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Public School Gender Policies That Exclude Parents Are Unconstitutional

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KEY TAKEAWAYS

The Supreme Court has long recognized parents' fundamental right to direct the upbringing and education of their children.

Many school districts prioritize children's gender-related choices while actively excluding parents knowing of—let alone participating in—those choices.

A minor child's parents are not only in the best position to address that child's self-professed gender identity, but they also have the right to do so.

Like others around the country, the Rockford, Michigan, Public School District requires parents' permission for many things that affect their children's safety, education, and personal well-being. But during the 2021–2022 school year, acting on nothing more than a seventh-grader's e-mail to a school counselor, East Rockford Middle School personnel began treating the female student as a boy. They concealed the situation from the girl's parents. Indeed, they altered school records that the parents might see and failed to disclose anything about this scheme even while communicating with them about other aspects of the girl's mental health, well-being, and academic progress.[1]

In August 2020, administrative staff in the Escondido, California, Union School District, adopted a similar policy. They claimed that a student's "assertion" of "gender identity," by itself, requires school

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personnel to "begin to treat the student immediately, consistently with that gender identity. The student's assertion is enough."[2] Revealing a student's "transgender status"[3] to "individuals who do not have a legitimate need for the information"—*including parents*—is considered prohibited discrimination or harassment. Under the policy, "a student's consent to reveal gender information is required, regardless of the age of the student."

These are neither isolated incidents nor the random acts of a few rogue teachers or administrators. As of May 22, 2024, the database maintained by Parents Defending Education lists 1,062 public school districts in 38 states and the District of Columbia with written policies that authorize or require withholding gender-related information from parents. These districts include 18,658 schools attended by nearly 11 million students. This *Legal Memorandum* will identify the common features of school gender policies, outline the basis and substance of parents' right to direct the upbringing and education of their children, and examine litigation alleging that these policies violate this right.

Definitions

No legal or policy area is more fraught with definitional and categorical confusion than gender ideology. Trying to make some sense out of it is beyond the scope of this *Legal Memorandum*. Nevertheless, for purposes of this analysis, a few key terms that often appear in the school gender policies examined below must be defined.

Sex is an objective term, referring to the biological fact that a human being is either male or female. The American Medical Association defines sex as "the classification of living things as male or female" and is biological in nature.[4] Similarly, the World Health Organization defines it as "genetic/physiological or biological characteristics of a person which indicates whether one is female or male."[5] The school policies examined here reflect the almost complete abandonment of sex as an objective, or even relevant, category. In fact, these policies refer to sex only in phrases such as "sex assigned at birth."[6]

Gender has a long history in the English language, including as a synonym for sex as defined above. In the mid-20th century, however, some theorists began to separate the terms, using gender in a much broader and subjective sense to refer to the social and psychological aspects of sex such as stereotypes and personal experiences.[7] In a 2001 report, the Institute of Medicine recommended this separation, with the term *sex* "used as a classification, generally as male and female, according to the reproductive organs and functions that derive from the chromosomal component." *Gender*, the report said, "should be used to refer to a person's self-representation as male or female."[8]

Gender identity, the term at the heart of school gender policies, is inherently subjective and entirely internal. The Human Rights Campaign defines it as "[o]ne's innermost concept of self as male, female, a blend of both or neither."[9] Similarly, National Public Radio defines it as "one's own internal sense of self and their gender, whether that is man, or woman, neither or both."[10] Gender identity, the National Institutes of Health explains, "is not necessarily visible to others"[11] but is wholly determined by how individuals perceive and interpret their "internal sense." As such, gender identity, unlike sex, can change at any time and in whatever direction the individual desires. *Transgender* refers to a "gender identity [that] differs from the sex the person was identified as having at birth."[12]

Finally, *gender dysphoria* is a clinically diagnosed mental disorder. In the current edition of the *Diagnostic and Statistical Manual of Mental Disorders*, the American Psychiatric Association defines gender dysphoria as a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by" specified "strong" desires, preferences, or convictions.[13] "If untreated, gender dysphoria may lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide."[14]

School Gender Policies

Notwithstanding such conceptual and definitional difficulties, there is no doubt that issues of sexuality and identity, especially during adolescence, can profoundly affect how individuals understand themselves and others, as well as influence the course of their lives. Because minors lack the experience, knowledge, and judgment to make sense of this by themselves, the question is who will fill that gap. Public schools answer this question with gender policies that impose a particular ideological view of these issues, but prevent parents from playing this role.[15] They elevate "a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice."[16]

In doing so, they have broken the bonds of trust between parent and child, relegating parents to uninformed bystanders in the development of their children's very identities. Policies like this are "as foreign to federal constitutional and statutory law as [they are] medically unwise."[17]

Policy Components. School gender policies have three common components.

1. They take at face value and treat as conclusive a student's communication or other indication of his or her gender identity.

2. They require school personnel immediately to treat the student consistent with whatever gender identity a student may have communicated, including the use of student's preferred names or pronouns and access to student's desired school facilities.[18]

3. They prohibit communication about the student's gender identity or "transgender status" to anyone, including his or her parents, without the student's permission.

Two related problems are particularly relevant to the legal validity of these policies. First, they impose upon students and their parents a controversial ideology regarding a profoundly important and highly sensitive subject. Second, this problem is compounded by the fact that this subject is unrelated to either curriculum or school administration—the spheres in which schools are traditionally given deference. Instead, these policies are directly related to family life, parent/child relationships, and other aspects of what has traditionally been deemed the prerogative of parents in raising their children.

The Diminished Capacity of Children. School gender policies, which apply to students of any age, presume that "[t]he person best suited to determine a student's Gender Identity is the individual student."[19] Yet this presumption is at odds with the consensus, in many other contexts, that minors lack the maturity, judgment, or experience to make decisions, especially regarding important matters that can significantly affect their lives.

The Supreme Court has long recognized this fact, and as such, it renders these school policies particularly noxious. The Supreme Court has affirmed that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. [Therefore], parents can and must make those judgments."[20] The Supreme Court also wrote in 2021:

> A child's "lack of maturity" and "underdeveloped sense of responsibility" lead to recklessness, impulsivity, and heedless risk-taking.... They "are more vulnerable... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment".... And because a child's character is not as "well formed as an adult's," his traits are "'less fixed."[21]

A child's decision about whether to engage in a school-facilitated social "gender transition,"[22] and the underlying mental health implications of such a choice require the maturity and guidance of a child's custodial parents

during that process.[23] "Social transition"—the facilitation of a student's desired bathroom use, pronoun, or name use—is a clinically significant therapeutic intervention[24] by his or her school and "not a neutral act."[25]

Studies show that these "social transitions" lock gender-confused adolescents into the belief that they are born into the wrong body and, invariably, lead to an increased likelihood of future medical gender-related interventions designed to "affirm" that gender, including surgery, puberty blockers, and cross-sex hormones.[26] This is particularly notable as "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves."[27] Therefore, 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."[28]

In *Bellotti v. Baird*,[29] which involved a challenge to a state law requiring parental consent for a minor to obtain an abortion, the Court recognized that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[30] As a result, "parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions."[31] Similarly, in *H.L. v. Matheson*,[32] the Court acknowledged that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[33] This authority "presumptively includes counseling [children] on important decisions."[34]

And in *Roper v. Simmons*,[35] the Court held that executing an individual for crimes committed while a minor violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Court observed several "general differences between juveniles under 18 and adults."[36] These include "comparative immaturity and irresponsibility"[37] and vulnerability and susceptibility "to...outside pressures, including peer pressure."[38]

The Precipitous Rise in Childhood Transgenderism

The "influences and outside pressures"[39] that the Supreme Court noted in *Roper* may not have negative or lasting effects in some contexts. Unfortunately, it appears that within the context of gender identity, they have both. Magnified by social media[40] and promoted by school gender policies,[41] what is sometimes referred to as "social contagion"[42] is fueling a dramatic increase in the number of adolescents who identify as transgender.

As reported by the *New York Times*:

> [m]any parents of kids who consider themselves trans say their children were introduced to transgender influencers on YouTube or TikTok, a phenomenon intensified for some by the isolation and online cocoon of Covid. Others say their kids learned these ideas in the classroom, as early as elementary school, often in child-friendly ways through curriculums supplied by trans rights organizations, with teaching aids like the "gender unicorn" or the "gender bread" person.[43]

A June 2022 report by the Williams Institute at UCLA's School of Law found that while "the percentage and number of adults who identify as transgender has remained steady over time," the percentage of individuals identifying as transgender who are between 13 and 17 years of age nearly doubled in just five years.[44] By 2022, minors were nearly *five times* more likely than adults to identify as transgender.[45]

A 2018 study showed an especially significant rise in "rapid-onset gender dysphoria" appearing for the first time during puberty, often in the context of belonging to a peer group in which one or more members became gender-dysphoric or transgender-identified at the same time.[46] The study suggested that "peer contagion," which has been shown to be a factor in problems such as depression and eating disorders, may contribute to this phenomenon.

Rapid-Onset Gender Dysphoria. School gender policies make rapid-onset gender dysphoria even more likely. They uniformly prohibit consideration of any medical diagnosis or treatment, documentation, or other objective evidence that may give a student's subjective communication any context.[47] And by excluding parental knowledge, let alone input, these policies foreclose the best source of information regarding a student's medical history, temperament, habits, activities, or other factors that may provide a better and more accurate understanding of the student's communication regarding gender identity: his or her parents.

Prohibiting consideration of external factors means that schools must take a student's expression or communication regarding gender identity at face value, on its own terms. Recall, however, that gender identity is inherently subjective, internal, and variable. There is, by definition, no standard or common way for students to communicate regarding their gender identity and, therefore, no way for schools to correctly identify the very thing on which their gender policies are based. Taking a student's expression of gender identity "at face value" therefore cannot be the basis of a rational school-wide policy.

The Madison, Wisconsin, policy provides an example. It defines gender identity as "[a]n internal, deeply felt sense of being male, female, a blend

of both or neither." All students, the policy states, "must have access to changing facilities" and must be "able to participate on [an athletic] team consistent with their gender identity." How can a school maintain changing areas or athletic teams "consistent with" claims of being neither male nor female or both? And how can schools do so when a student can change gender identity at any time and in any way?

Subjective Expression. Relying solely on a student's subjective expression of gender identity, however, is even more problematic. These policies describe the communication that triggers social transitioning and parental exclusion in many different ways. Some policies refer concretely to a student's "assertion" of gender identity but do not define or provide any guidance for how to identify or interpret such an assertion. Dictionaries, for example, typically define an assertion as a "confident and forceful statement of fact or belief"[48] or a "declaration that's made emphatically."[49] At the same time, while the Escondido policy noted above refers to an "assertion" of gender identity, school officials there have also said that "[t]here is no need for a formal declaration."[50]

Other policies cover situations in which "the school administration is notified by a student or the student's parent or guardian that the student will assert a gender identity that differs from previous representations or records."[51] These policies do not indicate the form that this assertion might take or what it would mean if no "previous representations or records" indicate anything about a student's gender identity.

Some policies cover "gender identity...which is consistently asserted at school"[52] without either defining "consistently" or providing criteria for what constitutes an assertion. Others cover "gender identity as expressed by the student and asserted at school"[53] without distinguishing between expressions and assertions or how a student makes either regarding gender identity.

After excluding any external considerations—and unable to interpret or sometimes even identify a student's subjective expression of internal feelings—a school that insists on such a policy has no choice but to impose its own concepts and terms. These include the ideological position that minors have an absolute right to privacy regarding what the school says their gender identity is at the moment, a right that requires school personnel to exclude a minor's parents from not only any role in making decisions but, in most cases, any knowledge of the situation at all. These policies conflict with the parents' constitutional right to direct the care, upbringing, and education of their children.

Parental Rights

Under Common Law. The principle that parents have primary authority regarding the upbringing and education of their children has deep philosophical and legal roots. In his work *Summa Theologica*, for example, Thomas Aquinas wrote in the 13th century that "it would be contrary to natural justice, if a child...were to be taken away from its parents' custody, or anything done to it against its parents' wish."[54] John Locke emphasized the same principle four centuries later in his *Second Treatise on Government*,[55] arguing that parental childrearing authority precedes and is independent of political authority.[56]

In his *Commentaries on the Laws of England*, published in 1765, William Blackstone wrote of parents' common-law duty to provide for the maintenance, protection, and education of their children.[57] In terms of priority, Blackstone argued that the duty to provide a suitable education for children had "the greatest importance of any."[58] Blackstone, who was influenced by Locke, was "one of the political philosophers whose writings...were 'most familiar to the Framers.'"[59] Parents' common-law duty became a constitutional right through the Fourteenth Amendment.

