NO. 23-16031

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AURORA REGINO,

Plaintiff-Appellant,

v.

KELLY STALEY, Superintendent,

Defendant-Appellee,

v.

CAITLIN DALBY; REBECCA KONKIN; TOM LANDO; EILEEN ROBINSON; and MATT TENNIS,

Defendants.

On Appeal from the United States District Court
for the Eastern District of California
The Honorable John A. Mendez
Case No. 2:23-CV-00032-JAM-DMC

MOTION FOR LEAVE TO FILE BRIEF OF THE JUSTICE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Justice Foundation is a nonprofit organization, does not have a parent corporation, and does not issue stock. The Justice Foundation is not aware of any publicly owned corporation, not a party to the appeal, with a financial interest in the outcome of this case.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2)–(3), (b)(3), the Justice Foundation moves this Court for leave to file the accompanying brief as *amicus curiae* in support of Plaintiff-Appellant and reversal. On November 1, counsel for *amicus* contacted counsel for the parties to request consent to file this brief. Plaintiff-Appellant's counsel consented. Defendant-Appellee's counsel did not respond. So counsel for *amicus* contacted Defendant-Appellee's counsel again on November 3, again receiving no response. Because Defendant-Appellee has not responded to indicate whether it consents to the filing of this brief, the Justice Foundation seeks the Court's leave to file it.

INTEREST OF *AMICUS CURIAE*

The Justice Foundation is a 501(c)(3) charitable foundation that provides free legal representation to protect individual and parental rights across the nation, while enforcing constitutional limits on state authority. It supports the fundamental and natural right of parents to direct the education and upbringing of their own children. The Justice Foundation believes that parental rights are fundamental to the family and society. And it opposes efforts to expand state authority and control over children at the expense of parental rights.

Through direct litigation and *amicus* submissions, the Justice Foundation seeks to legally establish that parents are the best protectors of children, and that parents have the natural right and duty to

provide for their children's care and well-being. The Justice Foundation also has substantial experience with public-school law. Its president, Allan E. Parker, Jr., was designated by the Texas State Board of Education as one of the official evaluators of Texas's open-enrollment charter school program. Mr. Parker is a former professor of education law who represented public school districts in the early years of his practice, before founding the Justice Foundation to represent parents' rights. The Justice Foundation has used his expertise to advocate for parental rights and limiting government entities—like public school districts—to their proper role in many education cases.

In one recent case, the Justice Foundation and Parental Rights Iowa together submitted a brief as *amici curiae* challenging a school district policy much like the policy challenged by Plaintiff here. Br. of Parental Rights Iowa & The Justice Foundation as *Amici Curiae*, *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023) (No. 22-2927), https://bit.ly/46TGVWB.

The policies in *Linn Mar* and this case highlight a disturbing national trend of public school districts subverting parental rights. A Wisconsin state trial court, for example, just recently granted two families' motion for summary judgment and enjoined a school district policy that required staff—without parental consent and even over an express objection—to treat students as though they were a gender identity different from their sex. *T.F. v. Kettle Moraine Sch. Dist.*, No.

2021CV1650, 2023 WL 6544917, at *10 (Wis. Cir. Ct. Oct. 3, 2023). And federal courts have also ruled in favor of teachers' challenges to similar policies, both in California and elsewhere. *See Mirabelli v. Olson*, No. 3:23-CV-00768-BEN-WVG, 2023 WL 5976992, at *18 (S.D. Cal. Sept. 14, 2023); *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-CV-04015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022).

Just like the parents and teachers in those cases, longstanding constitutional principles support Aurora Regino, who challenges Defendants' refusal to provide complete information to her about her daughter's education and wellbeing here. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923). Her right to "direct the education and upbringing of [her] children" is entitled to no less protection than any other unenumerated right the Supreme Court has recognized as fundamental. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (listing the right alongside other "fundamental rights and liberty interests"). Indeed, it "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

As the accompanying brief argues, this Court should hold that the district court's failure to apply strict scrutiny to Plaintiff's parental-rights claim was error, *see, e.g.*, ER-11, reverse the judgment below, and remand for further proceedings.

