Case No. 24-1509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMBER LAVIGNE,

Plaintiff-Appellant,

vs.

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.

PLAINTIFF-APPELLANT SUPPLEMENTAL BRIEF

Appeal from the United States District Court for the District of Maine
Case No. 2:23-cv-00158-JDL, Hon. Jon D. Levy, presiding

Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Adam Shelton (1207245)
John Thorpe (1212548)
500 E. Coronado Rd.
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Plaintiff-Appellant

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INTRODUCTION

This Court's decision in *Foote v. Ludlow School Committee*, 128 F.4th 336 (1st Cir. 2025), vindicates Appellant's claim that Appellee Great Salt Bay Community School District ("GSB") violated her fundamental constitutional right to control and direct the education and upbringing of her child. GSB violated Appellant's constitutional rights through an official, if unwritten, policy of withholding information from parents about decisions made and actions taken that directly affect the mental health and physical well-being of a child. Specifically, GSB's policy permitted a school social worker to give Appellant's child chest binders (undergarments that compresses breasts so the wearer appears more masculine) and permitted teachers and employees to refer to her child with a name and pronouns that matched the child's gender identity rather than the child's biological sex without ever notifying Appellant.

The court below held that Appellant had not pleaded sufficient facts to lead to a reasonable inference that GSB has an official policy under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). Because the court held that "the Complaint adequately pleads facts that could plausibly support municipal liability under section 1983," the court refused to "address the separate question of whether any of the alleged constitutional violations are adequately pleaded." Addendum at 44. On appeal, Appellant contends that she pled sufficient facts to lead

to a reasonable inference that GSB has an official, if unwritten, policy that permitted school officials to act as they did. She also has asked that this Court address the constitutional violation on appeal. Blue Br. 23-32.

Foote provides the path for doing so. It held that school board policies, even unwritten ones, can be and were legislative in nature rather than executive in nature. 128 F.4 at 345-48. Appellant made the same argument below and on appeal, focusing on the nature of the policy and its general applicability. Blue Br. 29-32. This Court held in *Foote* that constitutional rights should not be defined with "microscopic granularity," and that parents have a fundamental constitutional right to control and direct the education and upbringing of their children—a right implicated by the policy permitting the school to call a child by a different name and different pronouns without notifying parents. *Foote*, 128 F.4th at 348. Appellant has made a similar argument here. Blue Br. 26-29. Finally, *Foote* provides a path for determining whether challenged conduct actually restricts a fundamental right. The *Foote* parents lost on this prong, but this case is fundamentally different.

Appellant asserts that GSB's conduct violated a key aspect of her parental rights—namely, her right to decide how to educate her child—by withholding information essential to assessing whether GSB remained the best educational option. The school, pursuant to its policy, deprived her of information about the school's decisions and actions. This information—which GSB concedes any

conscientious parent would want to know, APP. 014 ¶ 25; Answer (Doc. 13) ¶ 25—is necessary for a parent to evaluate whether GSB is the best environment for her child. And, when Appellant learned of the GSB's actions, she—unlike the parents in *Foote*—found a different educational environment for her child, not because her child was gender-questioning, but because of the decision by GSB officials to conceal its actions. APP.016 ¶ 35. The trust necessary between a parent and the school educating her child had been broken because of GSB's policy. APP.017 ¶ 38

Should this Court reach the constitutional violation issue, *Foote* controls with respect to whether the challenged action is legislative or executive in nature, and controls as to whether Appellant has pleaded a fundamental constitutional right. As to whether GSB's official policy violates that right, this case is readily distinguishable from *Foote*.

ARGUMENT

GSB violated Appellant's fundamental constitutional right to direct the education and upbringing of her child through its official—albeit unwritten—policy that allowed a school social worker to give her child chest binders and permitted employees to use a different name and pronouns without notifying Appellant. By withholding this information, GSB deprived Appellant of the ability to assess whether GSB remained the best educational option for her child. GSB concedes that any conscientious parent would want to know this information, yet it kept Appellant

in the dark. As a result, Appellant was deprived of the ability to exercise her constitutional right to make informed decisions about her child's education. Once she learned of GSB's actions through happenstance, she immediately removed her child from GSB and found a different educational environment.

Foote supports Appellant's claims. Under *Foote*, GSB's actions are legislative in nature, rendering the shock-the-conscience test inapplicable. Additionally, under *Foote* Appellant has adequately pleaded a violation of a fundament right. What's more, Appellants claims here are different than those in *Foote* as *Foote* centered on a parent's right in upbringing, while this case focuses on Appellant's right to educate her child. GSB's policy of withholding important information from parents restricted Appellant's exercise of that right. Because GSB's actions restricted Appellant's fundamental parental rights, strict scrutiny applies—and the challenged conduct cannot survive that test.

