Docket No. 23-16031

In the

United States Court of Appeals

For the

Ninth Circuit

AURORA REGINO,

Plaintiff-Appellant,

v.

KELLY STALEY, Superintendent,

Defendant-Appellee,

and

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

Defendants.

Appeal from a Decision of the United States District Court for the Eastern California, Sacramento, No. 2:23-cv-00032-JAM-DMC Honorable John A. Mendez

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The District's Response Brief attacks a strawman. Ms. Regino does not claim "veto" power over her children's ability to adopt a transgender identity. Rather, she asserts only the right to consent when her children's school seeks to socially transition them. Social transitioning is a form of psychological treatment, and whether to socially transition a child is a decision that goes to the heart of parenting. Absent exigent circumstances not present here, parents have the right to consent before the state facilitates their child's social transition. Rather than afford parents this right, the Policy presumes all parents are child abusers based solely on the fact their children want to be socially transitioned in secret. This presumption impermissibly flips on its head the Constitution's command that the authority to raise children "resides first" with parents.

The District ignores the Complaint's allegations regarding the science of social transitioning—including its powerful psychological impact on children—and argues instead that children have a constitutional right to keep their parents from knowing they are being socially transitioned at school. But no such right exists. The District's argument has no foundation in law, no basis in logic, no limiting principle, and, if accepted, would be harmful to children. Parental rights ensure children do not suffer the consequences of their own imprudent choices, and keeping parents in the

dark on this monumental decision in their children's lives based on overbroad presumptions benefits no one. The Court should reverse.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARDS

As a threshold matter, the district court applied the wrong legal standards.

The District does not defend the district court's application of the "clearly established" qualified immunity standard. Nor does the District argue *Glucksberg*'s "careful description" requirement applies to Ms. Regino's First Amendment claims. And while the District asserts *Glucksberg* applies to *new* substantive due process claims, it does not grapple with the fact that parental rights are not new.

Instead, the District claims the only exceptions to *Glucksberg*'s "careful description" requirement are cases involving the "right[s] to marry and the rights of gays and lesbians." Resp. Br. at 36 (citing *Khachatryan v. Blinken*, 4 F.4th 841, 856 (9th Cir. 2021)). But that is not *Khachatryan*'s holding. Instead, the Court there concluded the parental right could not be expanded to apply where an "*adult child*" wanted to bring his foreign parent into the United States. 4 F.4th at 856 (emphasis added). In that situation, the family relationship was not of sufficient "importance . . . to the . . . individuals" involved to warrant an exception to *Glucksberg*. *Id.* Here, by contrast, Ms. Regino's claim pertains to her relationship with her *minor children*—a relationship of utmost importance given minor children's inability "to

make sound judgments" concerning life's important decisions. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (cleaned up).

Indeed, both the Supreme Court and this Court have eschewed *Glucksberg*'s "careful description" requirement in parental rights cases. Instead, the question is whether the asserted right falls within the scope of parents' pre-existing right to the "care, custody, and control" of their minor children. *Troxel v. Granville*, 530 U.S. 54, 66 (2000) (plurality op.); *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (evaluating whether claim "flows from" pre-existing right); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) ("*Fields I*") (evaluating whether claim "is encompassed within" pre-existing right), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187, 1191 (9th Cir. 2006) ("*Fields II*"). Here, Ms. Regino's substantive due process claims fall within the scope of the pre-existing parental right.

Even if *Glucksberg*'s "careful description" requirement applied, the Complaint satisfies it. The District asserts the Court should ignore the "long-deserted ways parents used to dominate their children during times preceding the Declaration of Independence." Resp. Br. at 37–38. But time-honored principles drawn from English common law form the basis of our law today. *Parham*, 442 U.S. at 602 (citing, *inter alia*, Blackstone's *Commentaries on the Laws of England*). Moreover, the original public meaning of the Fourteenth Amendment matters too. *Id.* (citing,

inter alia, Kent's *Commentaries on American Law*). And while "attitudes toward children changed" from English common law to 1868, under both, "[p]arents [had] the right . . . to ensure the proper development of their children." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 824 (2011) (Thomas, J., concurring).

This is no less true today. The "primary role of . . . parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Troxel*, 530 U.S. at 66 (plurality op.) (quotations omitted). Under this tradition, the Complaint plausibly alleges the Policy violates Ms. Regino's constitutional rights.

II. THE POLICY VIOLATES MS. REGINO'S RIGHT TO CONSENT TO TREATMENT THE STATE PROVIDES HER CHILDREN

The Complaint plausibly alleges the Policy infringes Ms. Regino's First Amendment and substantive due process right to consent when the state performs psychological treatment on her children.