DESIRABILITY AND RELEVANCE OF THE BRIEF

"Since an *amicus* does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of [its] participation." *Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 808 (3d Cir. 1991) (quotation omitted). But "Rule 29's criteria [are] broadly interpreted." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.). "[M]ost courts of appeals freely grant leave to file" even "when the other side refuses to consent." *Id.* That is because courts are "usually delighted to hear additional arguments from able amici that will help the court toward right answers." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999). This is particularly true when an *amicus* provides "information on matters of law about which there [is] doubt, especially in matters of public interest." *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991).

The Justice Foundation and its counsel are well-suited to aid the Court in considering this appeal that raises critical parental-rights questions. Both the Justice Foundation and its counsel specialize in constitutional law and are actively involved in a variety of parental-rights disputes, some of which are cited in this motion and the accompanying brief. The contours and exercise of parental rights are of paramount importance and interest to the public.

The accompanying *amicus* brief is desirable for three reasons. First, it provides this Court with important historical and legal background surrounding parental rights. It shows how both the Supreme Court and the Ninth Circuit's precedents properly acknowledge that parental rights are deeply rooted in our Nation's history and tradition and are, therefore, fundamental.

Second, the accompanying brief explains the extent of the district court's error in failing to apply strict scrutiny, the correct tier of scrutiny, to parents' fundamental rights. Instead, the district court applied the "shocks the conscience" test despite this Court's precedent limiting that test to claims that do not implicate a fundamental right and consistent case law across the country reaffirming that application.

Third, the accompanying brief explains how the education and mental health decisions in this case clearly implicate parental rights.

The district court's error, if uncorrected, would set a dangerous precedent for government policies that violate the Constitution, especially those which threaten parental rights.

CONCLUSION

For these reasons, this Court should grant *amicus curiae* leave to file the accompanying brief supporting Plaintiff-Appellant and reversal of the district court's judgment.

Dated: November 6, 2023

Respectfully submitted,

/s/ Katherine L. Anderson

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CERTIFICATE OF COMPLIANCE

This motion complies with the word-count limitation of Fed. R. App. P. 27(d)(2) 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 1,094 words and does not exceed 5,200 words.

This 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.

/s/ Katherine L. Anderson
Katherine L. Anderson
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit 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.

/s/ Katherine L. Anderson
Katherine L. Anderson
Counsel for Amicus Curiae

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[*] No counsel for a party authored this brief in whole or in part; no one, other than *amicus* and its counsel, made a monetary contribution for its preparation or submission; and Plaintiff has consented to its filing. Because Defendants have not yet consented, despite multiple requests for consent, *amicus* is also filing a motion for leave to file this brief.

parents' rights. The Justice Foundation has used his expertise to advocate for parental rights and limiting government entities—like public school districts—to their proper role in many education cases.

In one recent case, the Justice Foundation and Parental Rights Iowa together submitted a brief as *amici curiae* challenging a school district policy much like the policy challenged by Plaintiff here. Br. of Parental Rights Iowa & The Justice Foundation as *Amici Curiae*, *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658 (8th Cir. 2023) (No. 22-2927), https://bit.ly/46TGVWB.

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Along similar lines, at the beginning of this school year, a California federal court considered a parental-secrecy policy with wording identical to the one in this case and dubbed it "a trifecta of harm," hurting children, their parents, and their teachers. *Mirabelli v. Olson*, No. 3:23-CV-00768-BEN-WVG, 2023 WL 5976992, at *18 (S.D. Cal. Sept. 14, 2023). And a Kansas federal court rejected an attempt to

justify a parental-secrecy policy on the same grounds pressed by Defendants below. *See, e.g.*, ER-11. That court found it "difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns." *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-CV-04015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022).

Schools must not presume that parents won't act in their children's best interests. Just the opposite: "there is a presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion). That presumption is inconsistent with parental-secrecy policies like Defendants'.