Under Constitutional Law: Substantive Due Process. The Fourteenth Amendment prohibits any state from depriving "any person of life, liberty, or property, without due process of law."[60] In two ways, however, the Supreme Court has gone beyond the text's procedural focus and recognized new constitutional rights by substantively defining "liberty." This interpretive approach is often called *substantive due process*.

Both before[61] and after[62] ratification of the Fourteenth Amendment, the Supreme Court held that the Bill of Rights—which, on their face, apply only to Congress—do not apply to the states. Beginning in 1925, however, the Supreme Court reversed course and began applying individual provisions of the Bill of Rights to the states by "incorporating" them into "liberty"[63] in the Fourteenth Amendment's Due Process Clause. While scholars have long debated the Supreme Court's change of direction,[64] the rights being incorporated at least appear somewhere in the Constitution's text.

The second method by which the Supreme Court has given Fourteenth Amendment "liberty" substantive meaning is even more controversial[65] because it results in recognition of rights that do not appear in the constitutional text at all. The idea that a written Constitution contains, in effect, unwritten substantive provisions conflicts with the Framers' purpose in putting the Constitution in writing in the first place. The Supreme Court recognized in *Marbury v. Madison*[66] that they did so in order that the Constitution's limits on government "may not be mistaken nor forgotten."[67]

When the Framers designed the American system of government—and the judiciary's role within it—they explained that "strict rules and precedents, which serve to define and point out [the judges'] duty in every particular case that comes before them" is "indispensable" to minimize "arbitrary discretion."[68] Less than a decade after the Constitution's ratification, the Supreme Court held that it "can be revoked or altered only by the authority that made it."[69] The power to recognize rights that the people—the authority that made the Constitution—did not put in its text, rights based on ultimately unknown subjective ideas or criteria, is incompatible with these principles.

The Supreme Court, in fact, has acknowledged that substantive due process has been a "treacherous field"[70] and warned against "the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy."[71] To that end, the Court has "been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended."[72]

Attempting to cabin substantive due process, the Supreme Court has emphasized two general criteria for recognizing unenumerated rights under the Fourteenth Amendment. In *Palko v. Connecticut*,[73] the Court held that a law allowing the state to appeal criminal convictions violated the Fourteenth Amendment. The Court explained that the Fourteenth Amendment incorporated provisions of the Bill of Rights because those rights are "implicit in the concept of ordered liberty."[74] And in *Moore v. City of East Cleveland*,[75] the Court held that an ordinance limiting occupancy of a building to members of a single defined "family" violated the Fourteenth Amendment. "Appropriate limits on substantive due process," the Court held, include the requirement that rights be "deeply rooted in this Nation's history and tradition."[76]

Another hedge against courts using substantive due process too expansively is the Supreme Court's insistence that rights said to meet these criteria must be carefully or specifically described rather than vaguely stated.[77] The Court "has always been reluctant to expand the concept of substantive due process" and has focused on "how [a] petitioner describes the [unenumerated] constitutional right at stake."[78]

When the Supreme Court has concluded that an asserted unenumerated right falls in one or both of these categories, identifying it as a "fundamental" right, it will apply *strict scrutiny* to government actions that burden that right.[79] This standard requires the government to show that its action was "justified only by compelling state interests" and was "narrowly drawn to express only those interests."[80]

Parental Rights in Education

The Supreme Court has several times recognized parents' constitutional right to direct the upbringing of their children, including in the educational context. In *Meyer v. Nebraska*,[81] for example, the Supreme Court held more than a century ago that a state law requiring school instruction to be conducted in English violated the Fourteenth Amendment. It held that "liberty" includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[82] These privileges included "the power of parents to control the education of their own."[83]

***Pierce* and Its Progeny.** In *Pierce v. Society of Sisters*,[84] the Court held that a state law requiring that children between the ages of eight and 16 attend public schools violated the Fourteenth Amendment. Citing *Meyer*, the Supreme Court held as "entirely plain" that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[85]

Federal courts applying these principles in individual cases have provided additional guidance. Because family relationships are the kind of "personal bonds" that "act as critical buffers between the individual and the power of the State,"[86] for example, those family relationships must be given "a substantial measure of sanctuary from unjustified interference by the State."[87] And as the Supreme Court has clarified that the rights of parents to the companionship, care, custody, and management of their children are within the scope of "fundamental" liberty interests subject to these constitutional protections,[88] a state may not affirmatively interfere with that fundamental right without demonstrating that its actions are narrowly tailored to achieve a compelling state interest.[89]

This is no less so within the context of public education.

Federal courts have held that parental rights do not end at the "school house door,"[90] and that "public schools must not forget that 'in *loco parentis*' does not mean 'displace parents.'"[91] But the parental right, as we have written in a previous *Legal Memorandum*,[92] is not unlimited, absolute, or unqualified.[93]

Federal appellate courts have recognized categories of educational decisions in which parents do not have a constitutional interest,[94] often indicating that the parental right to control the upbringing and education of their children is comparatively weaker regarding the development of a substantive curriculum or school administration.[95] While parents, for example, have the right to determine "which school their children will attend,"[96] they cannot dictate "how a public school teaches their child."[97] The challenge for this analysis is to clarify on which side of the line gender

policies fall and, therefore, whether they implicate strong or weak parental rights. In general, the parental right to control the upbringing and education of their children is comparatively weaker regarding the development of a substantive curriculum or school administration.

Gruenke. At the same time, courts have held that even in this context, the balance may favor parents regarding sensitive subjects such as sexuality or gender identity. In *Gruenke v. Seip*,[98] for example, the U.S. Court of Appeals for the Third Circuit held that in asking a member of his high school swim team to take a pregnancy test without her mother's knowledge or consent, a coach had plausibly violated the mother's Fourteenth Amendment due process right. The court wrote that "[i]t is not unforeseeable...that a school's policies might come into conflict with the fundamental right of parents to raise and nurture their child. 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."[99] Noting that "[i]t is not educators, but parents who have primary rights in the upbringing of children...[s]chool officials have only a secondary responsibility and must respect these rights,"[100] the court took particular issue with the school's failure to inform the girl's parents and the confidential nature of its actions.[101]

Ridgewood. In *C.N. v. Ridgewood Board of Education*,[102] the U.S. Court of Appeals for the Third Circuit held that an anonymous survey seeking details of students' personal lives, including their sexual behavior, did not violate the Fourteenth Amendment. The court noted, however, that "the challenged action of the school defendant is not neatly tied to considerations of curriculum or educational environment."[103] School-sponsored counseling or psychological testing "that pry into private family activities," the court warned, might "overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children."[104] It noted that "introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority."[105]

Tatel. In *Tatel v. Mt. Lebanon School District*,[106] parents of first-grade children sued because a teacher had been instructing them about gender dysphoria and transgender transitioning without giving parents notice or an opportunity to opt their children out of such instruction. Even though this occurred in the instructional context, the court found a Fourteenth Amendment violation, holding that "teaching a child how to determine one's gender identity" strikes "at the heart of parental decision making in a matter of greatest importance in their relationship with their children, i.e., forming their children's religious and moral beliefs and their identity."[107]

Ricard. In *Ricard v. USD 475 Geary County, KS School Board,*[108] a teacher challenged a school policy much like those examined in this analysis. It required school personnel to use a student's preferred first name and pronouns and prevented communicating with parents regarding their child's preferred name and pronouns without the child's consent. The teacher claimed these policies violated her First Amendment rights to free speech and free exercise of religion. The court denied a preliminary injunction against the policy regarding the use of a student's preferred name and pronouns but granted it against the policy regarding parental communication.

While not a final decision on the merits, the court in that case concluded that the plaintiff would likely be able to show that requiring communication with parents that, in her view was dishonest, substantially burdened her Christian beliefs. "Plaintiff would face the Hobbesian choice," the court explained, "of complying with the district's policy and violating her religious beliefs, or abiding by her religious beliefs and facing discipline."[109]

Further, the school district observed that a federal law allowing parents to access their children's education records might disclose his or her preferred name and pronouns. A policy allowing an exception for such a secular purpose, but not one for religious reasons, showed that the parental communication policy is not "generally applicable," but actually disfavors religion. As a result, it would have to be a "narrowly tailored" means to further "interests of the highest order"—a very high legal standard—to be valid under the First Amendment.[110] The court concluded that the policy could not meet this standard in light of the Supreme Court's recognition of the fundamental parental right to direct the upbringing and education of children.

The 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." Parental exclusion was not merely an effect of the school's gender policy, but its intention. The school district "intended to interfere with the parents' exercise of a constitutional right to raise their children as they see fit. And whether the District likes it or not, that constitutional right includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred."[111]

While the courts, therefore, have broadly distinguished between curriculum and administration and other school actions, even *within* the context of instruction and curriculum, gender identity is a "matter of great importance that goes to the heart of parenting."[112]

To summarize, the Supreme Court has recognized that the parents' right to direct the upbringing of their children is "essential to the orderly pursuit of happiness," "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." That right is strong in the educational context, generally, remaining so even within the context of curriculum and instruction regarding highly sensitive matters that impact family relationships.

Minors' immaturity and lack of judgment and experience counsel for more parental involvement, not less. Federal and state law implement this principle by giving priority to both parental knowledge and decision-making authority in matters affecting the well-being and education of their children. This is the philosophical and legal context, seven centuries in the making, within which to address the rapid social and cultural changes on gender identity that are playing out in America's schools.

Parental Litigation Over School Gender Policies

As the Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected,"[113] there have been a proliferation of lawsuits[114] across the country against school districts with these secrecy policies. These lawsuits share similar claims[115] and characteristics. In each, the court was tasked with determining whether the gender identity confidentiality policy followed by school personnel violated the right of the parents to direct their child's education as protected by the U.S. Constitution. The fundamental interpretive legal principles underlying each lawsuit are the same, and this analysis addresses some of the resulting federal court rulings below.

Together, they argue for much-needed clarity from the Supreme Court on the precise contours of parental rights within the context of school gender policies.

Standing. In setting out the powers of the federal judiciary, Article III of the U.S. Constitution grants federal courts the power to adjudicate active "cases" and "controversies" only.[116] The Supreme Court in *Lujan v. Defenders of Wildlife*[117] articulated a three-part test to determine whether a party has standing to sue under Article III:

1. The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is: (a) concrete and particularized; and (b) actual or imminent;

2. There must be a causal connection between the injury and the conduct brought before the court; and

3. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

While anticipated future injuries may be sufficient to establish standing, those injuries must also be concrete, imminent, and more than merely conjectural.[118] However, federal courts have "long held that the deprivation of a constitutional right [is] irreparable,"[119] and constitutes a sufficient injury to confer standing.

In addition, many—if not all—of the challenged gender confidentiality policies violate not just parents' constitutional rights, but federal statutory rights to their children's educational information as well.[120] The Supreme Court has determined that a violation of a parent's statutory right to information is sufficient to confer standing.[121] Therefore, "[w]here a school district or its employees affirmatively act to prevent a parent from having information necessary to make informed decisions about their child's safety, the parent has standing to bring their own claims."[122]

Parents Involved. Perhaps most directly relevant to school policy litigation, however, is the Supreme Court's holding in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[123] in which the Court held that parents have standing to sue when the practices and policies of a school threaten the rights and interest of their minor children. In *Parents Involved*, the Supreme Court assessed a parental organization's standing to sue a school district and a school board under the Fourteenth Amendment because of its assignment plan that relied on racial classifications to allocate high school enrollment slots, elementary school enrollment slots, and transfer requests. The Court determined that because "the group's members have children in the district's elementary, middle, and high schools…and [their] elementary and middle school children may be denied admission to the high schools of their choice when they apply for those schools in the future," the group had standing to challenge the policies under the Equal Protection Clause.[124]

Notwithstanding, much of the parental litigation involving school secrecy policies has been hobbled by court findings that the plaintiff parents lack standing and is plagued by misapplication of standing principles by some federal courts. This is particularly so in cases where the parents challenging the school policy have children that—while subject to the policy—do not express gender dysphoria or utilize the school confidentiality policy. But

some cases would not suffer this defect, such as when the parents challenging the school policy have children with feelings of gender incongruence, and the school has facilitated the social transition of their children and hidden that fact from the parents. These two types of cases represent the difference between facial and as-applied constitutional challenges.