A. Ms. Regino does not assert "veto" power over her children's healthcare.

The District argues the Constitution does not give parents "veto" power over important decisions in their children's lives. Resp. Br. at 23. But Ms. Regino does not assert such a power. Instead, she argues that the Policy violates her right to *consent* when the state seeks to perform healthcare treatment on her children.

Under the Constitution, "the care, custody, and control" of minor children "reside[s] first in the parents." *Troxel*, 530 U.S. at 65 (plurality op.) (quotations omitted). For this reason, parents generally have "the right . . . to make important medical decisions for their children." *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1149 (9th Cir. 2021) (cleaned up). Indeed, "parental consent is critical in medical procedures involving children because children rely on parents . . . to provide informed permission . . . ." *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018) (cleaned up).

While parents have the "ultimate authority" over their children's healthcare *vis-à-vis their children, Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000), parental control is "not absolute" *vis-à-vis the state*, *Mueller v. Auker*, 576 F.3d 979, 995 (9th Cir. 2009) ("*Mueller I*"). Exercising its *parens patriae* authority, the state may perform healthcare treatment on children without parental consent when the child is "subject to . . . apparent danger or harm." *Mueller v. Auker*, 700 F.3d 1180, 1187 (9th Cir. 2012) ("*Mueller II*"). But even in that situation, parents have a "right to a judicial hearing" unless the state has "reasonable cause to believe that the child is in imminent danger of serious bodily injury." *Mueller I*, 576 F.3d at 995.

The Policy violates these principles. It does not require the District to find children are (1) "subject to . . . apparent danger or harm," *Mueller II*, 700 F.3d at

1187, or (2) in "imminent danger of serious bodily injury," *Mueller I*, 576 F.3d at 995, before socially transitioning them. Instead, the Policy authorizes the District to socially transition children in secret simply because they ask for it. ER-99. Accordingly, it is unconstitutional.

The District argues parents' rights are only implicated when the state performs investigatory examinations on their children and not when the state provides them healthcare treatment. Resp. Br. at 25 n.5. But that is not what the cases say. Indeed, *Mueller* did not involve an investigatory examination. *Mueller I*, 576 F.3d at 984; *see also Mann*, 907 F.3d at 1162 (noting "[p]arental consent is . . . warranted when . . . [the] purpose [of the state's action] is purely for health reasons"). Moreover, the rule that parents have the right to consent when the state performs healthcare treatment on their children is not subject to dispute. *Kanuszewski v. Michigan Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418 (6th Cir. 2019) (noting parents' "right to direct their children's medical care"); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1207 (10th Cir. 2003) ("In medical procedures involving children . . . parental consent is critical . . . ."); *Mario V. v. Armenta*, No. 18-CV-00041-BLF, 2021 WL 1907790 (N.D. Cal. May 12, 2021) (holding teacher violated parental right by performing blood sugar testing on students without parental consent). Because the Policy authorizes the District to perform healthcare treatment on children without

parental consent in the absence of exigent circumstances, it violates the Constitution.[1]

B. The Complaint plausibly alleges social transitioning is psychological treatment.

Seeking to avoid this conclusion, the District argues social transitioning is not "medical treatment." Resp. Br. at 32. This argument is mere wordplay. Ms. Regino has never suggested social transitioning is *medical* treatment. Instead, she alleges it is *psychological* treatment and that its impact on children is so significant the state must obtain parental consent before performing it. ER-59–62 ¶¶ 33–50. *See also Parham*, 442 U.S. at 587 (discussing parental right to direct child's "mental health care"); *Colon v. Collazo*, 729 F.2d 32, 34 (1st Cir. 1984) (holding parents have right to make mental healthcare decisions for minor children); *see also Mann*, 907 F.3d at 1162 (noting violation of parental right does not require the state to use a "magnifying scope" on the child (quotations omitted)).

The District also contends social transitioning is not treatment at all, but that it merely "facilitate[s]" children's choice of what gender identity to express. Resp.

[1] Because Ms. Regino asserts only that she has the defensive right to consent when the state seeks to provide her children healthcare treatment—and not the affirmative right to provide healthcare treatment to her children—her claims are not barred by the logic of those cases holding parents do not have the affirmative right to give their children healthcare treatment the state has deemed harmful. *See, e.g.*, *L.W. v. Skrmetti*, 83 F.4th 460, 475 (6th Cir.), *cert. dismissed in part sub nom. Doe v. Kentucky*, 144 S. Ct. 389 (2023).