Longstanding constitutional principles support Aurora Regino, who challenges Defendants' refusal to provide complete information to her about her daughter's education and wellbeing here. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923). Her right to "direct the education and upbringing of [her] children" receives no less protection than any other unenumerated right the Supreme Court has recognized as fundamental. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (listing the right alongside other "fundamental rights"). Indeed, it "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel*, 530 U.S. at 65 (plurality opinion).

This Court should hold that the district court's failure to apply strict scrutiny to Plaintiff's parental-rights claim was error, *see, e.g.*, ER-11, reverse the judgment below, and remand for further proceedings.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

By failing to apply strict scrutiny to Aurora Regino's parental-rights claims, the district court failed to treat those rights as fundamental. This Court should reverse.

The district court erred at each of the two steps in the analysis of an unenumerated right protected by the Fourteenth Amendment. First, the district court did not acknowledge the centuries of precedent—from the Supreme Court and this Court, and from the common-law courts of England and America—protecting parental rights. As a result of missing how deeply rooted parental rights are in our Nation's history and tradition, the district court downplayed the protection these rights receive under the Fourteenth Amendment.

That led to its second error: failing to apply strict scrutiny. This Court and many others have held that fundamental rights receive strict scrutiny. Instead of applying strict scrutiny to Ms. Regino's claims, however, the district court applied the "shocks the conscience" test. But that test, this Court has indicated, applies to Fourteenth Amendment claims that do *not* implicate a fundamental right.

The high stakes of Ms. Regino's claims compound the district court's error of not treating her parental rights as fundamental. Defendants here denied Ms. Regino the right to be notified about school administrators' decision to intervene in her child's mental healthcare. But parents like her cannot exercise their fundamental right to direct the upbringing and education of their children if public schools withhold from them important information about their own children. At the very least, parents' fundamental rights include the right to notice from a school that officials have decided to counsel a child about how best to treat discomfort with her gender.

This Court should hold that Ms. Regino's claims fall within this Nation's history and tradition of guaranteeing parents' right to direct the upbringing and education of their children. And it should reverse the district court's failure to protect that fundamental right.

ARGUMENT

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

For claimed violations of unenumerated rights protected by the Fourteenth Amendment to the U.S. Constitution, the analysis has two steps. First, a court should ask whether the asserted right is one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720–21 (cleaned up). Second, if the governmental action "infringe[s]

upon a fundamental right" it will "receive strict scrutiny." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005), *as amended on denial of reh'g*, 447 F.3d 1187 (2006); *see Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935, 951–52 (9th Cir. 1997) (applying strict scrutiny to parental-rights claim under Fourteenth Amendment).

The district court failed to properly analyze Ms. Regino's parental-rights claim as one involving the violation of a fundamental right. Its error began with the conclusion that Ms. Regino's claim is not supported by precedent. ER-6. On the contrary, a century of constitutional precedent—buttressed by centuries more of common-law history—demonstrates the fundamental nature of a parental-rights claim. *See Troxel*, 530 U.S. at 65–66 (plurality opinion) (tracing that precedent back to *Meyer*, 262 U.S. at 390); *see also* 1 William Blackstone, *Commentaries on the Laws of England* *446–53 (describing the rights of parents at common law), http://bit.ly/3leX7za.

Next, because the district court treated parental rights as disfavored instead of fundamental, it didn't ask whether Defendants' actions were narrowly tailored to serve any compelling state interest, as strict scrutiny requires. *Glucksberg*, 521 U.S. at 721. Finally, the district court chose to dismiss Ms. Regino's claims based on an alternate Fourteenth Amendment test, the "shocks the conscience" test, without explaining its decision to apply that test and not the fundamental-rights test. *E.g.*, ER-11.

This Court should hold 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. Accordingly, this Court should reverse.

A. The Supreme Court has held that the Due Process Clause treats parental rights, which are deeply rooted in this Nation's history and tradition, as fundamental.