Facial Challenges. A facial challenge is one in which the plaintiff alleges that "no application of the statute would be constitutional."[125] In contrast, courts define an as-applied challenge as one "under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances."[126]

Parents who bring facial pre-enforcement challenges[127]—those whose children express no gender incongruity—must still prove that they have suffered or will suffer an injury sufficient to satisfy standing as required by Article III of the Constitution, in addition to demonstrating that no application of the gender confidentiality policy would be constitutional. In the case of school gender policies, parents with children who express no gender incongruity often face the prospect of judicial determinations that find the risk of injury insufficiently "imminent." However, imminence is an "elastic concept" intended only to ensure injuries are not "too speculative."[128] And the Supreme Court has held that standing does not "uniformly require plaintiffs to demonstrate that it is literally certain"[129] parties will suffer the alleged harm, although that is how many of the federal courts tasked with assessing the constitutionality of school gender policies have interpreted it. Rather, the Court has allowed a showing of imminence through alternative means—such as "preenforcement review of facial due process challenge[s]."[130]

As of the date of publication of this *Legal Memorandum*, a case is pending on a petition for certiorari before the U.S. Supreme Court addressing this precise threshold question as it pertains to school gender policies. The petitioners in that case have asked the justices to determine whether they have standing to challenge a school confidentiality policy, though their children, while subject to the policy, have not expressed gender dysphoria or requested the concealment of information on the same from their parents.

This case, and others like it, are discussed below.

The Litigation

42 U.S.C. § 1983. The vehicle for seeking redress of injuries against state actors including public school administrators is a civil action for deprivation of rights brought under 42 U.S. Code § 1983.

Section 1983 provides an individual the right to sue state government employees[131] or others acting "under color of state law" for civil rights abuses such as violations of constitutional law. While it provides no substantive rights itself, it does provide the vehicle for injured parties to recover damages from someone who violated their rights under the Constitution or federal statute while acting in an official government capacity.[132]

In relevant part, the statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[133]

The requirements for success on a § 1983 substantive due process[134] challenge—whether facial or as-applied—are violation of a federal constitutional right and proof that the alleged violation was committed by a person acting under the color of state law and was of such a magnitude that it shocks the conscience.[135]

The question of whether school policies concealing the gender identity information of minors are egregious enough to "shock the conscience" has proven critical to the success or failure of much of the federal litigation thus far on these policies.

Shocks-the-Conscience Test. The "shocks the conscience" test was first articulated by the U.S. Supreme Court in 1952 in *Rochin v. California*. In that case, the "majority [held] that the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"[136] Since then, the Court has returned to the *Rochin* standard time and again, especially within the context of alleged violations of substantive due process rights.[137]

In *County of Sacramento v. Lewis*,[138] the parents of a motorcycle passenger who was killed in a high-speed police chase of the motorcyclist brought a § 1983 claim against the county of Sacramento, the sheriff's department, and the sheriff's deputy for deprivation of the passenger's substantive due process right to life. The Supreme Court, when assessing whether the executive action undertaken by the county officials was sufficiently "conscience shocking" first noted that "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[139] It wrote that

while due process protection in the substantive sense limits what government can do in both its legislative and executive capacities, the criteria to identify what is "fatally arbitrary" differ depending on whether the action is executive or legislative.[140]

Executive action generally involves "a specific act of a governmental officer that is at issue."[141] In other words, "[e]xecutive acts characteristically apply to a limited number of persons (and often to only one person); executive acts typically arise from the ministerial or administrative activities of members of the executive branch."[142] By contrast, legislative acts generally apply to a larger segment of society and "laws and broad-ranging executive regulations are the most common examples."[143]

For executive acts, the Supreme Court said, courts should apply the shock-the-conscience test.[144] And while the *Lewis* Court did not address the test for legislative or quasi-legislative acts, other federal courts have since held that when assessing legislative acts, a court should apply the more traditional levels of scrutiny (such as rational basis review, heightened or intermediate review, or strict scrutiny), depending on the specific right asserted.[145] When an asserted right is considered "fundamental," strict scrutiny review applies.[146]

In *Lewis*, the Court wrote that its precedent addressing abusive executive action has emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense."[147] Official "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level,"[148] and neither history nor tradition, the Court wrote, "justify finding a due process violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop."[149]

The shocks-the-conscience test has risen to new prominence in litigation on school gender confidentiality policies. School officials often advance claims that they are exercising a legitimate government interest in protecting transgender students from bullying or potential domestic abuse at the hands of non-affirming parents. As such, they claim that their official action is not "conscience-shocking" enough to meet the threshold for a deprivation of the constitutional parental right under 42 U.S.C. § 1983. This ignores, however, long-standing federal precedent on how deliberate interference with the parent-child relationship may satisfy the shocks-the-conscience test. It likewise ignores the fact that, as the Supreme Court has stated,[150] school board policies that apply to all students and school officials are properly assessed as legislative—not executive—actions. Therefore, an entirely different analysis applies.

Regardless of whether school gender policies that interfere with parental rights are considered to be executive or legislative acts, however, parent plaintiffs meet the applicable threshold for both.

School Policies: Executive or Legislative Action?

As outlined above, American history and tradition evince a long-standing Fourteenth Amendment substantive due process right to direct the care and upbringing of one's children. In particular, the Supreme Court has recognized the primacy of the parental right in non-curricular matters of a child's education.[151] Indeed, "[t]he Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[152]

Familial relationships are the quintessential "personal bonds" that "act as critical buffers between the individual and the power of the State,"[153] and the family, as an institution deeply rooted in this nation's history and tradition, is the vehicle by which moral and cultural values are passed down.[154]

Federal courts have frequently employed a shocks-the-conscience test to school confidentiality policies, determining them to be exercises of executive function but insufficiently conscience shocking to be unconstitutional. These courts, however, have disregarded precedent indicating that, as one court correctly noted, "conduct shocks the conscience when there is highly intrusive conduct, the use of physical force, or interference with a protected relationship (e.g., a parent–child relationship)."[155]

Grendell. In *Grendell v. Gillway,*[156] for example, the court found that the behavior of the police "shocked the conscience" when an officer lied to and threatened an 11-year-old girl in order to extract incriminating information about suspected drug use by her parents, writing that it struck at "the basic fabric of all parent–child relations: love, trust, and faith."[157] Federal circuits have likewise held that the interference with the right of familial association can shock the conscience.[158] Indeed, the government's "forced separation of parent from child, even for a short time, represents a serious impingement"[159] on a parent's substantive due process right to familial association. A parent must allege an intent to interfere with this right; specifically, that the state actor directed conduct at the familial relationship "with knowledge that the statements or conduct [would] adversely affect that relationship."[160]

Dubbs. Federal courts have also held that interference with a fundamental right may shock the conscience. In *Dubbs v. Head Start, Inc.,*[161] the Tenth Circuit acknowledged that "the 'shocks the conscience' standard applies to tortious conduct challenged under the Fourteenth Amendment," but

left the door open to the possibility of greater protection for fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition."[162] The Supreme Court has often reinforced the fact that parenting and child-rearing are among the oldest of its recognized fundamental rights.[163]

Not only is the parental right one the Supreme Court has recognized as fundamental, but it has also held that the parent–child relationship is a protected relationship that must be substantially shielded from government intrusion. For both reasons, intrusion into the parent–child relationship by state school officials who withhold critical information on a minor child's self-identification from his or her parents—and in many cases, actively deceive those parents—is conduct that ably meets the shocks-the-conscience test.

Should school gender policies fail to shock the conscience when viewed as an exercise of executive power, however, parental claims can succeed on an alternate theory. The Supreme Court has clarified that school board policies are an exercise of legislative—not executive—authority and are therefore subject to the traditional tiers of scrutiny. As a result, a strict scrutiny analysis (and the attendant presumption of unconstitutionality) should apply to these school policies because the parental right has long been recognized as fundamental.

A few federal courts have properly assessed school board rules or policies as exercises of legislative function, subject to a fundamental rights' analysis and a balancing of these rights against the asserted interests expressed by the school, school board, or school district entity.[164] In each of those challenges, parents identified a municipal custom or specific policy that caused a violation of their fundamental constitutional rights,[165] resulting in liability against both the school entity for enacting the unconstitutional policy and the individuals who enforced the policy.[166]

Harrah. In *Harrah Independent School District v. Martin*, the Supreme Court assessed a legislative exercise, and held that a school board rule requiring teachers to earn additional college credits was "endowed with a presumption of legislative validity, and the burden [was] on [the respondent teacher] to show that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers."[167] Notably, however, the school board rule in *Harrah* did not implicate a fundamental liberty interest—such as the long-recognized right of parents to direct and oversee their children's upbringing.[168] The Supreme Court pointed out as much, writing that:

> [T]here is no claim that the interest entitled to protection as a matter of substantive due process was anything resembling "the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and

> family life…" Rather, respondent's claim is simply that she, as a tenured teacher, cannot be discharged under the School Board's purely prospective rule establishing contract nonrenewal as the sanction for violations of the continuing-education requirement incorporated into her contract.[169]

By contrast, school confidentiality policies strike right at the heart of the fundamental parental right and are specifically "intended to interfere with the family relationship."[170] They should therefore be subject to strict scrutiny review.[171] This renders the policies constitutionally suspect unless school districts can demonstrate that the policies are narrowly tailored to achieve a compelling interest. Though school officials may assert that they have a compelling interest in protecting children from perceived danger, the banning of communication between parent and school regarding the parent's minor child, the creation of false student records hidden from the parent, and the active obfuscation on the child's gender identity expression—these are not the most narrowly tailored means to achieve the school's goal. Assuming, *arguendo*, that the state's interest in preventing parental bullying or abuse of a transgender-identified student constitutes a compelling state interest, school gender policies would need the kind of narrow tailoring that accounts for both precedent and the duties of school officials under related statutory authority.

Parham. A state's representation of what may constitute a "child's best interest" would still be subject to significant and long-recognized limitations. In *Parham v. J.R.*,[172] for example, the Supreme Court assessed the constitutionality of a Georgia mental health law that permitted the involuntary admission of a minor child to a mental health hospital by his or her parents. Plaintiff children alleged that they had been deprived of their liberty without procedural due process, but the Court disagreed. In addressing claims that parents might abuse their minor children through the involuntary commitment process, the Supreme Court noted:

> We cannot assume that the result in *Meyer v. Nebraska*…and *Pierce v. Society of Sisters*…would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.[173]

Indeed, federal courts have held specifically that a "state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that *a child has*

been abused or is in imminent danger of abuse."[174] Moreover, school officials and employees are already required to report information to state child welfare agencies about the possibility of abuse or neglect of minor children.[175]

The overwhelming majority of school policies simply *assume* that a student's parents will be unsupportive and might subject their child to abuse for questioning his or her gender identity. If the schools actually believed that a student has been or might be subjected to abuse (and by abuse, the authors mean some form of physical or extreme psychological abuse beyond simply disapproving of their child's self-expression), it would be incumbent upon the school to conduct some form of investigation, and to report the matter should such an investigation reveal, as courts have said, "a child has been abused or is in imminent danger of abuse."

The absence of any such requirement clearly demonstrates that these school policies are not narrowly tailored to achieve the objective that the state believes is compelling enough to override the parents' fundamental rights to rear their child as they deem appropriate. Without such a requirement or demonstration, these policies sweep too broadly to satisfy strict scrutiny review and are therefore unconstitutional.

Regino v. Staley. In *Regino v. Staley*,[176] Aurora Regino filed suit against California School Superintendent Kelly Staley and other officials over a regulation that resulted in the school district "socially transitioning"[177] students expressing a transgender identity without notifying and obtaining the informed consent of parents, in violation of their constitutional rights. Among others, Regino brought a facial and as-applied challenge under 42 U.S.C. § 1983 for violation of her Fourteenth Amendment substantive due process right to parent her minor child, A.S.