I. The conduct challenged by Appellant is legislative in nature and thus the shock-the conscience test is inapplicable.

GSB violated Appellant's fundamental constitutional right to direct the education and upbringing of her child—a right protected by the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As explained in *Foote*, the first step in determining whether conduct violates parental rights is to determine whether the conduct is legislative or executive in nature. 128 F.4th at 345-46. This Court explained that function over form usually guides the inquiry, focusing on

whether the challenged action is broadly applicable. *Id.* If an action is broadly applicable, including those that involve "concerted actions by multiple government employees" that are "taken 'pursuant to broad governmental policies,'" they are more likely to be legislative. *Id*. at 345 (quoting *Abdi v. Wray*, 942 F.3d 1019, 1027-28 (10th Cir. 2019)).

In *Foote,* the parents were "challenging a school policy" which was "legislative, not executive conduct." 128 F.4th at 346-47. The policy applied "to all students in the Ludlow School District," and while "the [p]arents also challeng[ed] some individual actions of Ludlow educators … those discrete decisions by individual educators were taken to 'actively implement and reinforce the Protocol." *Id*. at 347 (quoting *Abdi*, 942 F.3d at 1027-28).

The same is true here. Appellant challenges the official policy of GSB, whereby school officials have withheld information from parents that involve a child's health and wellbeing. As Appellant has alleged, this policy is not specific to Appellant's child, but is a general policy of GSB applicable to all students. Thus, the challenged conduct is legislative in nature.

GSB below and on appeal has argued that the shock-the-conscience test applies to Appellant's claims. Red Br. 36-37; ECF 12 at 10. GSB's sole argument is

that the challenged conduct is executive because there is not evidence of an unwritten policy. Red Brief at 45 n.7.[1]

But if this Court reaches the question of whether the challenged conduct was legislative or executive in nature, then this Court has necessarily *already held that Appellant has pleaded sufficient facts to lead to a reasonable inference that GSB has an official, if unwritten, policy that permits school officials to withhold concededly important information from parents.* So, by reaching this question, this Court has necessarily rejected GSB's arguments. Appellant challenges GSB's conduct that is legislative in nature, and therefore, the shock-the-conscience test is inapplicable.

II. In *Foote*, this Court, consistent with Supreme Court precedent, held that parental rights are fundamental constitutional rights, and refused to define those rights at a microscopic level of granularity.

As the conduct challenged by Appellant is legislative in nature, this Court can "proceed directly to the next layered step of the substantive due process framework (asking whether a fundamental right is involved and whether the government conduct restrains that fundamental right)." *Foote*, 128 F.4th at 346. The Supreme Court has repeatedly held that the Fourteenth Amendment protects parental rights, which are defined "broadly as a fundamental right to direct the care, custody, and

[1] GSB conceding that its *written* policy *requires* parental involvement. But Appellant contends that the written policy is not the policy that is actually followed. This is proven by, *inter alia*, GSB's constituently maintained position that no policy was violated in this case.

upbringing of one's child[ ]." *Id*. at 348. *See also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel*, 530 U.S. at 65.

As *Foote* observed, the Supreme Court has not "described an asserted right by reference to the specific conduct at issue," but has "instead considered whether the conduct at issue fell within the broader well-established parental right to direct the upbringing of one's child." 128 F.4th at 348. That is, this Court did not define parental rights "with microscopic granularity"—which forecloses GSB's efforts to do just that. *Id.*; Red Br. 37-38 n.8.

For example, GSB claims that Appellant is asserting "the right to be informed about how one's child is navigating matters related to gender identity." Red Br. 37-38 n.8. GSB claimed that this was the same right "currently under advisement by the Court in *Foote*." *Id*. But this case has never involved such a narrowly defined right. Rather, this case involves a parent's right to make decisions about her child's education based on information that is withheld by a school.

This right is easily understood: Appellant has a fundamental right to decide whether to send her child to GSB or some other school. To make such a decision requires a parent to have information about how the school is treating her child. The information here—as GSB itself concedes—is the kind of information any conscientious parent would want to know. Yet GSB employees withheld that information pursuant to GSB's official policy. That made it impossible for Appellant

to make the decisions she had the right to make. (Only the happenstance of her learning the information through another source enabled her to make the choice she ultimately did make—to remove her child from GSB.) GSB's policies therefore violated Appellants' rights—and will do so again, when the time comes for Appellant to decide whether to send her other children to GSB. This is a far cry from the more generalized rights alleged in *Foote*—such as "oppos[ing] certain academic assignments," 128 F.4th at 352, or a right to "control a school's curricular or administrative decisions." *Id*. at 351.