At its heart, Ms. Regino's challenge to Defendants' policy and practice of treating her daughter as a gender different than her biological sex—without her consent—rests on Ms. Regino's right to "direct the education and upbringing of [her] children." *Glucksberg*, 521 U.S. at 720 (citation omitted); *see, e.g.*, ER-70 ¶ 100. Despite the district court's statements to the contrary, Ms. Regino does not advocate for an expansion of that fundamental right. *See* ER-12. Rather, that right covers Ms. Regino's claims here—especially when "carefully refined by concrete examples" of how English and American courts have protected it for over a century. *Glucksberg*, 521 U.S. at 722. As Justice Holmes said in another context, "Upon this point a page of history is worth a volume of logic." *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921).

At common law, parents had "both the responsibility and the authority to guide their children's development and make important decisions on their behalf." Eric A. DeGroff, *Parental Rights & Public School Curricula: Revisiting* Mozert *after 20 Years*, 38 J.L. & Educ. 83,

108 (2009). This common-law parental right included a right to make educational decisions. Early authorities "established the right of parents to make educational choices for their children," even against "the preferences of civil authorities." *Id.* at 110 & n.178. "[B]y the nineteenth century, legal scholars were describing the right of parents to control the education of their children as 'practically . . . absolute' or 'absolute against all the world.'" *Id.* at 111–12 (footnotes omitted; omission in original).

American courts also freed "parents to exercise those duties"—namely, the duties "to provide for their [children's] support and education"—"largely unhindered by the state." *Id.* at 112. This principle held true even as public schooling became the norm. In the late 19th century, "courts held that parents had a common law right to exempt their children from courses established by, and in some cases even required by, the state legislatures or local school districts." *Id.* at 113; *see, e.g.*, *State ex rel. Sheibley v. Sch. Dist. No. 1 of Dixon Cnty.*, 48 N.W. 393, 395 (Neb. 1891) ("[N]o pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch . . . ."); *Morrow v. Wood*, 35 Wis. 59, 65 (1874) ("[T]he parent has the right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils.").

These common-law principles led the Supreme Court in 1923 to acknowledge that the Fourteenth Amendment protects "the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401. For "[t]he child is not the mere creature of the state," as the Court would elaborate two years later. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). "[T]hose who nurture him and direct his destiny"—that is, a child's *parents*—"have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* And this duty or right, the Court would go on to say, "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

Given this historical backdrop, when the Court in *Glucksberg* foregrounded the question whether a right is "deeply rooted in this Nation's history and tradition," it left no doubt about parental rights. 521 U.S. at 721 (cleaned up). The Court listed the "fundamental rights and liberty interests" for which the Due Process Clause "provides heightened protection." *Id.* at 720 (citation omitted). And it *expressly included* the right to "direct the education and upbringing of one's children." *Id.* (citation omitted). Because this 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 in *Troxel* reaffirmed that parents have a "fundamental liberty interest[]" in the "care, custody, and control of their children." *Troxel*, 530 U.S. at 65 (plurality opinion); *see id.* at 80 (Thomas, J., concurring in the judgment) (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 opinion). And as the *Troxel* 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 in the judgment) (endorsing "strict scrutiny" as the correct test for infringements on the "fundamental right of parents to direct the upbringing of their children").

Finally, last year's decision in *Dobbs v. Jackson Women's Health Organization* reaffirmed yet again that parental rights are fundamental. 142 S. Ct. 2228, 2257 (2022). *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 2283. 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 2257. And among those rights, it included "the right to make decisions about the education of one's children." *Id.*

The Supreme Court has used numerous formulations to describe the historically grounded, fundamental right central to Ms. Regino's claims: a "claim to authority in [parents'] own household to direct the rearing of their children [that] is basic in the structure of our society," *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)); the right to "direct the education and upbringing of one's children," *Glucksberg*, 521 U.S. at 720; *accord Pierce*, 268 U.S. at 534–35 (same); the liberty "interest of parents in the care, custody, and control of their children," *Troxel*, 530 U.S. at 65 (plurality opinion); and, "the right to make decisions about the education of one's children," *Dobbs*, 142 S. Ct. at 2257. Whatever the phrasing, though, Ms. Regino's parental rights easily qualify as "fundamental rights and liberty interests" for determining the appropriate level of review. *Glucksberg*, 521 U.S. at 720 (citation omitted).