A.S., an elementary school student, had expressed her desire to be a boy to her school counselor, and the school's staff began referring to her by a new name and new pronouns without consulting with Regino. The staff hid this information from Regino, who was unaware that her daughter was subject to the school confidentiality policy and had a "gender support plan" in place—until her minor daughter told her. Regino filed a motion with the court seeking to enjoin the policy.

In denying her request, Judge John Mendez found that Regino was unlikely to succeed on the merits, holding that she could not demonstrate that she had a constitutional right to be informed of her minor child's new name or preferred pronouns, or that she was likely to suffer irreparable harm if the policy was not enjoined.[178]

In determining that Regino was unlikely to succeed on the merits, Judge Mendez wrote:

> While the cases cited by Plaintiff refer to the generally held presumptions that parents act in the best interest of children and help compensate for their children's lack of maturity and experience when dealing with intimate and health related decisions…[*n*]*one of the cases cited by Plaintiff opine on whether the state has an affirmative duty to inform parents of their child's transgender identity nor whether the state must obtain parental consent before socially transitioning a transgender child*…. In the absence of the requisite legal and statutory support for Plaintiff's contention that she has a constitutional right that was violated, Plaintiff cannot establish a likelihood of success on the merits.[179]

The court reached this conclusion even though it recognized "the novel nature of Plaintiff's claims and finds that Plaintiff has raised serious questions that go to the merits of her case."[180] Judge Mendez added that Regino's nine-month delay in filing for injunctive relief and the impermissible burden on the school to apply the policy in different ways to different children argued against a grant of injunctive relief.

He concluded:

> It is not necessarily a school's duty to act as an impenetrable barrier between student and parent on intimate, complex topics like gender expression and sexuality…[but] on the other hand, granting parents unimpeded access to and control over a student's personal life can result in conflict that makes students feel vulnerable and unsafe both at home and at school, depending on their parents' personal beliefs…[and] a school could be prevented from providing institutional support and protection for certain marginalized identities because of parents' personal beliefs.[181]

Those concerns, Judge Mendez wrote, were better suited for deliberation by the legislature.

The school superintendent, Kelly Staley, subsequently filed a motion to dismiss the case. In granting the motion, Judge Mendez determined that the school policy was not egregious enough to "shock the conscience," and that Regino had not demonstrated her constitutional rights as a parent had been violated.[182] The court analyzed the issue utilizing the rational basis test,[183] rather than subjecting the policy to strict scrutiny analysis, and determined that the defendant had set forth a legitimate state interest in creating a "zone of protection" for transgender or gender-questioning students from adverse hostile reactions, including domestic abuse and bullying.[184] That, he wrote, was in line with the regulation's general purpose to combat discrimination and harassment against students.

Significantly, though, the court failed to recognize Supreme Court precedent indicating that a state's notion of what may be "thought to be in the children's best interest," without some "showing of unfitness" on the part of parents, offends the Due Process Clause.[185]

Judge Mendez also ignored the Supreme Court's holding that

> [t]he statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. Simply 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.[186]

In this case, the school district had not demonstrated Regino's unfitness as a parent, nor had it proven that the policy was developed as a result of demonstrated incidents of Regino's abuse or neglect of her minor daughter. Though Judge Mendez determined that a "zone of protection" theory satisfied rational basis judicial review, long-standing Supreme Court precedent does not support a finding that the creation of a "zone of protection" is a legitimate state interest. Still, Judge Mendez concluded his opinion by noting that the school district's staff was not forcing students to adopt transgender identities or to keep their identities secret from their parents.[187] Rather, they were simply "directed to affirm a student's expressed identity and pronouns and disclose that information only to those the student wishes."[188]

Even though Aurora Regino had a child who was directly affected by and who utilized the school's gender policy, and even though she was completely excluded from the school's determination on the social transition of her minor daughter, the trial court erroneously concluded that Regino had not demonstrated that the school's policy violated her clearly established constitutional rights.

Littlejohn v. School Board of Leon County Florida. In 2020, as the COVID-19 pandemic swept the nation, and most children were relegated to virtual school, January and Jeffrey Littlejohn's 13-year-old daughter told January that "she no longer felt like a girl." This revelation appeared at the same time that three of their daughter's friends at her local middle school had also suddenly declared a transgender identity, and while their daughter was struggling with Attention Deficit Hyperactivity Disorder that made online learning challenging.[189] Over the next two years, January and Jeffrey's daughter's claimed identity changed *four* times. She revealed she had met with school administrators and was requesting that her parents refer to her by a different name, and "they/them" pronouns.

After the Littlejohns demanded to know why administrators had met with their minor daughter without notifying them, they learned that the school district's LGBTQ+ Equity Committee had created and implemented the "LCS Lesbian, Gay, Bisexual, Transgender, Gender Nonconforming and Questioning Support Guide" throughout Leon County Schools, including at Deer Lake Middle School, where their daughter was a student. The guide directed administrators and staff not to communicate with and involve parents in decisions related to their children's desire to "socially transition" unless parents were deemed in "support of their child's gender transition."[190] The guide also advised staff that they could change a student's records at the student's request, without any involvement of the parents.

In late 2021, January and Jeffrey Littlejohn learned that the school had developed a gender support plan with their daughter without their knowledge, affirming their daughter's belief that she was nonbinary, providing housing and bathroom recommendations, and instituting a plan to use "they/them" pronouns for their child. The Littlejohns subsequently filed a lawsuit under 42 U.S.C. § 1983 against the Leon County, Florida, School Board and various school officials alleging a violation of, among others, their constitutional rights under the Fourteenth Amendment.

The trial judge, Chief Judge Mark Walker, rejected their claim, stating that "the law regarding substantive due process rights afforded to parents is an *unsettled area of constitutional law, such that a reasonable person would not be able to know when their conduct is in violation of the law*."[191] His opinion was largely devoid of any reference to the more than 100 years of jurisprudence establishing the Fourteenth Amendment substantive due process parental right as "fundamental." Because he determined the law on parental rights to be "unsettled," Chief Judge Walker held that the individual school officials were entitled to qualified immunity because they were acting within the scope of their employment and discretionary state authority.[192] They would not have known, Walker claimed, that hiding the gender identity information of a minor child from that child's parents would have violated the parents' rights.[193]

When assessing the actions of the school board, Chief Judge Walker determined that the shocks-the-conscience test was the most appropriate assessment of the school board's actions, even though the school-wide policy was an exercise of legislative—not executive—authority. He also ignored binding Eleventh Circuit precedent indicating that when fundamental rights are at issue, a shocks-the-conscience analysis is inappropriate; rather, the court should employ a strict scrutiny analysis that balances the interests of both the individual claimant and the state.[194]

In his opinion, Chief Judge Walker wrote that "parental rights...are a 'murky area of unenumerated constitutional rights' where courts must 'tread lightly' to avoid placing important matters 'outside the arena of public debate and legislative action.'"[195] He determined that the failure to seek the parents' input, and the concealment of their minor child's gender support plan, were not sufficiently conscience-shocking to violate the parents' substantive due process rights.

Chief Judge Walker reached this conclusion even though the factors involved arguably satisfy the shocks-the-conscience test: among others, the deliberately intrusive conduct of the school officials and school board exacerbated the student's mental health concerns. However, Chief Judge Walker determined that because the Littlejohns' minor daughter had requested the meeting, and because school officials had not publicly accused the parents of abusing their daughter or attempted to interfere with their custodial relationship with her, their conduct was appropriate.

In the end, Walker concluded that the Littlejohns had not pleaded "sufficient facts that demonstrate that Defendants' alleged conduct was so egregious or created such extraordinary circumstances...that a reasonable jury would be permitted to find that Defendants' deliberate indifference to their liberty interests shocks the conscience."[196]

The case is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit.

John and Jane Parents 1

In October of 2020, three parents with children in a Montgomery County, Maryland, high school sued the Montgomery County Board of Education over its gender identity support plan guidelines.

In relevant part, those guidelines state:

> It is critical that all MCPS [Montgomery County Public Schools] staff members recognize and respect matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality.... All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA).[197]

As with the other previously mentioned cases, the guidelines kept critical information away from the parents about their child's gender identity or their need for a "support plan." In *John and Jane Parents 1 et al. v. Montgomery County Board of Education*,[198] the parents alleged that the guidelines were both facially unconstitutional,[199] and unconstitutional as applied[200] to their children, though none of them alleged that their children had gender support plans, were transgender, or were struggling with their gender identity.

While the parents were seeking relief in the form of information about any possible future gender support plan for their children, the parents did not allege that their children were likely to direct the school to refuse to share their gender identity with their families. However, the parents alleged that the parental preclusion policy violated their fundamental right to parent their individual children by violating their right to obtain information about them.

In rejecting the parents' claim and granting the defendant's motion to dismiss, Judge Paul Grimm acknowledged that while government actions infringing on a fundamental constitutional right are subject to strict scrutiny analysis, there was no fundamental parental right to be "promptly informed of their child's gender identity, when it differs from that usually associated with their sex assigned at birth."[201] Grimm noted that the Fourth Circuit has rejected the use of strict scrutiny analysis for parental rights claims based on an alleged substantive due process violation unless an associated allegation of a violation of one's right to the free exercise of one's religion is also asserted. So, in employing the lowest-tier rational basis review to the parents' claims, Judge Grimm determined that the Montgomery County Board of Education had a "legitimate interest in providing a safe and supportive environment for all MCPS students, including those who are transgender and gender nonconforming. And the guidelines [were] certainly rationally related to achieving that result."[202] He likened the parental preclusion policy to curricular or other school policy decisions, which are clearly subject to rational basis review, and held the Board of Education's policy satisfied that standard.

The plaintiffs cited the Eleventh Circuit's decision in *Arnold v. Board of Education of Escambia County, Alabama*,[203] in which the court concluded that a "parent's constitutional right to direct the upbringing of a minor is violated *when the minor is coerced to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion; a decision which touches fundamental values and religious beliefs parents wish to instill in their children*."[204] But Judge Grimm distinguished *Arnold*, saying that none

of parents in the case before him alleged specific facts regarding the application of the guidelines to any of their children.

Fourth Circuit Appeals Court. On appeal, the U.S. Court of Appeals for the Fourth Circuit did not address the merits of the parents' claims. Rather, a majority of the three-judge panel determined that the parents lacked standing to bring the challenge in the first place. In an opinion by Judge Marvin Quattlebaum, that was joined by Judge Allison Jones Rushing, the court held that because none of the parents' children had gender support plans, were transgender, were struggling with the issue of gender identity, or were suspected to be at a heightened risk of considering gender transition, the plaintiffs could not demonstrate that they had suffered an injury in fact and therefore lacked standing.[205] While the court recognized that future injuries can confer standing, the claimed harm "must not be so speculative as to lie 'at the end of a highly attenuated chain of possibilities.'"[206]

The court noted that injury-in-fact requires more than a conceivable potential injury, but a current injury, a certain-impending injury, or a substantial risk of a future injury, and it reasoned that the parents' fear was speculative at most.[207] The court reasoned that for the parents to be injured, a chain of events would have to occur: Their children would have to identify as transgender or gender-nonconforming, they would have to disclose their gender identity to the school, the school would need to create a support plan, and the school would need to deem the parent unsupportive or the child to refuse disclosure to the parent.[208] That, the court wrote, was too attenuated to meet the legal standard for an injury sufficient to confer standing.

While the court did acknowledge the Board of Education's policy was "staggering," and that it might be "repugnant as a matter of policy,"[209] it noted that "just because a policy or practice exists and is unconstitutional does not mean a particular plaintiff has been injured and has standing to challenge it."[210] Judge Quattlebaum acknowledged that the parents' strongest support for standing was its reliance on *Parents Involved in Community Schools v. Seattle School District No. 1*, because there, too, the harm (being forced to participate in an unconstitutional, race-based system) depended on a chain of future events involving the decisions of others.[211] But the court determined that nothing about *Parents Involved* applied beyond the context of equal protection claims, and it did not read the opinion so as to abrogate the "certainly impending" test that applies to cases involving future injuries.[212]

The court declined to hold that a plaintiff has standing anytime he or she is forced to participate in an unconstitutional policy, regardless of whether there was an active associated injury, because doing so would open the doors to conflicts that should be resolved by legislatures, not the judiciary.[213]

Ignoring that the Supreme Court does not always require a "plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat,"[214] the majority vacated the case and remanded it to the trial court with instructions to dismiss the complaint.