Br. at 33. This factual assertion contradicts (1) the well-pled allegations in the Complaint regarding social transitioning's purpose (to alleviate psychological distress) and effect on children (making desistence substantially less likely), (2) this Court's decision in *Edmo v. Corizon*, (3) numerous other lower court decisions, (4) the views of numerous medical associations, and (5) the opinions of experts in the field. Op. Br. at 30–36. In short, creating an environment in which every person who interacts with a child is required to "affirm" the child's transgender identity constitutes a form of psychological treatment. *Id.* Indeed, most of the cases the District cites in its Response Brief confirm this fact. *M.H. v. Jeppesen*, No. 1:22-CV-00409-REP, 2023 WL 4080542, at *1 (D. Idaho June 20, 2023) (crediting plaintiffs' allegation that "[t]reatment for gender dysphoria includes 'gender transition'"); *Janiah v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022) ("Social transition . . . is a medically necessary component of treatment for some prisoners . . ."); *see also Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1275 n.11 (11th Cir. 2020) (concluding Eighth Amendment did not require social transition of prisoner because hormone therapy was adequate treatment).

The District also cites *Foote v. Town of Ludlow*, but *Foote* is distinguishable. There, the complaint failed to allege sufficient facts to create the inference that social transitioning had "clinical significance." No. CV 22-30041-MGM, 2022 WL 18356421, at *4 (D. Mass. Dec. 14, 2022), *appeal filed* (1st Cir.). Here, by contrast,

the Complaint explains the clinical significance of social transitioning in detail. ER-59–62 ¶¶ 33–50. And the other documents in the record here—which were not part of the record in *Foote*—leave no doubt as to the plausibility of the Complaint's allegations.

The District points out that the Policy does not require children to receive a gender dysphoria diagnosis before they are socially transitioned. But this fact does not help the District. Socially transitioning a child whose psychological distress is sub-threshold for gender dysphoria—or even the hypothetical child who has no psychological distress—is no less treatment than if the child has full-blown gender dysphoria. The purpose and effect of the social transition are the same regardless of the level of the child's psychological distress. ER-59 ¶ 40; ER-60 ¶ 43. The District's argument is like saying giving a child Tylenol somehow loses its character as "treatment" if the child does not actually have a severe headache. That is not the law.

In short, the fact that the Policy does not require a gender dysphoria diagnosis does not mean social transitioning is not treatment. Instead, it means the District is likely providing treatment to children who do not need it. Considering the serious psychological impact of social transitioning on children—an impact Ms. Regino's daughter experienced, ER-67 ¶ 76 (alleging A.S.'s social transition caused her to feel "stuck in [her] male identity," which exacerbated her "depression and anxiety")—this is not a mark in the Policy's favor.

At this stage in the proceedings, the Court need not conclude social transitioning constitutes psychological treatment. Rather, the sole question is whether the Complaint plausibly alleges it is. The Complaint satisfies this standard.

C. Requiring parental consent before the state socially transitions children does not infringe children's liberty interests.

The District argues requiring parental consent (or notice) before the state socially transitions their children infringes children's "liberty interests." Resp. Br. at 23–29. This argument is also wrong.

1. Ms. Regino does not seek to deprive her children of their liberty.

The District's argument is based on a misreading of *Parham*. There, parents committed their minor child to a state-run mental institution. 442 U.S. at 597. The child sued the institution's administrator asserting he had the due process right to an evidentiary hearing testing the propriety of the restriction on his liberty. *Id.* The Supreme Court disagreed, concluding the parents' constitutional "authority to decide what is best for the child" meant the child was entitled only to a review of his detention by a "neutral factfinder." *Id.* at 604, 606.

Unlike the parents in *Parham*, Ms. Regino does not seek to enlist the power of the state to deprive her children of their liberty. Instead, she asserts only the right to consent to healthcare treatment the state provides her children. Thus, the procedural due process guardrails the Supreme Court placed around the parents' constitutional rights in *Parham* are inapplicable here.

The District also argues *Parham* stands only for the proposition that states are *permitted* to give parental decisions initial deference, but not that they are *required* to do so. This argument is meritless. *Parham* itself observed the Constitution grants "broad parental authority over minor children." 442 U.S. at 602; *see also Troxel*, 530 U.S. at 67 (plurality op.) (holding visitation statute that gave "no deference" to parental decision unconstitutional). The District argues *Cruzan v. Missouri Department of Health* somehow modifies *Parham*, but the patient in *Cruzan* was not a minor, so the Constitution did not require any deference to parental decisions there. 497 U.S. 261, 286 (1990). *Cruzan* is thus inapposite here.