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—strict scrutiny. This Court has been unequivocal: "Governmental actions that infringe upon a fundamental right receive strict scrutiny." *Fields*, 427 F.3d at 1208. And the Supreme Court has been no less clear: "[T]he 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.'" *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Unsurprisingly, therefore, this Court has applied strict scrutiny to claims that the government has violated a parent's fundamental rights. *Nunez*, 114 F.3d at 951–52. The district court was wrong not to follow this Court's lead when considering Ms. Regino's claims.

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. Ala.*, 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 Ms. Regino'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). The district court here read *Gruenke* too narrowly, focused only on how the swim coach had "compell[ed] student athletes to take pregnancy tests." ER-20. But *Gruenke* also relied on the coach's infringement of the parents' rights, not just the students'. 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.*, No. 2:22-cv-00837, 2022 WL 15523185, at *28 (W.D. Pa. Oct. 27, 2022), *reh'g denied*, 2023 WL 3740822, at*17–18 (May 31, 2023). Ms. Regino'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, when the government infringes upon "parents' fundamental right to care for and control their children," its actions will be "subject to strict scrutiny." *In re Parental Rts. of J.L.N.*, 55 P.3d 955, 958 (Nev. 2002); *see A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 523 P.3d 519, 525 (Mont. 2023) ("The right to parent one's child is a fundamental right, and we therefore apply strict scrutiny where the right to parent is implicated."); *Nelson v. Evans*, 464 P.3d 301, 308 (Idaho 2020) ("Government efforts that restrict or interfere with certain fundamental parental rights are only permitted if that restriction or interference satisfied the strict scrutiny standard." (cleaned up)). In fact, "the majority of courts" have understood that decisions like *Troxel* require strict-scrutiny protections for parental-rights claims. *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 & n.18 (Pa. 2006) (same).

In short, the Supreme Court, this Court, other federal courts of appeals, and many state courts of last resort have held that fundamental rights—and parental rights, in particular—receive strict scrutiny. And Ms. Regino has alleged a valid parental-rights claim. The district court did not explain its refusal to follow the reams of authority, both binding and persuasive, requiring strict scrutiny here.

C. The district court did not explain its failure to apply strict scrutiny.

None of the decisions the district court cited justified its failure to follow the lead of the many federal and state courts holding that fundamental rights in general—and parental rights in particular—trigger strict scrutiny. Instead, the district court applied an alternative test, requiring Ms. Regino to show that "(1) a federal constitutional right was violated and (2) the alleged violation was committed by a person acting under the color of state law such that it shocks the conscience." ER-15–16 (citing *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006)). The application of that test in this context, however, misreads this Court's precedent and misunderstands the nature of the shocks-the-conscience standard for Fourteenth Amendment claims.

The "shocks the conscience" 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."). When seen in this light, the "shocks the conscience" test represents an alternative test for Fourteenth Amendment claims. Its "Due Process Clause protects individuals from state action that either 'shocks the conscience,' or

interferes with rights 'implicit in the concept of ordered liberty.'" *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003); *accord Nunez*, 147 F.3d at 871. As the Eleventh Circuit has put it, even "[w]here a fundamental liberty interest does not exist," an official's conduct is unconstitutional "when it 'shocks the conscience.'" *Waldman v. Conway*, 871 F.3d 1283, 1292 (11th Cir. 2017).

Understanding these as alternative tests for Fourteenth Amendment liability is consistent with Supreme Court precedent. 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). Even though *Lewis* issued a year after *Glucksberg*, the Supreme Court never asked whether the police officer's deliberately or recklessly indifferent action violated a fundamental right; in fact, the term "fundamental rights" appears only in a concurrence. *See* 523 U.S. at 860–61 (Scalia, J., concurring in the judgment). *Lewis* only asked whether the high-speed chase in question was an "abuse of power" that "shocks the conscience." *Id.* at 846 (majority opinion).