Neimeyer Dissent. In dissent, Judge Paul Neimeyer took issue with the majority's finding that the plaintiff parents lacked standing, relying specifically on *Parents Involved* and the Supreme Court's finding of standing even though the harm in that case was only speculative. Writing that "parents whose children are subject to the policy must have access to the courts to challenge such a policy." He argued that the majority was reading the complaint in an unfairly narrow way and pulling the discussion of gender issues "from the family circle to the public schools without any avenue of redress."[215] The policy, Neimeyer argued, directed staff to engage in a form of cover-up by providing that "[s]chools should seek to minimize the use of permission slips and other…forms that require disclosure of a student's gender or use gendered terminology."[216] In shutting parents out from an open relationship with their children, the parents had experienced a redressable injury and had standing, because standing depends "considerably upon whether the plaintiff is himself an object of the action…at issue."[217]

Because the complaint alleged a broader constitutional injury—that of usurping parental roles—it was dispositive that the guidelines were not voluntary but mandatory and applied to all students in the system. As a result, the parents now had to "contend with the worry that school officials might…deem 'unsupportive' the Parents' view that their child ought to transition only after professional psychological or psychiatric consultation."[218] He also charged the majority with suggesting that "injury under the Due Process Clause yields rank to injury under the Equal Protection Clause"—something not supported by the *Parents Involved* decision, or in any decision from the Supreme Court, since.[219]

Judge Neimeyer's dissent is in line with the notion that "federal courts have long held that the deprivation of a constitutional right [is] irreparable."[220] He also recognized that intangible harms can and do give rise to standing—such as, for example, the disclosure of information and intrusion upon seclusion.[221] Developing and implementing a gender transition plan for minors without their parents' knowledge does not simply implicate a curricular or policy decision, but goes to the "very personal decision-making about children's health, nurture, welfare, and upbringing, which are fundamental rights of the Parents."[222]

Prior to the publication of this *Legal Memorandum*, the parents in this case filed a petition for a writ of certiorari with the Supreme Court in which they asked the Court to address two discrete questions:

1. When a public school, by policy, expressly deceives parents about how the school will treat their minor children, do parents have standing to seek injunctive and declaratory relief in anticipation of the school applying its policy against them?

2. Assuming the parents have standing, does the Parental Preclusion Policy violate their fundamental parental rights?[223]

Their petition was dismissed on May 8, 2024.[224]

Within four weeks, however, the parents in a similar case originating in the U.S. Court of Appeals for the Seventh Circuit[225] filed their own petition for a writ of certiorari based on a facial challenge to the constitutionality of the gender support policies of the Eau Claire, Wisconsin, Area School District. As had the parents in *John and Jane 1,* the parents in *Parents Protecting our Children v. Eau Claire Area School District* are asking the Court to address whether, when a school district adopts an explicit policy to usurp parental authority regarding a child's expression of gender identity—and to conceal that information from parents—the parents subject to that policy have standing to challenge it.[226]

The lack of clarity in legal standards, the debate over "social transitions," and the proliferation of gender support plans that preclude parents from receiving critical information about their own children all cry out for Supreme Court review. The Court has the chance to clarify the boundaries of parental rights—something not undertaken by the Court for over two decades—and should grant review in *Parents Protecting our Children v. Eau Claire Area School District* to clarify how "fundamental" the parental right is. The result will determine whether, when school gender policies and parental rights collide, parents are relegated to powerless bystanders in the development of their own children's very identities.

Conclusion

Conflicting federal court opinions on parents' right to know about their child's desire to transition,[227] the modern zeitgeist on gender ideology, and the sudden surge in transgender-identifying adolescent populations argue for *more* parental involvement, not less. As the Supreme Court noted in *Parham v. J.R.*, "parents possess what a child lacks in maturity, experience and capacity for judgment" and the "natural bonds of affection lead parents to act in the best interests of their children."[228] Parents' fundamental constitutional rights have been recognized by the Supreme Court as superior to

the interests of a public school.[229] But for more than 1,000 school districts across the country, this understanding has been lost and parental rights have been ignored.[230]

One's gender identity implicates "medical, social, and policy" considerations.[231] And school gender identity policies and "support plans" involve similarly significant considerations.[232] A minor child's parents are not only in the best position to address that child's self-professed gender identity, but they also have the right to do so. These policies do not address mere curricular or administrative policies, but rather, concern matters that strike directly "at the heart of the parental decision-making authority on matters of the greatest importance."[233] The contours of the parental right originate in the nation's history and tradition, intrinsic to human rights.[234] And the principle that parents have the right to direct the upbringing, care, and education of their children has philosophical and legal roots dating back centuries. The institution of the family predates the Constitution itself.[235]

As the Supreme Court held in *Troxel v. Granville*, the parental right is the oldest of the fundamental liberty interests ever recognized by that Court. If that is to mean anything in the future, parents must act now to force school districts to change these policies, urge state legislatures to prohibit them, and, if necessary, to defend their rights in court.

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Endnotes

1. The girl's parents, Dan and Jennifer Mead, filed a lawsuit against the school district on December 18, 2023. *See* https://adfmedialegalfiles.blob.core.windows.net/files/MeadComplaint.pdf.
2. *See* Mirabelli v. Olson, No. 3:23–CV–00768–BEN–WVG, 2023 WL 5976992, at *4 (S.D. Cal. 2023).
3. In the Escondido policy, this term means "a student whose gender identity is different from the gender he/she was assigned at birth." The text of the school policies referenced or quoted in this *Legal Memorandum* can be found at https://defendinged.org/investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/ (last visited May 14, 2024). For simplicity, they will be referred to by the school name.
4. AMA Manual of Style ¶ 11.7 (Amn. Med. Ass'n. eds., 11th ed. 2020), https://academic.oup.com/amamanualofstyle/book/27941/chapter/207567296?login=false#440333829.
5. *Id*.
6. *See, e.g*., policy of Escondido, California, school district, *supra* note 3.
7. HERITAGE FOUND., HOW TO SPEAK UP ABOUT GENDER IDENTITY: QUESTIONS AND ANSWERS DRIVING THE DEBATE 3, May 2020, https://www.heritage.org/sites/default/files/2020-05/2019_09_0319_GenderIdentity_eBook.pdf.
8. Inst. of Med., Exploring the Biological Contributions to Human Health: Does Sex Matter? 8 (Theresa M. Weizmann & Mary-Lou Pardue eds., 2001). *See also* Institute of Medicine, Exploring the Biological Contributions to Human Health: Does Sex Matter? (Theresa M. Weizmann & Mary-Lou Pardue eds., 2001), https://www.ncbi.nlm.nih.gov/books/NBK222288/pdf/Bookshelf_NBK222288.pdf.
9. HUM. RTS. CAMPAIGN, *Sexual Orientation and Gender Identity Definitions*, https://www.hrc.org/resources/sexual-orientation-and-gender-terminology-and-definitions.
10. Laurel Wamsley, *A Guide to Gender Identity Terms*, Nat'l. Pub. Radio (June 2, 2021), https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq. *See also* similar definitions at *Definitions of Gender, Sex, and Sexual Orientation and Pronoun Usage*, Amn. Psychiatric Ass'n., https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/definitions-and-pronoun-usage ("a person's basic internal sense of being a man, woman, and/or another gender"); *Gender and Health*, World Health Org., https://www.who.int/health-topics/gender#tab=tab_1 ("a person's deeply felt, internal and individual experience of gender, which may or may not correspond to the person's physiology or designated sex at birth"); *Terminology*, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm ("[a]n individual's sense of their [sic] self as man, woman, transgender, or something else."); and *Sexual Orientation and Gender Identity*, U.S. Dept. of State, https://eca.state.gov/files/bureau/sogi_terminology.pdf ("[a]n individual's internal, deeply felt sense of being a man, a woman, both, neither, or in-between."). These definitions demonstrate the confusion that pervades this entire subject, interchangeably using terms that refer to biological sex ("male" and "female") and subjective gender ("man" or "woman").
11. NAT'L. INST. OF HEALTH, *NIH Style Guide: Sex, Gender, and Sexuality,* https://www.nih.gov/nih-style-guide/sex-gender-sexuality.
12. *Transgender*, Merriam-Webster, https://www.merriam-webster.com/dictionary/transgender#:~:text=adjective-,trans%C2%B7%E2%80%8Bgen%C2%B7%E2%80%8Bder%20tran(t)s,identified%20as%20having%20at%20birth.
13. Diagnostic and Statistical Manual of Mental Disorders 452 (Amn. Psychiatric Ass'n. eds., 5th ed. 2013).
14. Mirabelli v. Olson, No. 3:23–CV–00768–BEN–WVG, 2023 WL 5976992, at *9 (S.D. Cal. 2023).
15. "Gender policies" are sometimes called "gender support plans," and the terms will be used interchangeably throughout this *Legal Memorandum*.
16. *Mirabelli*, 2023 WL 5976992.
17. *Id*. at *9.
18. This treatment is often referred to as "social transition," discussed *infra* at 4.
19. *See, e.g*., *State Board of Education Statement and Guidance on Safe and Supportive Learning Environments for Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Students*, Mich. Bd. of Educ. (Sept. 14, 2016), at 4, https://www.michigan.gov/-/media/Project/Websites/mde/Year/2016/09/15/SBEStatementonLGBTQYouth.pdf?rev=4df8bc6d407b4fa08ebc73ffeb50633e#:~:text=The%20person%20best%20situated%20to,the%20student's%20parents%20or%20guardians.
20. Parham v. J. R., 442 U.S. 584, 603 (1979).
21. Miller v. Alabama, 567 U.S. 460, 471 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569, 570 (2005)). The notion of a child's traits as "less fixed" is borne out by data from a recent Dutch study that followed 2,700 adolescents for 15 years and revealed that by the age of 25, only 4 percent of the study's participants expressed any feelings of gender incongruity or dysphoria. *See* Pien Rawee et al., *Development of Gender Non-Contentedness During Adolescence and Early Adulthood*, Archives Sex Behav. (Feb. 27, 2024), https://doi.org/10.1007/s10508-024-02817-5.
22. See *Mirabelli*, 2023 WL 5976992, at *5–7 (describing the nature of "social transition," summarizing evidence that argues for a cautious approach—particularly without parental involvement).

