.* As a result, *Alfonso* was not about parents complaining that their children were being exposed to ideas they found offensive. *Id.* at 266. It was about parents "being forced to surrender a parenting right," namely the right to "influence and guide the sexual activity of their children without State interference." *Id.* Thus, "[n]o

matter how laudable its purpose," excluding parents "impermissibly trespass[ed]" on their fundamental rights. *Id.* 265.

If a school cannot dispense condoms without notifying parents, then surely it cannot provide a minor child with multiple chest binders without parental notification and consent. The school is sending students down a path that could lead to lifelong infertility, mental illness, and even suicide—yet insisting that parents have no right to know.

To be clear, Plaintiff does not merely object to her daughter being taught ideas she disagrees with about sex and gender identity. The parts of the policy she opposes are not merely "an aspect of education." *Id.* at 263. Instead, she objects to the "means" Defendants have chosen to socially transition her daughter to a different gender identity without her knowledge or consent. *Id.*

As in *Alfonso*, the solution here is simple: the school's policy "can go forward without interfering with the [plaintiff's] rights simply by allowing parents who are interested in providing appropriate guidance and discipline to their children to 'opt out' by instructing the school not to [socially transition] their children without their consent." *Id.* at 267. The Constitution demands nothing less.

CONCLUSION

This Court should reverse the judgment below and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word-count limitation of Fed. R. App. P. 29(a)(5) because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 5,377 words and does not exceed 6,500 words.

This amicus brief also 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 a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2024, I electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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