No. 23-1069

In the United States Court of Appeals
FOR THE FIRST CIRCUIT

STEPHEN FOOTE, individually and as Guardian and next friend of B.F. and G.F., minors; MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors, PLAINTIFFS-APPELLANTS,

JONATHAN FELICIANO; SANDRA SALMERON, PLAINTIFFS

v.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, former Superintendent; LISA NEMETH, Interim Superintendent; STACY MONETTE, Principal, Baird Middle School; MARIE-CLAIRE FOLEY, school counselor, Baird Middle School; JORDAN FUNKE, former librarian, Baird Middle School; TOWN OF LUDLOW, DEFENDANTS-APPELLEES

On appeal from the United States District Court for the District of Massachusetts, Springfield Division, Case No. 3:22-cv-30041-MGM
The Honorable Mark G. Mastroianni, Judge

AMICUS BRIEF OF DR. ERICA E. ANDERSON, PhD, SUPPORTING APPELLANTS AND REVERSAL

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INTEREST OF AMICUS[1]

Dr. Erica E. Anderson, PhD, is a clinical psychologist practicing in Berkeley, California, with over 40 years of experience, and is transgender herself. Between 2019 and 2021, Dr. Anderson served as a board member for the World Professional Association for Transgender Health (WPATH) and as the President of USPATH (the United States arm of WPATH). Since 2016, Dr. Anderson's work has focused primarily on children and adolescents dealing with gender-identity-related issues, at the Child and Adolescent Gender Clinic at Benioff Children's Hospital at the University of California, San Francisco (2016 to 2021), and at her private consulting and clinical psychology practice (2016 to present). She has seen hundreds of children and adolescents for gender-identity-related issues in that time, many of whom transition, with her guidance and support.

As a practitioner serving children and adolescents experiencing gender incongruence, Dr. Anderson has a strong interest in ensuring that such children receive the best possible support and assistance (whether

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

or not they ultimately transition), which, in her view, requires involving their parents. All parties have consented to the filing of this amicus brief.

INTRODUCTION

The Ludlow Public School District, like some other school districts around the country, has adopted a policy allowing minor children to secretly adopt a new gender identity at school, requiring all staff to treat them as though they were the opposite sex, without parental notice or consent, and even directing staff to conceal this from parents in various ways. Many mental-health professionals believe that a gender-identity transition during childhood is a profound and difficult treatment decision, and that parental involvement is critical for many reasons: to properly assess the underlying sources of the child's feelings; to evaluate the risks and benefits of a transition; to identify and address any coexisting issues; to provide ongoing support; and ultimately, to decide whether a transition will be in their child's best interests. Yet the District Court held that this is not a mental-health treatment decision, but merely a "curriculum" decision that school districts may not only exclude parents from, but also hide from them. And it held this on a motion to dismiss, no less, contrary to the well-pled allegations in the complaint,

and, as explained below, the opinions of many well-respected mental-health professionals in the field. This Court should reverse.

ARGUMENT

I. Whether a Minor Experiencing Gender Incongruence Should Transition Socially Is a Major and Potentially Life-Altering Mental-Health Treatment Decision That Requires Parental Involvement, for Many Reasons.

When children and adolescents express a desire to socially transition to a different gender identity (to change their name and pronouns to ones at odds with their natal sex), there is a major fork in the road, a decision to be made about whether a transition will be in the youth's best interests. Parents must be involved in this decision, for many reasons.

First, there is an ongoing debate in the mental health community about how quickly and under what conditions children and adolescents who experience gender incongruence (a mismatch between their natal sex and perceived or desired gender identity) should transition socially. Childhood social transitions were "[r]elatively unheard-of 10 years ago,"

but have become far more frequent in recent years.[2] Before the recent trend, in some circles, to immediately "affirm," without question, every child's and adolescent's expression of a desire for an alternate gender identity, a robust body of research—multiple studies across different locations and times—had found that, for the vast majority of children (roughly 80-90%), gender incongruence does not persist.[3] As one researcher summarized, "*every* follow-up study of GD [gender diverse] children, without exception, found the same thing: Over puberty, the majority of GD children cease to want to transition."[4]

These studies were conducted before the recent trend to quickly transition, whereas some newer studies of youth who *have* socially transitioned show much higher rates of persistence. A study in 2013

[2] Rae, James R., et al., *Predicting Early-Childhood Gender Transitions*, 30(5) Psychological Science 669–681, at 669–70 (2019), https://doi.org/10.1177/0956797619830649.

[3] *See*, *e.g.*, The World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* ("WPATH SOC7") at 11 (Version 7, 2012), *available at* https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

[4] Cantor, James M., *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 46(4) Journal of Sex & Marital Therapy 307–313 (2019), https://doi.org/10.1080/0092623X.2019.1698481.

found that "[c]hildhood social transitions were important predictors of persistence, especially among natal boys."[5] Another recent study of 317 transgender youth found that 94% continued to identify as transgender 5 years after transitioning.[6]

In light of the vastly different rates of persistence between youth who transition and those who do not, many experts in the field are concerned that a social transition may causally affect the likelihood that a child's or adolescent's experience of gender incongruence will persist. Dr. Kenneth Zucker, who for decades led "one of the most well-known clinics in the world for children and adolescents with gender dysphoria," has argued publicly that a social transition can "become[ ] self-reinforcing," because "messages from family, peers, and society do a huge amount of the work of helping form, reinforce, and solidify gender

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[5] Steensma, T. D., et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52(6) Journal of the American Academy of Child & Adolescent Psychiatry 582–590, at 588 (2013), https://doi.org/10.1016/j.jaac.2013.03.016.