2. Children do not have a liberty interest to keep their social transitioning secret from their parents.

The District resists these straightforward conclusions, contending minor children have an "informational privacy" liberty interest to keep their parents from knowing they are being socially transitioned by their school. Resp. Br. at 15. But even assuming the Supreme Court would hold a right to "informational privacy" exists in the abstract, *cf. NASA v. Nelson*, 562 U.S. 134, 147 (2011) (assuming without deciding right exists), it would not apply here.

a. Danforth is inapposite.

The District tries to shoehorn this case into the line of cases striking down parental consent laws that gave parents an arbitrary "veto" over their minor children's abortion decisions. Resp. Br. at 21–23 (citing, *inter alia*, *Planned*

Parenthood v. Danforth, 428 U.S. 52, 74 (1976)). But those cases were not predicated on minors' right to "informational privacy." Rather, they were predicated on minors' right to make "important decisions" in their lives. *Whalen v. Roe*, 429 U.S. 589, 599–600 and n.26 (1977) (distinguishing between two types of "privacy" rights); *see also Danforth*, 428 U.S. at 74. Indeed, the Supreme Court never extended *Danforth* to statutes requiring parental *notice*. *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510 (1990) (leaving question open). Because the District invokes only the right to "informational privacy," and not decisional privacy, *Danforth* is inapposite.

In any event, the logic of the *Danforth* line of cases cannot be stretched to apply here. The Supreme Court has never struck down a parental consent law outside the abortion context, and the holding of the *Danforth* line of cases was based on the unique nature of abortion. Specifically, absent mishap, a pregnant minor will necessarily give birth "in a matter of weeks," at which point the (former) right would be lost forever. *See Bellotti v. Baird*, 443 U.S. 622, 642 (1979). In addition, "there are few situations [outside of the abortion context] in which denying a minor the right to make [the] decision will have consequences so grave and indelible." *Id.* Unlike abortion, even if *adults* have a constitutional right to be socially transitioned, the right is such that *minors* can exercise it when they reach the age of majority. And unlike *Danforth*, California law does not purport to give parents arbitrary "veto"

power over the decision to socially transition their children, nor does Ms. Regino dispute that her parental decision-making power may be limited by a compelling state interest. Thus, unlike *Danforth*, Ms. Regino's children are not subject to her unfettered control.

Moreover, the right to informational privacy arises only when an individual has a legitimate "expectation of privacy." *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 944 (9th Cir. 2009), *abrogated on other grounds by Rotkiske v. Klemm*, 140 S. Ct. 355 (2019). Unlike an abortion, which can be performed in the seclusion of a clinic before the minor is showing, a child's social transition at school is apparent to *everyone* in the school environment. Thus, children "can hardly be said to have a reasonable expectation of privacy" in their social transition at school. *Mirabelli v. Olson*, No. 3:23-cv-00768-BENWVG, 2023 WL 5976992, *10 (S.D. Cal. Sept. 14, 2023); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 659 n.2 (1995) ("[P]ublic school children . . have a diminished expectation of privacy." (cleaned up)). This is particularly true considering parents have a statutory right to observe their children's classes. Cal. Educ. Code § 49091.10(b); *see also* 20 U.S.C. § 6318(d)(2)(C).

Indeed, the suggestion that a school can unliterally create a privacy right in children simply by trying to conceal important events from their parents is absurd. No court has ever held children have a right to keep day-to-day information they

voluntarily disclose throughout the school environment secret from their parents. This Court should not be the first.

Even if parental secrecy policies could theoretically give rise to a right to informational privacy, such a right would not exist here. The Policy *itself* mandates parental disclosure in certain situations, ER-98–99, and school personnel have a First Amendment right not to lie to parents, *Mirabelli*, 2023 WL 5976992, *15. Thus, any expectation of privacy the child might have in their social transition is not legitimate.

Finally, the *Danforth* line cases would not help the District even if they applied. Under those cases, a minor had the right to bypass her parents' consent only when she could demonstrate either (1) "she possesse[d] the maturity and information to make her abortion decision" or (2) the abortion would be "in her best interests." *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789–90 (9th Cir. 2002). Here, the Policy does not require either of these preconditions. Instead, it authorizes social transitioning based solely on the child's request. ER-99. This is insufficient to trump parents' rights.

b. No other precedent supports the District's argument.