23. At least one federal circuit court has acknowledged that "social transitioning" (the use of a different name, different pronouns, and different private facilities or sports teams) is a clinically significant intervention for gender dysphoric children. In *Edmo v. Corizon, Inc*., the Court acknowledged that the World Professional Association for Transgender Health's Standards of Care identifies social transitioning as a "form of treatment" for those suffering from gender dysphoria. 935 F.3d 757, 770 (9th Cir. 2019), opp'n at 4.
24. *Id*.
25. Hillary Cass, *Independent Review of Gender Identity Services for Children and Young People: Interim Report*, Cass Rev. (Feb. 2022) at 63, https://cass.independent-review.uk/wp-content/uploads/2022/03/Cass-Review-Interim-Report-Final-Web-Accessible.pdf.
26. *See* Kristina R. Olson et al., *Gender Identity 5 Years After Social Transition*, 150 Pediatrics 2 (Aug. 2022), https://publications.aap.org/pediatrics/article/150/2/e2021056082/186992/Gender-Identity-5-Years-After-Social-Transition?autologincheck=redirected. *See also Early Social Gender Transition in Children Is Associated with High Rates of Transgender Identity in Early Adolescence*, Soc'y for Evidence Based Gender Med. (May 2022), https://segm.org/early-social-gender-transition-persistence. Furthermore, these "social transitions" are not affiliated with better mental health outcomes, and concealment of a child's gender identity from his or her parents may contribute to emotional destabilization and increased psychological distress. *See* James S. Morandini et al., *Is Social Gender Transition Associated With Mental Health Status in Children and Adolescents with Gender Dysphoria?* 52 Archives Sex Behav. 1045–60 (2023), https://doi.org/10.1007/s10508-023-02588-5.
27. Schall v. Martin, 467 U.S. 253, 265 (1984).
28. Parham v. J. R., 442 U.S. 584, 602 (1979).
29. Bellotti v. Baird, 443 U.S. 622 (1979).
30. *Id*. at 635 (opinion of Powell, J.). In general, children have the same constitutional rights as adults unless the specific right: (1) exposes the vulnerability of children; (2) exposes their inability to make mature decisions; or (3) involves the importance of the parental role in child rearing. *Id.* at 622, 634–637. Incontrovertibly, the asserted right of a minor to keep gender identity information concealed from one's parents satisfies all three exceptions. *See also* Ginsberg v. N.Y., 390 U.S. 629 (1968) ("illustrat[ing] well the Court's concern over the inability of children to make mature choices").
31. *Bellotti*, 443 U.S. at 640.
32. H.L. v. Matheson, 450 U.S. 398 (1981).
33. *Id*. at 410, quoting *Ginsberg*, 390 U.S. at 639.
34. *Id*.
35. Roper v. Simmons, 543 U.S. 551 (2005).
36. *Id*. at 569.
37. *Id*.
38. *Id*.
39. *Id.* at 569.
40. *See* Pamela Paul, *As Kids They Thought They Were Trans. They No Longer Do*, N.Y. Times (Feb. 2, 2024), https://www.nytimes.com/2024/02/02/opinion/transgender-children-gender-dysphoria.html.
41. According to LGBTQ+ advocacy group Gender Spectrum, many of these policies include "gender support plans," which "are detailed forms intended to 'create a shared understanding among school staff, parents and a student about the ways in which the student's authentic gender will be accounted for and supported at school.'" *Why Some Schools Are Embracing Gender Support Plans for LGBTQ+ Students*, K–12 Dive (Sept. 29, 2023), https://www.k12dive.com/news/gender-support-plans-dont-say-gay-lgbtq/693992/#:~:text=Gender%20support%20plans%20%E2%80%94%20or%20GSPs,pro%2DLGBTQ%2B%20nonprofit%20that%20provides.
42. Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PLoS ONE, Vol. 13, No. 8 (2018), at 3–5, https://pubmed.ncbi.nlm.nih.gov/30114286/; Selin Davis, *A Trans Pioneer Explains Her Resignation from the U.S. Professional Association for Transgender Health*, Quillette (Jan. 6, 2022), https://quillette.com/2022/01/06/a-transgender-pioneer-explains-why-she-stepped-down-from-uspath-and-wpath/.
43. Paul, *supra* note 40.
44. Judy L. Herman, Andrew R. Flores, and Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?* UCLA Williams Inst. 13 (June 2022), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/.
45. *See also* Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the U.S*., N.Y. Times (June 10, 2022), https://www.nytimes.com/2022/06/10/science/transgender-teenagers-national-survey.html.
46. Littman, *supra* note 42.
47. *See, e.g*., policies in Creighton, Arizona, Elementary School District; Eau Clare, Wisconsin, Area School District; Montgomery County, Maryland, Public Schools; and Tucson, Arizona, Unified School District.

48. *Assertion*, Oxford Pocket Dictionary of Current Eng., https://www.encyclopedia.com/science-and-technology/computers-and-electrical-engineering/computers-and-computing/assertion.
49. *Assertion*, Vocabulary.com, https://www.vocabulary.com/dictionary/assertion.
50. Mirabelli v. Olson, No. 3:23–CV–00768–BEN–WVG, 2023 WL 5976992, at *3 (S.D. Cal. 2023).
51. *See, e.g*., the Casa Grande, Arizona, policy.
52. *See, e.g*., the policies in Montgomery County, Maryland, and Eau Clare, Wisconsin.
53. *See, e.g*., the policy in Washoe County, Nevada.
54. Thomas Aquinas, Summa Theologiae, II–II, q. 10, a. 12. *See also* Melissa Moschella, *Parental Rights: A Foundational Account*, Heritage Found. Backgrounder No. 3568, 4 (Dec. 9, 2020), https://www.heritage.org/sites/default/files/2020-12/BG3568.pdf.
55. John Locke, Second Treatise of Government, Ch. VI, § 71 (1689).
56. *See also* Moschella, *supra* note 54, at 4.
57. 1 William Blackstone, Commentaries, Ch. 16, https://avalon.law.yale.edu/18th_century/blackstone_bk1ch16.asp. *See also* Robert A. Sedler, *From Blackstone's Common Law Duty of Parents to Educate Their Children to a Constitutional Right of Parents to Control the Education of Their Children*, Forum Pub. Pol. (2006), https://files.eric.ed.gov/fulltext/EJ1098491.pdf.
58. 1 Annals of Cong. 755 (1789).
59. Sessions v. Dimaya, 584 U.S. 148, 217 (2018) (Thomas, J., dissenting) (quoting Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 253 (2001)).
60. U.S. Const. amend. XIV.
61. *See, e.g*., Barron v. Baltimore, 32 U.S. 243 (1833).
62. *See, e.g*., United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("For their protection in [the First Amendment's] enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."); Adamson v. Calif., 332 U.S. 46, 54 (1947) ("Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution.").
63. *See, e.g*., Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment freedom of speech); Near v. Minn., 283 U.S. 697 (1931) (First Amendment freedom of the press); DeJonge v. Or., 299 U.S. 353 (1937) (First Amendment freedom of assembly); Cantwell v. Connecticut, 310 U.S. 296 (1940) (First Amendment exercise of religion); Everson v. Board of Education, 330 U.S. 1 (1947) (First Amendment establishment of religion); McDonald v. City of Chi., 561 U.S. 742 (2010) (Second Amendment right to keep and bear arms); Wolf v. Colo., 338 U.S. 25 (1949) (Fourth Amendment search and seizure); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule); Aguilar v. Tex., 378 U.S. 108 (1964) (Fourth Amendment warrant requirement); Benton v. Md., 395 U.S. 784 (1969) (Fifth Amendment double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment self-incrimination); In re Oliver, 333 U.S. 257 (1948) (Sixth Amendment right to public trial); Klopfer v. N.C., 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); Pointer v. Tex., 380 U.S. 400 (1965) (Sixth Amendment right to confront witnesses); Powell v. Ala., 287 U.S. 45 (1932) (Sixth Amendment right to counsel in capital cases); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel in felony cases); Parker v. Gladden, 385 U.S. 363 (1966) (right to trial by impartial jury); Robinson v. Cal., 370 U.S. 660 (1972) (Eighth Amendment cruel and unusual punishment).
64. *See, e.g*., Horace Edgar Flack, The Adoption of the Fourteenth Amendment (1908) (favoring an intent to incorporate); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Fourteenth Amendment? The Original Understanding*, 2 Stan. L. Rev. 5 (1949) (opposing same); Raoul Berger, Government By Judiciary: The Transformation of the Fourteenth Amendment 134–56 (1977); Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 Ind. L.J. 1439, 1439 (2022) ("The incorporation of the Bill of Rights against the states by way of the Fourteenth Amendment raises a host of textual, historical, and doctrinal difficulties.").
65. Concurring in Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), Justice Clarence Thomas outlined several dangers of substantive due process that, he argued, "favor jettisoning the doctrine entirely." *Id*. at 333 (Thomas, J., concurring).
66. Marbury v. Madison, 5 U.S. 137 (1803).
67. *Id*. at 176.
68. The Federalist No. 78 (Alexander Hamilton).
69. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795).
70. Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).
71. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022). See also *Moore*, 431 U.S. at 502 ("there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.").
72. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).
73. Palko v. Conn., 302 U.S. 319 (1937). *See also* Wash. v. Glucksberg, 521 U.S. 702, 721(1997); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

74. *Palko*, 302 U.S. at 325. *See also* Troxel v. Granville, 530 U.S. 57, 100 (2000).
75. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
76. *Id*. at 503 (plurality opinion). *See also Glucksberg*, 521 U.S. at 720–21; *Dobbs*, 597 U.S. at 231.
77. *See* Reno v. Flores, 507 U.S. 292, 302 (1993).
78. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).
79. *See, e.g*., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–40 (1973) (infringement of a "fundamental" right is subject to a heightened or "strict" level of judicial scrutiny, whereas an encroachment on other rights or liberties must be analyzed under "the traditional standard of review, which requires only that the [challenged state action] be shown to bear some rational relationship to legitimate state purposes.").
80. Carey v. Population Services Int'l, 431 U.S. 678, 686 (1976).
81. Meyer v. Neb., 262 U.S. 390 (1923).
82. As noted, the common law had long recognized parents' right to direct the upbringing and education of their children. This right is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." Troxel v. Granville, *Troxel*, 530 U.S. 57, 65 (2000) (opinion of O'Connor, J.). See also Prince v. Mass., 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents.")
83. *Meyer*, 262 U.S. at 401.
84. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
85. *Id*. at 534–35.
86. Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984). *See also* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"), quoting *Moore*, 431 U.S. at 503.
87. *Roberts*, 468 U.S. at 618.
88. See also, *Smith*, 431 U.S. at 845 (1977) ("[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'") (footnote omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
89. *See* Wash. v. Glucksberg, 521 U.S. 702, 720–21 (1997) (The Fourteenth Amendment "forbids the government to infringe…'fundamental' liberty interests of all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); Carey v. Population Services Int'l, 431 U.S. 678, 686 (1976) ("where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."). A majority of the federal appellate circuit courts also hold to a strict scrutiny analysis when assessing the constitutionality of state action against a parent's substantive due process claim—properly assessing the parental right to be a fundamental one, as the Supreme Court recognized in Troxel v. Granville, 530 U.S. 57 (2000). *See e.g*., Kanuszewski v. Mich. Dep't of Health and Hum. Servs., 927 F.3d 396 (6th Cir. 2019). Some federal circuits, however, note that the state's interest in these cases implicating the parental right need not be "compelling," but only "legitimate." *See* Hodges v. Jones 31 F.3d 157, 163-164 (4th Cir. 1994).
90. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 185 (3d Cir. 2005).
91. Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000). *In loco parentis* means someone acting in the place of a parent. *See also C.N.*, 430 F.3d at 183.
92. Sarah Parshall Perry & Thomas Jipping, *States May Protect Minors by Banning "Gender-Affirming Care*," Heritage Found. Legal Memo. No. 344 3 (Dec. 6, 2023), https://www.heritage.org/gender/report/states-may-protect-minors-banning-gender-affirming-care.
93. *See* Hodge v. Jones, 31 F.3d at 163–64 ("The maxim of familial privacy is neither absolute nor unqualified, and may be outweighed by a legitimate governmental interest."); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655 (1995) (noting that during the school day, the state's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.")
94. *See, e.g*., Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir.1998) (school policy against part-time attendance did not violate parent's right to direct upbringing of child).
95. *See, e.g*., Parker v. Hurley, 514 F.3d 87, 102 (2008). In *Parker*, parents objected to their children being taught with books depicting same-sex families. The district refused to grant the children an exemption from the instruction, writing, "Defendants respond that plaintiffs' argument runs afoul of the general proposition that, while parents can choose between public and private schools, they do not have a constitutional right to 'direct *how* a public school teaches their child.'" Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir.2005). That proposition is well recognized. *See, e.g., Ridgewood*, 430 F.3d at 184 (recognizing a "distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension"); Leebaert v. Harrington, 332 F.3d 134, 141 (2003) ("Meyer, Pierce, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir.2001) ("It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation."); Swanson, 135 F.3d at 699 ("The case law in this area establishes that parents simply do not have a constitutional right to control each and every aspect of their children's

education." Indeed, Meyer and Pierce specified that the parental interests they recognized would not interfere with the general power of the state to regulate education, including "the state's power to prescribe a curriculum for institutions which it supports" (some citations omitted). *See also* Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005) ("once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished.").

