UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1509

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

APPELLEES' REPLY TO SUPPLEMENTAL BRIEF OF APPELLANT

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Defendant–Appellee Great Salt Bay Community School Board ("GSB" or the "District") submits this reply brief in response to Plaintiff-Appellant Amber Lavigne's Supplemental Brief and this Court's Order, dated February 21, 2025, directing supplemental briefing addressing the impact of *Foote v. Ludlow Sch. Comm.* 128 F.4th 336 (1st Cir. 2025) on the disposition of this case.

ARGUMENT

A. Lavigne Has Not Plausibly Alleged Coercion or Restraint

Lavigne claims the withholding policy that she challenges is an official, unwritten policy "pursuant to which GSB employees withheld information from her about decisions made and actions taken that directly affected the mental health and physical well-being of that child." Lavigne's Supp. Br. at 9. Lavigne does not allege in the Complaint that such actions did in fact affect the mental health or physical wellbeing of her child; however, she specifies now that the actions about which she was not informed included "giving a chest-binder to her child, calling her child by a different name and pronoun, . . . and even counseling the child not to notify her of these actions." *Id*.

To the extent Lavigne has alleged such an official policy under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), Lavigne's singular challenge to this so-called "withholding policy" is akin to the parents' challenge against the non-disclosure protocol in *Foote*, 128 F.4th at 352-356 (asserting, in their third

claim, a restriction of substantive due process rights based on the school's policy of nondisclosure to parents of information about students' expression of gender). Indeed, Lavigne claims harm only as a result of having not been affirmatively and proactively informed by GSB about the allegedly withheld information. Yet, *Foote* makes clear that, absent "restraining conduct by the government," such a claim does not result in constitutional harm. *Id*. at 354 ("A cognizable parental rights claim under the Due Process Clause . . . generally requires restraining conduct by the government, not mere nondisclosure of information.").

Lavigne's attempt now to cast GSB's purported "withholding policy" as a policy of concealing information about "school action" does not create a distinction from *Foote*. Like the complaint in *Foote*, "there are no allegations of coercive conduct towards" A.B. *Id.* at 353. Lavigne furthermore has not alleged that any information was concealed from her given that she has not alleged that she requested any of the purportedly withheld information. Lavigne's assertion of "coercion" now, for the first time, based on Maine law that requires that children under the age of seventeen attend school, Lavigne's Supp. Br. at 11, cannot create coercion where there otherwise is none. As Lavigne acknowledges and as she alleges she did here, parents remain free to choose to educate their children in alternative ways, including through home instruction or through private school. 20-A M.R.S. § 5001-A.

B. Lavigne's Attempt to Distinguish Her Fundamental Right Does Not Create an Infringement on Her Fundamental Right to Parent

Although Lavigne still asserts her fundamental right "to direct the education and upbringing of her child," Lavigne's Supp. Brief at 4 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)), she tries to distinguish that right from that asserted by the parents in *Foote*, claiming that her right is more particularly the "right to educate her child," *id*. at 4. Specifically, she claims that the so-called "withholding policy" implicates "her right to decide how to educate her child" *id*. at 2, explaining that the alleged withholding of information deprived her of the ability "to assess whether GSB remained the best educational option for her child" and "to exercise her constitutional right to make informed decisions about her child's education," *id*. at 3-4. In essence, Lavigne argues that her fundamental right is implicated because, absent information *from the school* about her child's gender identity, she claims she cannot make informed decisions about where to educate her child. *Id*. at 8.

Neither *Foote* nor the facts alleged in the Complaint support Lavigne's framing of the infringement that she alleges on her fundamental right. Indeed, Lavigne did not, as she now says, learn about her child's gender identity by "happenstance . . . through another source," *id*. at 4, 8; rather, she learned such information from her own child. She alleges that she found a chest binder while she was cleaning A.B.'s room and then questioned A.B. about it, at which point she learned that A.B. had asked to be referred to by a different name and pronouns at

school. App. 013 ¶ 20. That is precisely an example of the way in which, as this Court reasoned in *Foote*, parents have other means, outside of information from the school, to learn about and observe their child's gender identity. *See Foote*, 128 F.4th at 355. The fact that she could have learned this information sooner had the school immediately informed her of A.B.'s decisions about gender identity at school does not allege a due process violation: "it is not enough . . . to allege that" a school's policy of non-disclosure makes "parenting more challenging." *Id*. at 354.

Lavigne's citations to cases in which employers were statutorily required to advise employees of their rights under the Family Medical Leave Act, Lavigne's Supp. Br. at 10, are inapposite and attempt to turn the Due Process Clause into something that it is not, *see Foote*, 128 F.4th at 354 ("[T]he Due Process Clause 'cannot fairly be extended to impose an affirmative obligation on the State to ensure that [due process] interests do not come about to harm through other means.'" (quoting *Deshaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989))).

Here, the fundamental right asserted by Lavigne is not distinct from that asserted by the parents in *Foote*, 128 F.4th at 348 (observing that "the Supreme Court's parental rights cases have never described an asserted right by reference to the specific conduct at issue"), and Lavigne has not alleged an official "withholding policy" that restricted her fundamental right to direct the care, custody, and

upbringing of her child, *see id*. at 255 (reasoning that the parents remained "free to strive to mold their child according to [their] own beliefs, whether through direct conversations, private educational institutions, religious programming, homeschooling, or other influential tools.").

CONCLUSION

The District Court correctly dismissed the complaint in this case because the Plaintiff failed to plead facts sufficient to plausibly state a claim of municipal liability under the *Monell* standard. But, if this Court were to reach beyond that to consider the merits of her constitutional claims, the recent *Foote* decision provides alternate grounds to affirm the District Court decision.

Dated: March 13, 2025

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation in this Court's February 21, 2025 Order, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 a proportionally spaced typeface using serifs in Times New Roman 14 point font.

Dated: March 13, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2025, I electronically filed the forgoing document with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered as CM/ECF users and that service will be accomplished by Notice of Electronic filing by CM/ECF system.

Dated: March 13, 2025

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