The District claims lower courts have held minors have "the right to keep [their] gender identity confidential from parents." Resp. Br. at 27. But none of the cases the District cites say that. In *Thomas v. Evansville-Vanderburgh School Corporation*, the Seventh Circuit held a *parent* did not have a right to be informed

about "academically oriented conversations" between her child and a school counselor. 258 F. Appx. 50, *54 (7th Cir. 2007). In *Doe v. Irwin*, the Sixth Circuit held *parents* did not have a right to be informed when a public health clinic distributed birth control to their children. 615 F.2d 1162, 1163 (6th Cir. 1980). And in *John & Jane Parents 1 v. Montgomery County Board of Education*, the court held *parents* did not have the "right to be promptly informed of their child's gender identity." No. 8:20-3552-PWG, 2022 WL 3544256, at *7 (D. Md. Aug. 18, 2022); *see also Doe v. Manchester Sch. Dist.*, No. 216-2022-CV-00117, at *5 (N.H. Sup. Ct. Sept. 5, 2022) (similar). None of these cases held *children* had a right to privacy vis-à-vis their parents, much less a right to keep information about their social transition secret.[2]

The District also tries to cobble together an argument that minors have a right to keep their "sex lives" secret from their parents. Resp. Br. at 45. Putting aside the fact that social transitioning has nothing to with a person's "sex life," the cases the

[2] The holdings of these cases are also distinguishable. In *Thomas*, unlike social transitioning, parents do not have the right to be informed about "academically oriented conversations" their children have at school. 258 F. Appx. at *54. In *Irwin*, the parents' claim implicated minors' decisional privacy right to obtain contraceptives, a right that is not present here. 615 F.2d at 1166 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692–93 (1977)). And in *Parents 1* and *Manchester School District*, the parents claimed a right to be informed if the school merely had knowledge of their children's gender identity. 2022 WL 3544256, at *7; No. 216-2022-CV-00117, at *5. As Ms. Regino has previously explained, her argument is the District's "*affirmative steps*" in socially transitioning her children triggers her parental right, not the District's mere knowledge. Op. Br. at 24–25.

District cites do not support its argument. In *Sterling v. Borough of Minersville*, the Third Circuit held an *adult* had a privacy right to keep his sexual orientation secret from his *grandfather*. 232 F.3d 190, 192 (3d Cir. 2000) (noting the individual at issue was "18 years old"). In *Nelson v. NASA*, the plaintiffs were *adults* who wanted to keep their sexual orientation secret from *their employer*. 568 F.3d 1028, 1037 (9th Cir. 2009) (Wardlaw, J., concurring in the denial of rehearing *en banc*), *reversed* 562 U.S. 134. Even if *adults* have an informational privacy right in their social transition, such a right would not extend to allow *minor children* to keep this information secret *from their parents*.

The closest the District gets is *Nguon v. Wolf*, where the court concluded a minor had a privacy right to keep her school from disclosing her sexual orientation to her parents. 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007); *see also C.N. v. Wolf,* No. SACV05868JVSMLGX, 2006 WL 8434249, at *9 (C.D. Cal. Nov. 1, 2006). But *Nguon* is deeply flawed. It did not evaluate whether the new right it was creating satisfied *Glucksberg*. 2006 WL 8434249, at *9. It did not consider the minor's parents' rights. *Id.* It uncritically extended *Sterling* to apply to minors. *Id.* It misinterpreted FOIA case law. 517 F. Supp. 2d at 1191 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989)). And it based its conclusion on the fact that the minor's parents were immigrants who spoke

little English. *Id.* These analytical shortcomings defeat any precedential value *Nguon* might otherwise have.

In any event, *Nguon* is distinguishable. The court concluded the minor had a legitimate "expectation of privacy" in her sexual orientation because she had "come out" to only "five friends." *Id.* Here, as discussed, children do not have a legitimate expectation of privacy vis-à-vis their parents when they are being socially transitioned at school.

In addition, information about a child's sexual orientation is vastly different from information that a child is being socially transitioned. In determining whether information is protected, the Court must evaluate the nature of the information, the "degree of need for access," and whether there is a "public interest" in disclosure. *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999). Considering "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," *Bellotti*, 443 U.S. at 634, the serious consequences of social transitioning cry out for parental involvement, not secrecy, Op. Br. at 5–8, 19.

Indeed, even in *Nguon* the court ultimately concluded the school had a legitimate reason to disclose the child's sexual orientation to her parents because disclosure was made "in the context of [school] discipline." 517 F. Supp. 2d at 1195. The justifications for disclosure are significantly more substantial here.

c. The District's proposed rule would send shock waves throughout the law of parent-child relations.

If the Court were to accept the District's argument, it would cause reverberations far beyond this case. This Court has held, for example, that "medical information" is encompassed within adults' right to informational privacy. *Doe v. Att'y Gen. of U.S.*, 941 F.2d 780, 795 (9th Cir. 1991), *disapproved on other grounds by Lane v. Pena*, 518 U.S. 187 (1996). If children have the right to keep "medical information" secret from their parents—and under the District's logic there is no reason they would not—then children would be empowered to direct their own healthcare. Such a result would not only contradict centuries of law and tradition, but it would also saddle children with the consequences of their own imprudent choices.