96. The U.S. Court of Appeals for the Ninth Circuit has expressed a limited view of the parental right within the context of education, noting in *Fields* that "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Fields*, 427 F.3d at 1206. In *Fields*, it affirmed the dismissal of an action against a public school district for distributing a survey to elementary-age students that included questions about sex, holding that "there is no fundamental right of parents to be the exclusive provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it." *Id*. at 1200. The court went on to add that "Parents have a right to inform children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise." *Id.* at 1206. However, the Ninth Circuit's analysis in *Fields* has been expressly repudiated by other federal courts (see discussion of Tatel v. Mt. Lebanon Sch. Dist., *infra* note 106 and accompanying text).
97. Blau v. Fort Thomas Pub. Sch. Dist., 401 F3d 381, 395–96 (6th Cir. 2005). Matters in this second category include "the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or…a dress code." *Id*. These "issues of public education are generally committed to the control of state and local authorities."
98. Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000).
99. *Id*. at 305.
100. *Id*. at 307.
101. *Id*. at 306 ("One is struck by the fact that the guidance counselor…did not advise [the coach] to notify the parents. Nor did the counselor herself undertake that responsibility. Even the principal…did not even comment that this was a matter for the parents and not school authorities. His reprimand to Seip did not mention the supremacy of the parents' interest in matters of this nature."). *See also* Arnold v. Bd. of Educ., 880 F.2d 305, 312 (11th Cir. 1989) (By coercing a student into an abortion and urging her not to discuss the matter with her parents, school officials interfered with the parents' right to direct the rearing of their child).
102. *Ridgewood*, 430 F.3d at 159.
103. *Id*. at 183
104. *Id*.
105. *Id*. at 185.
106. Tatel v. Mt. Lebanon Sch. Dist., 637 F.Supp.3d 295 (W.D. Pa. 2022).
107. *Id*. at 320–321. *See also* Doe By & Through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 522 (3d Cir. 2018) (gender identity implicates a person's "deep-core sense of self").
108. Ricard v. USD 475 Geary Cnty., 2002 WL 1471372 (D. Kansas) (May 9, 2022).
109. *Id*. at *5.
110. *Id*. at *6.
111. *Id*. at *8.
112. Tatel, 637 F.Supp.3d at 320.
113. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).
114. *See e.g.*, Foote v. Town of Ludlow Sch. Comm., 2022 WL 18356421 (D. Mass 2022); Dan Mead & Jennifer Mead v. Rockford Publ. Sch. Dist., No. 1:23–CV–1313 (W.D. MI); Jennifer Vitsaxaki v. Skaneateles Cent. Sch. Dist., No. 5:24–CV–00155 (N.D. NY); Jane Doe v. Pine-Richland Sch. Dist., No. 2:24–CV–00051–WSS (W.D. PA); Blair v. Appomattox County Sch. Bd., No. 6:23–CV–00047 (W.D. VA); Regino v. Staley, 2023 WL 4464845 (E.D. CA) (July 10, 2023).
115. In addition to their claims rooted in the Fourteenth Amendment's substantive due process right to direct the education and upbringing of their minor children, plaintiff parents in much of the related litigation have brought additional claims against school districts. These include claims based on a violation of the First Amendment's right to free exercise of religion, the First Amendment's associational right to familial relationships, the Fourteenth Amendment right to procedural due process, claims based on violation of federal education privacy laws such as the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), the Protection of Public Rights Act (20 U.S.C. § 1232h), and various state law claims. An analysis of these additional claims is outside the scope of this *Legal Memorandum*.
116. U.S. Const. art. III, § 2, cl. 1.
117. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
118. Clapper v Amnesty Int'l USA, 568 U.S. 398, 409–410 (2013).

119. Cnty. of Butler v. Wolf, 2020 WL 2769105, at *5 n. 3 (W.D. Pa. May 28, 2020).
120. Specifically, the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), and the Protection of Pupil Rights Amendment (20 U.S.C. § 1232h). Both laws guarantee parents a right to certain information relative to their children within public education.
121. Fed. Election Comm. v. Akins, 524 U.S. 11, 20–21 (1998) ("injury in fact" includes the inability to obtain information that must be disclosed by statute); *Lujan*, 504 U.S. at 572 (the standing requirement is met if plaintiffs "are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.").
122. Posey v. S.F. Unified Sch. Dist., No. 23–CV–2626, 2023 WL 8420895, at *6 (N.D. Cal. Dec. 4, 2023).
123. Parents Involved in Cmty Schools. v. Seattle Sch. Dist. No. 1., 551 U.S. 701 (2007).
124. *Id*. at 718.
125. Sabri v. U.S., 541 U.S. 600, 609 (2004).
126. Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex. 1995). *See also* Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 236 (1994).
127. *See, e.g*., Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist., Wis., 2024 WL 981436 (7th Cir. 2024) (Association of public school students' parents alleging school district's gender identity support policy violated due process brought facial pre-enforcement challenge to invalidate the entirety of the policy, but lacked standing to challenge the policy).
128. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 n.2 (1992).
129. Clapper, 568 U.S. at 414 n.5.
130. Seegars v. Gonzales, 396 F.3d 1248, 1254 (D.C. Cir. 2005); see also Draper v. Healey, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) (due process pre-enforcement challenge to state firearm law).
131. While state actors are normally entitled to qualified immunity, plaintiffs may overcome such immunity by demonstrating that the state official violated a clearly established constitutional right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). *See also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841, n.5 (1998) ("As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated…. [T]he [best] approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.")
132. See, e.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 288–290 (2002).
133. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983.
134. *Supra* notes 60-80 and accompanying text.
135. Regino v. Staley, 2023 WL 4464845, at *3 (E.D. Ca July 11, 2023), slip copy ("This Court has held that the threshold requirement for such substantive or procedural due process claims is 'plaintiff's showing of a liberty or property interest protected by the Constitution'…[and]…a 'careful description of the asserted liberty interest' that has been violated.") (internal citations omitted). *See also Cnty. of Sacramento*, 523 U.S. at 850 ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.")
136. Rochin v. Cal., 342 U.S. 165, 174 (1952) (Black, J., concurring).
137. *See* U.S. v. Salerno, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience'…or interferes with rights 'implicit in the concept of ordered liberty.'") (quoting *Rochin*, 342 U.S. at 172, and Palko v. Conn., 302 U.S. 319, 325–26 (1937)). More recently, the Supreme Court wrote that the substantive component of the Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." Collins v. City of Harker Heights 503 U.S. 115, 128 (1992).
138. *Lewis*, 523 U.S. at 833.
139. *Id*. at 845 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).
140. *Id*. at 846 ("[C]riteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.")
141. *Id*.
142. McKinney v. Pate, 20 F.3d 1550, 1557 n.9 (11th Cir. 1994).
143. *Id*. *See also* Reyes v. N. Texas Tollway Auth., (NTTA), 861 F.3d 558, 562 (5th Cir. 2017). ("government action that applies broadly gets rational basis; government action that is individualized to one or a few plaintiffs gets shocks the conscience.").
144. *Id*. at 846–47.
145. See *Reyes*, 861 F.3d at 562. See also, Halley v. Huckaby, 902 F.3d 1136, 1153 (10th Cir. 2018) ("[W]e apply the fundamental-rights approach when the plaintiff challenges legislative action, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious executive action.")

146. Reno v. Flores, 507 U.S. 292, 302 (1993); *see also* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).
147. Lewis, 523 U.S. at 845 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).
148. *Id*. at 848.
149. *Id*. at 857 (Kennedy, J. concurring).
150. *See, e.g.,* Wood v. Strickland, 420 U.S. 308, 319 (1975), overruled in part on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982) ("[S]chool board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. Each of these functions necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy.") Lower courts, frequently in school prayer cases, have more specifically observed that a school board's policymaking function makes it like a legislature (even if recognizing that the forum itself may not be akin to a legislature). *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017) ("We agree with the district court that 'a school board is more like a legislature than a school classroom or event.'") To determine if an act is executive or legislative activity, courts consider the nature of the act, not the motive or intent of the official performing the act. *See* Young v. Mercer Cnty. Comm'n, 849 F.3d 728, 733 (8th Cir. 2019) (noting that voting on a council resolution is a "quintessentially legislative" act that rests within the bounds of legitimate legislative activity).
151. *Supra* notes 81-112 and accompanying text.
152. Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).
153. *Id*. at 619–620.
154. Moore v. City of East Cleveland, 431 U.S. 494, at 503–04 (1977).
155. Brady v. Mosca, 2023 WL 8807398 (D.NH. 2023).
156. Grendell v. Gillway, 974 F.Supp. 46 (D.Me. 1997).
157. *Id*. at 52.
158. *See, e.g*., Halley v. Huckaby, 902 F.3d 1136, 1155 (10th Cir. 2018) ("[W]e clarify that familial association claims are grounded in the shocks-the-conscience approach to substantive due process claims challenging executive action.")
159. Doe v. Woodward, 912 F.3d 1278, 1301 (10th Cir. 2019) (internal citations omitted).
160. *Id*. (internal citations omitted).
161. Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) (questioning the district court's dismissal of a substantive due process claim based on physical examinations of minors without parental consent).
162. *Id*. at 1203. *See also* Christensen v. Cnty. of Boone, Ill., 483 F.3d 454 (7th Cir. 2007) (holding that a substantive due process plaintiff must prove the existence of a fundamental right and conscience-shocking behavior).
163. Troxel v. Granville, 530 U.S. 57, 66 (2000).
164. *See, e.g.*, Doe #1 v. Del. Valley Sch. Dist., 572 F.Supp. 3d 38, 68 (M.D. Pa 2021) ("An infringement on a 'fundamental' constitutional right is subject to a heightened or 'strict' level of judicial scrutiny, whereas an encroachment on other rights or liberties must be analyzed under 'the traditional standard of review, which requires only that the [challenged state action] be shown to bear some rational relationship to legitimate state purposes.'") (internal citations omitted); Lloyd v. Sch. Bd. of Palm Beach Cnty., 570 F.Supp.3d 1165 (S.D. Fl 2021) (holding that the school board's mask mandate did not implicate any fundamental rights of plaintiffs and withstood rational basis review).
165. Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998).
166. C.H. by Hilligoss v. Sch. Bd. of Okaloosa Cnty., Fla., 606 F.Supp.3d 1186, 1195 (N.D. Fl. 2022). That the plaintiff parents in much of the litigation over gender confidentiality policies have named certain officials in addition to school boards or school districts has perhaps inadvertently sidetracked judicial review toward an *executive* action analysis, rather than a *legislative* action analysis. But "liability may attach…where the municipality's custom or policy caused municipal employees to violate the plaintiff's constitutional rights.… A plaintiff can establish municipal liability in three ways: (1) identify an official policy; (2) identify an unofficial custom or practice that is 'so permanent and well settled as to constitute a custom and usage with the force of law'; or (3) identify a municipal official with final policymaking authority whose decision violated the plaintiff's constitutional rights.") *Id*. (internal citations omitted). *See also* Cuesta v. Sch. Bd. of Mia.–Dade Cnty., Fla., 285 F.3d 962, 966 (11th Cir. 2002).
167. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198 (1979).
168. Care & Prot. of Charles, 504 N.E.2d 592, 598 (Mass. 1987) (*Pierce* [v. Soc'y of Sisters] makes it "clear that the liberty interests protected by the Fourteenth Amendment extend to activities involving child rearing and education" and that parents "possess a basic right in directing the education of their children."); State v. Whisner, 351 N.E.2d 750, 769 (Ohio 1976) ("[T]he right of a parent to direct the education, religious or secular, of his or her children [is a] fundamental right guaranteed by the due process clause of the Fourteenth Amendment."); Schleifer v. City of Charlottesville, 159 F.3d 843, 852 (4th Cir. 1998), cert. denied, 119 S.Ct. 1252 (1999) ("We are mindful that the Supreme Court has suggested in other contexts that parents may possess a fundamental right against undue, adverse interference by the state."); Jordan v. Jackson, 15 F.3d 333, 342–343 (4th Cir. 1994) (summarizing that "to say that the institution of the family is rooted in this Nation's history and tradition…borders on understatement[,]" that "the relationship between parent and child [is] inviolable except for the most compelling reasons," and that the parental rights identified in *Pierce v. Society of Sisters* and *Meyer v. Nebraska* are "essential" and "fundamental.").