This Court should hold, in line with *Foote*, that Appellant has identified a fundamental right with sufficient specificity.

III. Appellant has pled sufficient facts to lead to a reasonable inference that GSB's conduct restricted the Constitution's protection for parental rights.

Foote's next step is to determine whether Appellant has sufficiently alleged that GSB "engaged in conduct that actually restricted those fundamental rights." *Id.* at 349. If so, GSB must prove that its conduct is narrowly tailored to a compelling government interest. Here, GSB's policy violated Appellant's fundamental rights because it deprived her of information about actions taken and decisions made by school officials—information Appellant needs to determine whether GSB is the appropriate educational environment for her child.

GSB has attempted to mischaracterize Appellant's argument as being a demand to be informed about her child's gender identity. But this is not what Appellant argues. This case is about the response, actions, and decisions of the school officials that were *withheld* from Appellant, which deprived Appellant of the information she needs when deciding whether to send her child to GSB or to seek different educational opportunities. It's about the school and its actions, not her child's gender identity. Because GSB's policy restricts Appellant's fundamental constitutional rights, the policy must survive strict scrutiny. It is GSB who bears the burden of proving that the policy passes muster under strict scrutiny. But GSB will fail in this as there is no evidence that GSB's policy is narrowly tailored to a compelling government interest.

A. GSB's official policy violated Appellant's constitutional rights.

Appellant alleged that GSB violated her rights through its withholding policy—the 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. These include giving a chest-binder to her child, calling her child by a different name and pronoun, and, of course, never notifying Appellant of these actions, and even counseling the child not to notify her of these actions. These actions violated Appellants' rights because they deprived her of information about the school necessary to make an informed decision

about whether GSB was the best educational environment for her child—that is, information necessary to satisfy what the Supreme Court has called a parent's "right, coupled with the high duty" of overseeing a child's education and upbringing. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925).

What Appellant *does not* allege is the decision to call her child by a different name or pronouns, or even giving her child a chest binder, violated the Constitution. Rather, she contends that *withholding that information* prevented her from being meaningfully able to exercise her constitutional rights. She alleges GSB's policy made it impossible for a her to meaningfully exercise her rights. *See Conoshenti v. Pub. Serv. Elec. & Gas Co.,* 364 F.3d 135, 143 (3d Cir. 2004) (holding that an employer's failure to advise an employee about her statutory rights to family and medical leave "rendered him unable to exercise that right in a meaningful way," and consequently violated the statutory right.); *Lubke v. City of Arlington*, 455 F.3d 489, 493 (5th Cir. 2006) (explaining that where an employee was "never clearly informed" of what information was required to exercise his family leave rights, the employer had deprived him of any meaningful exercise of his statutory rights to leave). In the same way, GSB's withholding of information deprived Appellant of information necessary to meaningfully exercise her rights under *Troxel* and *Pierce*.

That makes this case distinct from *Foote*. In fact, the parents' opening brief in *Foote* specifically argued that they were "asserting the latter right to direct

upbringing, not a right to direct *education*," Foote Opening Brief, *Foote v. Ludlow Sch. Comm.,* No. 23-1069, 2023 WL 2674553 (1st Cir. filed Mar. 20, 2023) at *24 (emphasis added). Here, by contrast, Appellant is focusing not on "upbringing" but on "education." More precisely, she is not challenging how the school maintains its pedagogical environment *at all* but GSB's policy of *keeping her in the dark about its educational environment*, necessarily depriving her of a meaningful opportunity to select a *different* environment. Indeed, when she discovered GSB's employee's conduct, she chose a different environment. Only GSB could provide information about what decisions GSB made and what actions GSB took, and it was those actions and decisions that led Appellant to remove her child from GSB and provide alternative educational opportunities.

Foote also explained that generally there must be some coercive or restraining conduct for a parent to succeed in her parental rights challenge. 128 F.4th at 353. Assuming that is necessary, such coercion and restraint is present here. Maine law *requires* "[p]ersons 6 years of age or older and under 17 years of age [to] attend *a public day school* during the time it is in regular session." Me. Rev. Stat. tit. 20-a, § 5001-A(1). So, not only must Appellant send her child to school under Maine law, but the default requirement is also that she must send her child to a public school. This is coercive. True, there is an exception: a parent is free to take advantage of a state-approved alternative, such as a private school. But that decision can only be

made with the requisite information provided by public schools, and the default under Maine law is that a child attends public school.