Moreover, in California alone, there is a significant body of statutory law requiring parental consent in certain situations. *See, e.g.*, Cal. Fam. Code § 302(b) (marriage); Cal. Fam. Code § 6925(b)(1) (sterilization); Cal. Penal Code § 652(a) (body piercing); Cal. Veh. Code § 17701 (driver's license); Cal. Educ. Code § 49423.1 (school's administration of medication); Cal. Educ. Code § 46014 (absence from school for religious purposes). If children have informational privacy rights vis-à-vis their parents, all these statutes—and the important role they play in protecting children from their own rash decisions—would be imperiled. The Court should reject such an outcome.

D. The state may not presume parents will harm their children.

Other than privacy, the only ground the District offers for why parents should be excluded from their child's social transitioning is that disclosure might lead to child abuse. Resp. Br. at 43. But Ms. Regino is a fit parent who would never harm her children, ER-56 ¶ 17; ER-66 ¶ 73, so this rationale does not apply to her. More broadly, the record contains no information regarding the alleged existence or frequency of child abuse in this situation. Thus, the Court may not consider the District's unfounded speculation. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (reversing dismissal of complaint "rooted in defendants' factual assertions").

Moreover, the Policy does not require a finding that individual parents are likely to abuse their children. Instead, parental unfitness is presumed based only on the child's desire to keep his or her parents in the dark. This violates the Constitution. *Parham*, 442 U.S. at 603 (rejecting notion that parental authority may be circumscribed "in *all* cases because *some* parents abuse and neglect their children" (emphasis in original)).

The facts here are emblematic of why the state may not presume the worst about parents. When Ms. Regino learned her daughter was being socially transitioned at school, she was "supportive," told her daughter she would "assist with" the transition, and arranged for her daughter to see a licensed therapist. ER-66 ¶ 74. While the District was content to allow Ms. Regino's daughter to suffer alone,

Ms. Regino took immediate action to ensure her daughter received competent care. This is the predictable consequence of the District's argument—because children lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602, they will often make choices that are harmful to them. The Constitution does not permit the state to facilitate this outcome.

III. THE POLICY VIOLATES MS. REGINO'S RIGHT TO MAKE IMPORTANT DECISIONS AND TO FAMILY INTEGRITY

The Complaint plausibly alleges the Policy violates Ms. Regino's First Amendment and substantive due process rights to make important decisions in her children's lives and to the integrity of her family.

A. The District is an active participant with the child under the Policy.

The District contends the Policy "simply preserves the status quo of the minor choosing to maintain the confidentiality of their gender identity" from their parents. Resp. Br. at 55. But this argument ignores that the District is an *active participant* with the child, in both the social transition and the parental concealment. ER-61 ¶ 50; ER-98–99. Indeed, the Policy requires school personnel to refrain from telling the truth to parents of a child who is being socially transitioned, even if the parents directly ask the school if their child is being socially transitioned, unless "the [D]istrict has compelling evidence that disclosure is necessary to preserve the student's . . . well-being." ER-98–99. This is impermissible. *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, No. 23-CV-069-SWS, 2023 WL 4297186, at

*14 (D. Wyo. June 30, 2023) (concluding "preclud[ing] a teacher . . . from answering . . . a parent's . . . inquiry [honestly] . . . creates a likely constitutional problem"). Accordingly, the District's assertion that Ms. Regino is seeking to impose a "duty upon public agencies to divulge the gender identities of minors to their parents if the agencies possess such information," Resp. Br. at 20, misrepresents her position. As Ms. Regino has explained, it is the District's *actions*—not its mere knowledge—that triggers its constitutional duty.

For the same reason, the District's hypothetical in which a parent wants to socially transition a child against the child's wishes is inapposite. Again, Ms. Regino does not assert the affirmative right to socially transition her children. Rather, she asserts only the defensive right to consent when the state seeks to do so. Regardless, the state may intervene to protect children in either situation, so long as it does so through a valid exercise of its *parens patriae* authority, which it has not done here.

Courts have repeatedly held similar state involvement in important family decisions violates the Constitution. Op. Br. at 18–22. Indeed, The District does not dispute that the decision to socially transition a child is an important one. In fact, it contends the decision is *so important* children have a privacy right to keep it secret from their parents. That argument is wrong, but the District's concession supports the conclusion that the decision is sufficiently important to implicate the parental right.