169. *Harrah*, 440 U.S. at 198 (internal citations omitted).
170. Gorman v. Rensselaer Cnty., 910 F.3d 40, 48 (2d Cir. 2018).
171. *See, e.g.*, Spiker v. Spiker, 708 N.W.2d 347, 351 (Iowa 2006) ("the right to direct the upbringing of one's children, is fundamental," and "state action infringing on that interest must be narrowly tailored to serve a compelling state interest.")
172. Parham v. J.R., 442 U.S. 584 (1979).
173. *Id*. at 603–04.
174. Croft v. Westmoreland Cnty. Child & Youth Services, 103 F.3d 1123, 1126 (3d Cir. 1997) (emphasis added). *See also* Doe v. Heck, 327 F.3d 492, 521 (7th Cir. 2003) (finding a violation of parents' rights when state actors "not only failed to presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite.").
175. *See, e.g.*, *Mandatory Reporting of Child Abuse and Neglect*, Child Welfare Info. Gateway (May 2023), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/manda.pdf#page=5&view=Summaries%20of%20State%20laws. *See also, e.g.*, D.C. Code § 4–1321.02 (requiring reporting by school officials, teachers, and athletic coaches).
176. Regino v. Staley, No. 2:23–CV–00032–JAM–DMC, 2023 WL 2432920 (E.D. Cal. Mar. 9, 2023).
177. *See supra* notes 22–26 and accompanying text.
178. *Regino*, 2023 WL 2432920, at *3.
179. *Id*. (emphasis added). As this is a fast-developing area of the law, there is a natural paucity of precedent on which to rely specifically supporting the premise that schools may not socially transition minor children or conceal gender identity information from their parents. The "law does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." David v. Kaulukukui, 38 F.4th 792, 800 (9th Cir. 2022). That parents have a right to know how their child identifies should be—and has been held so to be in increasing numbers by federal trial courts—beyond constitutional debate.
180. *Id*. at *4.
181. *Id*. at *5.
182. *Id*. at *13.
183. When assessing state action under a rational basis analysis, the court must determine only whether a law or policy is "rationally related" to a "legitimate" government interest. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 56 (1973) ("We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States.... The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest."); *see also* McGinnis v. Royster, 410 U.S. 263, 269 (1973) ("We do not wish to inhibit state...classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose.")
184. *Regino*, 2023 WL 2432920, at *11.
185. Quilloin v. Walcott, 442 U.S. 246, 255 (1978).
186. Parham v. J.R., 442 U.S. 584, 603 (1979).
187. While *Regino* cited the district court's holding in *Ricard v. USD 475 Geary Cnty., KS Sch. Bd*., stating that parents must be included in any decision regarding what names and pronouns their children are referred to in school, Judge Mendez called her reliance on the case "misguided," stating that as the case concerned a religious free exercise claim "where the plaintiff teacher argued that withholding a student's transgender status from their parents violated plaintiff's religious beliefs; substantive parental rights were not at issue before the Ricard court." *Regino*, 2023 WL 243292, at *9–10.
188. *Id*. at *10.
189. John Grimaldi, *January Littlejohn Says Her School Would Let Her Daughter "Choose to Be a Girl, a Boy, Neither or Both,"* Lassen County News (Feb. 23, 2024), https://www.lassennews.com/january-littlejohn-says-her-school-would-let-her-daughter-choose-to-be-a-girl-a-boy-neither-or-both.
190. Littlejohn v. Sch. Bd. of Leon Cnty., Fla., 647 F.Supp.3d 1271 (N.D. Fl. 2022). Plaintiffs' Verified Complaint for Preliminary and Permanent Injunctive Relief, Declaratory Judgment and Damages (filed Oct. 18, 2021).
191. *Id*. at 1276 (N.D. Fl 2022) (emphasis added).
192. Qualified immunity provides "complete protection for government officials sued in their individual capacities" so long as the government official in question was "acting within the scope of [their] discretionary authority" and their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002) (citations omitted). *See also supra* note 131.
193. While Chief Judge Walker's ruling elevated state interests over parental rights, it must be acknowledged that his decision may well be in keeping with the Supreme Court's modern expansion of qualified immunity doctrine in a way that favors government defendants. In a 2015 case, *Mullenix v. Luna*, the Court wrote that a "clearly established right is one that is 'sufficiently clear that *every reasonable official would have understood* that what he is doing violates that right.'... We do not require a case directly on point, but *existing precedent must have placed the statutory or constitutional question*

beyond debate.... Put simply, qualified immunity *protects all but the plainly incompetent* or those who knowingly violate the law." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (emphasis added). *See also* Plumhoff v. Rickard, 572 U.S. 765 (2014) ("[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.... In other words, existing precedent must have placed the statutory or constitutional question confronted by the official beyond debate.") The Court's continued expansion of the judicially created qualified immunity doctrine has prompted calls from conservative and liberal jurists alike for its elimination. *See* Baxter v. Bracey, 590 U.S. _____ (2020) (Thomas, J., dissenting from denial of certiorari) (the Court's "§ 1983 qualified immunity doctrine appears to stray from the statutory text"); Kisela v. Hughes, 584 U.S. _____ (2018) (Sotomayor, J. dissenting) (the Court's "decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.")

194. *McKinney*, 20 F.3d at 1557 n. 9 ("When discussing substantive due process protection in this opinion, it is crucial to note the distinction between 'legislative' acts and 'non-legislative' or 'executive' acts.... Executive acts characteristically apply to a limited number of persons (and often to only one person)...[such as] employment terminations.... Legislative acts, on the other hand, generally apply to a larger segment of—if not all of—society; laws and broad-ranging executive regulations are the most common examples. The analysis...appropriate for executive acts is inappropriate for legislative acts...only when addressing legislative acts has the Supreme Court mandated that states must demonstrate that they are violating private interests only as necessary to promote state interests.... A similar balancing test is not found in executive-act cases.") (internal citations omitted).
195. *Littlejohn*, 647 F. Supp. at 1278 (citing Maddox v. Stephens, 727 F.3d 1109, 1120 (11th Cir. 2013)).
196. *Id*. at 1283.
197. *2022–2023 Guidelines for Student Gender Identity*, Montgomery Cnty. Pub. Schs., https://www.montgomeryschoolsmd.org/siteassets/district/compliance/0860.22_genderidentityguidelinesforstudents_web.pdf. As with Montgomery County Schools, schools with gender confidentiality policies often cite the federal Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 C.F.R. Part 99) as a putative basis for why a minor child's gender identity must be concealed from his or her parents. This reliance represents an erroneous understanding of FERPA's application. Under FERPA, it is the parent who has certain rights with respect to their child's educational record until the child reaches the age of 18, at which point those rights transfer to the student. Under FERPA, a parent may inspect and review the student's education records, request that a school correct student records that they believe to be inaccurate or misleading, and withhold consent to disclosure of any information from a student's record to outside parties. *See* U.S. Dep't of Educ., *Family Educational Rights and Privacy Act (FERPA)*, https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.
198. John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F.Supp.3d 118 (D. Md. 2022).
199. The parents brought associated claims under the due process provision of the Maryland Declaration of Rights, Maryland Code of Regulations, and Maryland Code, § 5–203 of the Family Law Article, as well as claims under the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) and the Protection of Pupil Rights Amendment (20 U.S.C. § 1232h).
200. Judge Paul Grimm dismissed the as-applied challenge out of hand as there were no factual contentions sufficient to support it, and parents declined the opportunity to amend their complaint before the Board of Education filed its motion to dismiss. This was so even though all children were enrolled in Montgomery County Schools and were therefore subject to the policy, with no right of opt out. *Id.* at 139–40. Judge Grimm also dismissed the claim under 42 U.S.C. § 1983 because he determined the parents had failed to plead an as-applied challenge to the policy, and their facial challenge failed as a matter of law. Id at 140. *See supra* notes 125-135 and accompanying text.
201. *John and Jane Parents 1*, 622 F.Supp.3d at 130. *Cf*. Ricard v. USD 475 Geary Cnty., No. 5:22–CV–04015–HLT–GEB, 2022 WL 1471372, at *8 (D. Kan.) (May 9, 2022) Opp'n at 5 (holding that parents must be included in any decision regarding what names and pronouns their children are referred to in school).
202. *John and Jane Parents 1*, 622 F.Supp.3d at 136–37. Notably, Judge Grimm wrote that even if the policy were subject to strict scrutiny, he would conclude that it satisfied that standard as well. That is because the Board of Education advanced a compelling interest in protecting students' safety and promoting acceptance, eliminating discrimination against transgender students, and protecting student privacy. *Id*. at 137. And Grimm found the policy to likewise be narrowly tailored to achieving the Board of Education's interests. The guidelines, he wrote, were sufficiently flexible, allowing parenting involvement at the student's consent, and when those parents were deemed "supportive." *Id*. at 138.
203. Arnold v. Bd. of Educ. of Escambia Cnty., Ala, 880 F.2d 305 (11th Cir. 1989) (holding that parents sufficiently alleged a cause of action under 42 U.S.C. § 1983 for violation of their Fourteenth Amendment right to direct the upbringing of their children against two school officials who allegedly coerced a minor female into undergoing an abortion and then keeping it secret), overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993).
204. *Id*. at 312 (emphasis added).
205. John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 636 (4th Cir. 2023) (holding that parents in this case did not have Article III standing, but nevertheless acknowledging that "[t]he dissent's fundamental point [that]...'[t]he issue of whether and how grade school and high school students choose to pursue gender transition is a family matter, not one to be addressed initially and exclusively by public schools without the knowledge and consent of parents'—may be compelling").
206. *Id*. at 630 (internal citations omitted).

207. *Id*. (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014)).
208. *Id*. at 631.
209. *Id*.
210. *Id*. at 633.
211. *Id*. at 634 (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)).
212. *Id*. 634.
213. *Id*. at 636.
214. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128–29 (2007).
215. *Id*. at 636 (Neimeyer, J. dissenting).
216. *Id*. at 640 (Neimeyer, J. dissenting).
217. *Id*. (Neimeyer, J. dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. 561–62 (1992)).
218. *Id*. at 641 (Neimeyer, J. dissenting).
219. *Id*. at 643 (Neimeyer, J. dissenting).
220. Cnty. of Butler v. Wolf, 486 F.Supp.3d 883, 5 n.3 (2020).
221. TransUnion LLC v. Ramirez, 594 U.S. 413, 141 S. Ct. 2190, 2203 (2021) (intangible constitutional harms are concrete and confer standing).
222. John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th at 646 (Neimeyer, J., dissenting).
223. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, John and Jane Parents 1, John Parent 2, Petitioners v. Montgomery County Board of Education, filed Nov. 13, 2023, https://www.supremecourt.gov/DocketPDF/23/23-601/289461/20231113163224590_Cert%20Petition%20John%20and%20Jane%20Parents%201%20et%20al%20v%20MCBE%20et%20al.pdf,
224. Id., *cert. denied* May 8, 2024, no. 23-601, https://www.supremecourt.gov/orders/courtorders/052024zor_d1o3.pdf.
225. Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist., Wis., No. 23-1534 (7th Cir.), judgment entered March 7, 2024. *See* n. 127, supra.
226. Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist., Wis, filed June 5, 2024, https://will-law.org/wp-content/uploads/2024/06/Cert.-Petition-FINAL-PDFA.pdf.
227. *Compare* Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees, No. 23–CV–69, 2023 WL 4297186, at *14 (D. Wyo. June 30, 2023) (right to know), and Ricard v. USD 475 Geary Cnty., No. 5:22–CV–4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (same), *with* Regino v. Staley, No. 2:23–CV–00032-JAM-DMC, 2023 WL 2432920, at *3 (E.D. Cal. Mar. 9, 2023) (no right to know).
228. Parham, 442 U.S. at 602, *supra*, note 172.
229. Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 201–02 (2021) (Alito, J., concurring) ("In our society, parents, not the state, have the primary authority and duty to raise, educate, and form the character of their children.")
230. In a recent and welcome development, officials in some states that encourage the "social transition" of minor children without informing their parents have been forced to admit that the policies—an unconstitutional violation of parental rights—may be unenforceable. This is so even in states that express general hostility to skeptical perspectives on "gender identity," such as California. *See, e.g.*, Susannah Luthi, *California Justice Department Tells Court It Can't Force Schools To Transition Kids Behind Parents' Backs*, Wash. Free Beacon (May 7, 2024), https://freebeacon.com/california/california-justice-department-tells-court-it-cant-force-schools-to-transition-kids-behind-parents-backs/.
231. L.W. v. Skrimetti, 83 F.4th 460, 491 (6th Cir. 2023) (Sutton, J.).
232. Stephen McLoughlin, *Toxic Privacy: How the Right to Privacy Within the Transgender Student Parental Notification Debate Threatens the Safety of Students and Compromises the Rights of Parents*, 15 Drexel L. Rev. 327, 331 (2023) (("[T]he transgender student parental notification debate…[is] one of the most prevalent and complex issues that states and educational institutions must address.").
233. J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933–34 (3d Cir. 2011) (The threshold for finding a conflict between state interest and parental rights will not be as high when the school district's actions "strike at the heart of parental decision-making authority on matters of the greatest importance.")
234. Smith v. Organization of Foster Families, 431 U.S. at 845, *supra*, note 86.
235. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").