Finally, *Foote* said the due process clause "'cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other [i.e., non-state-created] means.'" 128 F.4th at 354 (citation omitted). It cited *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980), and *Anspach ex rel. Anspach v. City of Philadelphia*, 503 F.3d 256 (3rd Cir. 2007). But Appellant does not claim GSB owes her an obligation to protect her against some other harm-causing agent. She alleges that GSB, having taken her child under its wing in accordance with state law, may not withhold information from her—information GSB concedes any conscientious parent would want to know—in a manner that deprives her of the ability to meaningful determine if GSB is the best educational option for her child.

This case is also entirely different from *Doe* or *Anspach*. In *Anspach*, parents sued a city-run health center that provided their sixteen-year-old daughter with emergency contraceptives without notifying them. 503 F.3d at 259-61. The Third Circuit rejected their claim because the Constitution does not require "state actors to contact parents of a minor or to encourage minors to contact their parents." *Id*. at 262. And in *Doe*, the parents sued a publicly-funded clinic for giving their child contraceptives without notifying them. 615 F.2d at 1163. The Sixth Circuit rejected

the claim because there was no law requiring "that the children of the plaintiffs avail themselves of the services offered." *Id*. at 1168.

There are two main differences between *Anspach* and *Doe* and this case. First, state law requires that Appellant send her child to a public school; there was no such requirement in either *Anspach* or *Doe* for parents to send their children to the city-run or publicly funded health clinic. Second, there is a special relationship between a public school and parents, which has no analogue in *Anspach* or *Doe*. The whole doctrine of public school standing *in loco parentis* is the view that a parent delegates to a school some modicum of their parental authority "commensurate with the task that the parents ask the school to perform." *Mahanoy Area Sch. Dist. v. B.L. by & through Levy*, 594 U.S. 180, 200 (2021) (Alito, J., concurring). But that authority simply cannot authorize a school to intentionally withhold or conceal information from a parent. After all, the *in loco parentis* power is *delegated by* the parent—but the parent cannot manage that delegation without information. No such delegation was involved in *Anspach* or *Doe*.

Thus, GSB's conduct in withholding the information about its decision to give Appellant's child an undergarment to suppress breasts and to refer to the child with a name and pronouns matching the child's gender identity, violated Appellant's fundamental parental rights in a way that *Anspach* or *Doe* did not involve.

B. The challenged conduct fails strict scrutiny.

Finally, where *Foote* found that there was no intrusion on fundamental rights, and therefore that rational basis review applied, 128 F.4th at 356, the reverse is true here: GSB deprived Appellant of a fundamental constitutional right, and that conduct must therefore survie strict scrutiny. Under strict scrutiny, GSB's conduct must be narrowly tailored to serve a compelling government interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("the Fourteenth Amendment 'forbids the government to infringe ... 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest'" *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993)). GSB has identified no *compelling* interest. And that is because there is no compelling government interest that would support a blanket policy that permits school officials to give minor children undergarments to compress their breasts and call a child by a different name or pronouns, without notifying parents.

GSB proffered a host of "interests," including nondiscrimination law, students' rights, protecting against bullying, and providing a safe educational environment for children. It is questionable whether these interests are compelling—for one thing, the desire not to transgress civil rights law does not justify violating the Constitution. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (fear of disparate-impact liability is not an adequately compelling interest to justify race-based hiring).

But in any event, the policy is not narrowly tailored to achieve those goals, as parents have nothing to do with nondiscrimination law, in-school bullying, or the in-school learning environment. There is no indication or evidence that an across-the-board rule against notifying parents about actions taken with respect to a child's gender identity is necessary to ensure a safe learning environment.[2]

Because Appellant has pleaded sufficient facts at this stage of litigation to lead to a reasonable inference that the challenged conduct is not narrowly tailored to a compelling government interest, Appellant should be free to pursue her claim that GSB's actions violated her constitutional rights.

CONCLUSION

This Court should address the first prong of the *Monell* inquiry in light of its decision in *Foote*, hold that Appellant has pled sufficient facts to lead to a reasonable inference that GSB's official, if unwritten policy, violated Appellant's fundamental constitutional rights, and *reverse*.

Respectfully submitted this 7th day of March 2025,

/s/ *Adam Shelton*
Adam Shelton (1207245)
John Thorpe (1212548)

[2] On the contrary, even the most basic tailoring would require some case-by-case analysis by the school to determine *ex ante* whether withholding the information from a parent would be justified. GSB's unwritten policy lacks any such inquiry.

CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's Feb. 21, 2025 Order because this brief does not exceed 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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.

Date: March 7, 2025

/s/ Adam Shelton
Adam Shelton
John Thorpe
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2025, 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 Shelton*
Adam Shelton