The District's actions also intrude into the private realm of the family. In *Arnold v. Board of Education of Escambia County*, for example, the Eleventh Circuit held school officials violated parents' rights by "coerc[ing their child] to refrain from discussing" with them whether to have an abortion. 880 F.2d 305, 312 (11th Cir. 1989). Similarly, the Policy encourages children to make important decisions in their lives with state participation and without involving their parents through its promise of state-created secrecy. This veil of secrecy—no less than coercion—"deprives . . . parents of the opportunity to counter influences on the child" with which parents disagree. *Id.* at 313.

In *Gruenke v. Seip*, the Third Circuit held a school coach violated a mother's parental rights when he "fail[ed] to notify her" about her daughter's pregnancy and made the pregnancy "a subject of gossip in the school community." 225 F.3d 290, 306 (3d Cir. 2000). The pregnancy was a "family crisis," and the coach had no basis "to obstruct the parental right to choose the proper method" of managing it. *Id.* Similarly, here, given social transitioning's impact on the child, the District has no justification for attempting to manage children's request for social transitioning without involving their parents.

B. The Constitution requires the District to obtain parental consent before socially transitioning children.

The District argues the Constitution does not "compel state action" in the form of requiring the District to seek parental consent (or provide parental notice) before socially transitioning their children. Resp. Br. at 29. But Ms. Regino does not seek

to *compel* State action; she seeks to *stop* it. She seeks an injunction against the Policy and any policy allowing the District to socially transition children without parental consent (or notice). ER-81. There is nothing extraordinary about this form of relief. The state may not, absent exigent circumstances, perform healthcare treatment on children without "parental consent" and a "judicial hearing." *Mann*, 907 F.3d at 1158; *Mueller I*, 576 F.3d at 995. The state may not, absent exigent circumstances, separate children from their parents without "notice and a hearing." *Ram v. Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997). And the state may not take a child into protective custody without notifying parents with legal but not physical custody. *James v. Rowlands*, 606 F.3d 646, 654–56 (9th Cir. 2010). Legal rules requiring parental consent (or notice) are commonplace.

The District invokes *Fields*, but *Fields* held only that parents do not have a right to dictate *what* schools teach or *how* they do so, including things like "the hours of the school day, school discipline, [and] the timing and content of examinations." *Fields I*, 427 F.3d at 1206. That is not remotely analogous to social transitioning. And while public schools' core function is teaching students, they have no special role or competence deciding whether a child should be socially transitioned. ER-61 ¶¶ 49–50.

Further, *Fields*' core rationale was that giving parents the right to dictate what or how the school teaches its students would present intractable management

problems because parents would each want their children to be taught conflicting things and governed by conflicting rules. *Fields I*, 427 F.3d at 1205. That concern is not implicated here. If Ms. Regino were to prevail, all parents would have the freedom to decide whether the District socially transitions their children, subject to the state's *parens patriae* authority. Requiring parental consent (or notice) does not create the management concerns that drove this Court's decision in *Fields*.

In the end, as *Fields* recognized, parents' rights do not stop at the schoolhouse door. *Fields II*, 447 F.3d at 1190–91. And the Policy impermissibly applies the *in loco parentis* doctrine to "displace parents" from their primary role. *Gruenke*, 225 F.3d at 307.

IV. THE PARENTAL SECRECY POLICY FAILS ANY SCRUTINY

The Policy is subject to strict scrutiny, which the District makes no effort to satisfy. Moreover, the Policy does not satisfy any lesser standard, including rational basis review.

To have a rational basis, the Policy must bear a "rational[] relation" to a "legitimate state interest." *Witt v. Dep't of Air Force*, 527 F.3d 806, 814 (9th Cir. 2008). The District argues protecting students from "domestic abuse" is legitimate. Resp. Br. at 43. But the state "has no interest . . . in protecting children from their parents unless it has some reasonable evidence that the parent is unfit and the child

is in imminent danger." *Wallis*, 202 F.3d at 1142 n.14. Because the Policy does not require any such evidence, it lacks a legitimate purpose.

The District also argues protecting students' privacy is legitimate, but as discussed, students do not have a privacy right to keep their social transitioning secret from their parents. Moreover, mandating parental secrecy based only on the child's wishes is irrational. Student privacy is thus not a legitimate purpose either.