This Court hasn't seen any tension between *Lewis* and *Glucksberg* in the past. *Brittain* is a prime example. There, "a long-running custody dispute" between a child's unmarried parents resulted in a police officer

causing the child's mother to miss a single, one-week visitation with the child. 451 F.3d at 996. The officer's actions, this Court said, did not deprive the mother of her fundamental parental rights. *Id.*; *see id.* at 989 (distinguishing "a single visitation period" from "permanent custody"). Nonetheless, the Court proceeded to consider whether the officer's actions were "'conscience shocking' as a matter of law." *Id.* at 996. Because the plaintiff had "established neither a sufficient deprivation of liberty nor conscience shocking conduct," she had failed to allege a Fourteenth Amendment claim. *Id.* at 999.

Proving a violation of a fundamental right, or proving that official conduct shocks the conscience—these are two independent theories of liability under the Due Process Clause. *Martinez*, 337 F.3d at 1092; *Nunez*, 147 F.3d at 871. Understood this way, the shocks-the-conscience test operates to expand officials' potential liability under the Due Process Clause, not limit it. So, when challenging executive actions—in contrast to a broader legislative policy—under the Due Process Clause, the plaintiff's failure to invoke a fundamental right does not automatically consign the claim to the more lenient rational-basis test. A plaintiff can still obtain more searching constitutional review if the officer's conduct shocks the conscience. *Lewis*, 523 U.S. at 846–47.

The Tenth Circuit agrees with this Court's approach. According to that court, there are "two strands of the substantive due process doctrine." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008)

(Tymkovich, J.). "One strand protects an individual's fundamental liberty interests, while the other protects against the exercise of governmental power that shocks the conscience." *Id.* Claims for violations of fundamental rights receive strict scrutiny. *See id.* (citing *Glucksberg*, 521 U.S. at 721). "Conduct that shocks the judicial conscience, on the other hand, is deliberate government action that is 'arbitrary' and 'unrestrained by the established principles of private right and distributive justice.'" *Id.* (quoting *Lewis*, 523 U.S. at 845). A plaintiff can state a Fourteenth Amendment claim "[b]y satisfying either" test. *Id.*

Because Ms. Regino has invoked a fundamental right, *see Troxel*, 530 U.S. at 65 (plurality opinion); *Glucksberg*, 521 U.S. at 720, the appropriate test is strict scrutiny. The district court did not apply that test here. That error requires reversal.

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's mental health.

Defendants failed to notify Ms. Regino about how they planned to address her daughter's mental health needs. That fact heightens the stakes of the district court's legal errors. This case asks whether parents' fundamental right to direct the education and upbringing of their child includes the right to receive notification from their child's school that officials have decided to counsel and treat the child for gender dysphoria. *See* ER-70–78 ¶¶ 100–13.

The answer to that question 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.*

That explains why, even today, most minors cannot unilaterally consent to most forms of medical and mental healthcare. *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-2272 (requiring parental consent before providing mental health treatment to a minor); Mont. Code Ann. § 41-1-402 (outlining exceptions to general rule requiring parental consent for minor healthcare); Or. Rev. Stat. § 109.675 (minors under 14 generally cannot consent to mental health care). 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 *sometimes* act against the best interests of their children: "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* WPATH, *Standards of Care for the Health of Transgender and Gender Diverse People* (2022 v.8), http://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 into adulthood; such children are said to "desist." WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 11 (2011 v.7), 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 1, 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.*

This growing body of scientific evidence supports Ms. Regino's allegations that "[s]ocial transitioning . . . is a significant form of psychological treatment that substantially *reduces* the number of children who desist from a transgender identity." ER-60 ¶ 43. But the district court erroneously chose to disregard these allegations as "conclusory." ER-13. It cited no authority for this choice.

Relying on the same sort of scientific evidence that supports Ms. Regino, a Wisconsin state trial court recently granted summary judgment to a family who also challenged a school district's decision to treat their daughter as a boy without notifying her parents. *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL 6544917, at *10 (Wis. Cir. Ct. Oct. 3, 2023). In that case, two experts provided evidence supporting the family, while none supported the school district.