The Policy also does not serve its goals in a rational way. The District argues the Policy authorizes parental secrecy only if a "school official determin[es] that maintaining . . . confidentiality is not harmful to the student's" well-being. Resp. Br. at 23. But the Policy does not require such a finding. Instead, the Policy presumes secrecy is proper, and it allows for parental disclosure *only* when "the [D]istrict has compelling evidence that disclosure is necessary to preserve the student's . . . well-being." ER-98–99. Far from ensuring the social transition is "not harmful," this language *countenances* harm to the child. If, for example, the District has strong (but not "compelling") evidence that parental disclosure is likely (but not "necessary") to preserve the child's well-being, this evidence is insufficient to overcome the Policy's presumption of secrecy. Because the Policy values secrecy over the child's well-being, it is not rationally related to any state purpose.[3]

[3] The Policy contains an exception where disclosure is "required by law," but Ms. Regino is not aware of any law—other than the Constitution—that would "require[]"

Finally, the "shocks the conscience" standard is not applicable. That standard applies only to arbitrary "executive" action. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). It does not apply where, as here, the government has adopted a "policy." *Mann*, 907 F.3d at 1164. In such a case, the government's "deliberate adoption" of the policy—which the District did here, ER-55–56 ¶ 12—is sufficient. *Mann*, 907 F.3d at 1164.

V. MS. REGINO'S PROCEDURAL DUE PROCESS CLAIMS ARE NOT PREDICATED ON A DEFICIENT LEGISLATIVE PROCESS

The Complaint plausibly alleges the Policy violates Ms. Regino's procedural due process rights because it (1) infringes her liberty interests by authorizing the District to socially transition her children and (2) fails to provide her notice and an opportunity to be heard regarding the social transition.

The District contends the Policy does not violate Ms. Regino's procedural due process rights because she was able to participate in the "standard legislative process" prior to the Policy's enactment. Resp. Br. at 52. This is incorrect.

It is true that procedural due process does not require legislative bodies to provide individual notice and an opportunity to be heard before "adopt[ing]" a generally applicable law. *See Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445-46 (1915); *see also Halverson v. Skagit Cnty.*, 42 F.3d 1257, 1260

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parental disclosure, nor has the District identified any such law. Thus, as interpreted by the District, this exception is a legal nullity.

(9th Cir. 1994), *as amended on denial of reh'g* (Feb. 9, 1995). But Ms. Regino does not contend the District *adopted* the Policy without providing her adequate pre-enactment process. Rather, she alleges the Policy *itself* lacks adequate procedural safeguards. ER-79 ¶¶ 119–22. Specifically, the Policy fails to provide her notice and an opportunity to be heard before the District adjudicates whether to socially transition her children. *Id.* These allegations state plausible procedural due process claims. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 432 (1982) (holding claim-adjudication process for employee termination procedurally deficient); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544–45 (1985) (same); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (same for dependency proceeding).

VI. THE POLICY IS FACIALLY INVALID

The overbreadth doctrine applies to Ms. Regino's facial First Amendment claim. *Ams. for Prosp. Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021). Under that doctrine, a law is facially invalid when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* The Policy fails this test. As discussed, the Policy is based on a presumption that parents are unfit child abusers based only on their child's desire for secrecy. Because the vast majority of parents are fit, the Policy's "lack of tailoring" renders it substantially overbroad. *Id.*

The Policy is also facially unconstitutional under the Due Process Clause. Outside of the First Amendment context, a law is facially invalid when it "lacks a plainly legitimate sweep" or there are "no set of circumstances . . . under which the law would be valid." *Id.* (cleaned up). As discussed, the District has no interest in concealing a student's social transition from fit and loving parents simply because some parents might be dangerous. *Parham*, 442 U.S. at 603; *Wallis*, 202 F.3d at 1142 n.14. And because even unfit parents are entitled to a determination of their unfitness, the Policy is facially invalid. *Stanley*, 405 U.S. at 654; *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (holding statute facially invalid that precluded detainees' pre-trial release despite the existence of "persons who could be detained consistent with due process under a different categorical statute").

The District argues the Policy is not facially unconstitutional because some students are adults, but Ms. Regino's facial challenge extends only to children covered by the parental right. The fact that some small fraction of students may not be covered by the parental right is irrelevant. *Doe v. Reed*, 561 U.S. 186, 194 (2010) (noting plaintiffs must only demonstrate facial invalidity "to the extent of [the] reach" of the facial challenge).

Finally, the District contends requiring parental consent is unworkable because more than one parent may be involved, but Ms. Regino has sole custody of her children, ER-56 ¶ 16, so there is no one else to consider in her case. And in cases

where parents have joint legal custody, Ms. Regino's position is consent of only one custodial parent is required to socially transition the child, unless the District is in possession of a custody order saying otherwise, in which case the District must adhere to the terms of the order. This rule is easy to administer, and the District does not contend otherwise.

CONCLUSION

The Court should REVERSE the district court's Order and Judgment and REMAND for further proceedings.

February 22, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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9th Cir. Case Number(s) 23-16031

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