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/3SpeX0q.

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). Not surprisingly then, parents often "hold different philosophical views on what is the best way to help reduce [their child's] gender dysphoria," and those views "require both respect and understanding." Zucker, *Different Strokes*, *supra*, at 36.

The other expert witness who supported the parents 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, PhD at 1, *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650 (Wis. Cir. Ct. filed Feb. 3, 2023), https://bit.ly/40liv5I.

That long record of working with minors like Ms. Regino's daughter led Dr. Anderson to emphasize how potentially harmful it can be for school administrators like Defendants not to notify parents before "social transition," including the use of cross-gender names and

pronouns for students. 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. Without parental involvement, therefore, an "accurate diagnosis" is difficult. *Id.* 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.

Based in part on this evidence from Dr. Levine and Dr. Anderson, the *Kettle Moraine* court granted the parents' motion for summary judgment. In that case, a school district informed the parents of a female student that it would treat her as boy—despite the parents' express objection. 2023 WL 6544917, at *1. The school district's actions, said the court, "implicate[] an infringement against the parental autonomy right to direct the care for their child." *Id.* at *5. And those actions could not satisfy strict scrutiny. *Id.* at *6.

Like the policy in *Kettle Moraine*, Defendants' policy of counseling and treating students for gender dysphoria *without notifying their parents* infringes not only sound healthcare practice but also 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).

Contrary to Defendants' argument, *see* ER-9–10, students' own privacy interests cannot overcome their parents' right to direct their children's healthcare. As *Mirabelli* noted, it "seems unlikely" that children's state-law privacy right "includes a right of confidentiality from their own parents." 2023 WL 5976992, at *10. That seems particularly unlikely in a case like this one, which involves a student who is "publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun." *Id.*; *see* ER-12–14 ¶¶ 64–71. Indeed, it seems that Ms. Regino is the *only* person from whom Defendants withheld information about how they had begun to treat her daughter as a boy. That treatment of Ms. Regino is "in direct tension with the federal constitutional rights of parents to direct the upbringing and education of their children." *Mirabelli*, 2023 WL 5976992, at *8.

By denying parents the right to be notified about the decision to intervene in their child's mental health, the policy here, in *Kettle Moraine*, and in *Mirabelli*, closely resembles the one in *Arnold*. There,

the Eleventh Circuit held that "[c]oercing a minor to obtain an abortion or to assist in procuring an abortion *and to refrain from discussing the matter with the parents* unduly interferes with parental authority in the household and with the parental responsibility to direct the rearing of their child." 880 F.2d at 313 (emphasis added).

A school cannot encourage a student to make a healthcare decision apart from that student's parents—whether to obtain an abortion, as in *Arnold*, or, as here, to pursue a psychotherapeutic intervention for a child's gender confusion. Regarding issues like these, which "raise[] profound moral and religious concerns," *id.* at 314, parents' right to be involved in their children's lives is at its apex. Cutting them out of decisions about such issues "deprives the parents of the opportunity to counter influences on the child the parents find inimical to their religious beliefs or the values they wish instilled in their children." *Id.* at 313; *cf. Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 266 (N.Y. App. Div. 1993) (finding parental-rights violation where 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 has forced that judgment on them").

By depriving Ms. Regino of any notice about their decision to treat her daughter as a boy at school, Defendants denied Ms. Regino's ability to exercise her fundamental parental rights. Like the plaintiffs in

Alfonso, Ms. Regino doesn't simply oppose "an aspect of education," 606 N.Y.S.2d at 263; or, as Defendants argue, the "school's curriculum," ER-15. Instead, she objects to the "means" Defendants have chosen to socially transition her child to a different gender identity without her knowledge or consent. *Alfonso*, 606 N.Y.S.2d at 263.

The solution here is simple: Defendants' policy "can go forward without interfering with [Mr. Regino's] rights simply by allowing [her and any other] 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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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on November 6, 2023, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit 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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