[6] Olson, Kristina R., et al., *Gender Identity 5 Years After Social Transition*, 150(2) Pediatrics (Aug. 2022), https://doi.org/10.1542/peds.2021-056082.

identities."[7] Dr. Zucker elsewhere has written that, in his view, "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence."[8]

The U.K.'s NHS is currently reconsidering its model of transgender care,[9] and the doctor in charge of the review, Dr. Hilary Cass, wrote in her interim report: "[I]t is important to view [social transition] as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning. There are different views on the benefits versus the harms of early social transition. Whatever position one takes, it is important to acknowledge that it is not

[7] Singal, Jesse, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016), https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html.

[8] Zucker, K., *The myth of persistence: Response to "A critical commentary on follow-up studies and 'desistance' theories about transgender and gender non-conforming children" by Temple Newhook et al.*, 19(2) International Journal of Transgenderism 231–245 (2018), available at https://www.researchgate.net/publication/325443416.

[9] *See Independent review into gender identity services for children and young people*, NHS England, https://www.england.nhs.uk/commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/gender-dysphoria/independent-review-into-gender-identity-services-for-children-and-young-people/.

a neutral act, and better information is needed about outcomes."[10] Based on her report, "Britain now appears to be changing tack," moving away from the "affirmative approach" and the "hurry to affirm gender identity," instead recognizing that "gender incongruence … may be a transient phase" for young people.[11]

Dr. Stephen Levine, another well-known practitioner in the field,[12] in an expert report for a related case, writes that "therapy for young children that encourages transition cannot be considered to be neutral, but instead is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy."[13]

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[10] Cass, H., *Independent review of gender identity services for children and young people: Interim report* (February 2022), https://cass.independent-review.uk/publications/interim-report/.

[11] *Britain changes tack in its treatment of trans-identifying children*, The Economist (Nov. 17, 2022), https://www.economist.com/britain/2022/11/17/britain-changes-tack-in-its-treatment-of-trans-identifying-children.

[12] Dr. Levine was the court-appointed expert in the first major case to reach a federal court of appeals—this Court—about surgery for transgender prisoners. *Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014).

[13] Expert Affidavit of Dr. Stephen B. Levine, Dkt. 31, *Doe v. Madison Metropolitan Sch. Dist.*, No. 20-CV-454 (Dane County Wis. Cir. Ct., filed Feb. 19, 2020), available at https://will-law.org/wp-content/uploads/2021/02/affidavit-stephen-levine-with-exhibit.pdf.

The authors of the 2013 study mentioned above expressed concern that "the hypothesized link between social transitioning and the cognitive representation of the self" may "influence the future rates of persistence," while noting that this "possible impact of the social transition itself on cognitive representation of gender identity or persistence" had "never been independently studied," Steensma (2013), *supra* n.5, at 588–89.

Another group of researchers recently wrote that "early childhood social transitions are a contentious issue within the clinical, scientific, and broader public communities. [citations omitted]. Despite the increasing occurrence of such transitions, we know little about who does and does not transition, the predictors of social transitions, and whether *transitions impact children's views of their own gender*." Rae (2019), *supra* n.2, at 669–70 (emphasis added).

The Endocrine Society's guidelines similarly recognize that "[s]ocial transition is associated with the persistence of GD/gender incongruence as a child progresses into adolescence. It may be that the presence of GD/gender incongruence in prepubertal children is the earliest sign that a child is destined to be transgender as an adolescent/adult (20).

However, social transition (in addition to GD/gender incongruence) has been found to contribute to the likelihood of persistence."[14]

The World Professional Association for Transgender Health (WPATH), which takes a decidedly pro-transitioning stance, has acknowledged that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views," that "[f]amilies vary in the extent to which they *allow* their young children to make a social transition to another gender role," and that there is insufficient evidence "to predict the long-term outcomes of completing a gender role transition during early childhood." WPATH SOC7, *supra* n.3, at 17.[15] WPATH encourages health professionals to *defer to parents* "as they work through the options and implications," *even* "[i]f parents do not allow their young child to make a gender role transition." *Id.*

[14] Hembree, Wylie C., et al., *Endocrine Treatment of Gender-Dyshporic/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, Endocrine Society, 102(11) J Clin. Endocrinol. Metab. 3869–3903, at 3879 (2017), https://doi.org/10.1210/jc.2017-01658.

[15] The latest version of WPATH's standards of care guidelines (version 8), which was released last fall, continues to acknowledge that "there is a dearth of empirical literature regarding best practices related to the social transition process." *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, WPATH, 23 International J. Trans. Health 2022 S1–S258, at S76 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644

In short, when a child or adolescent expresses a desire to change name and pronouns to an alternate gender identity, mental health professionals do not universally agree that the best decision, for *every such* child or adolescent, is to immediately "affirm" their desire and begin treating that child or adolescent as the opposite sex. And whether transitioning will be helpful or harmful likely depends on the individual child or adolescent. As WPATH emphasizes, "an individualized approach to clinical care is considered both ethical and necessary." WPATH SOC8, *supra* n.15, at S45.

While the mental-health community continues to debate whether socially transitioning is generally beneficial or not, it is beyond dispute that there is currently little solid evidence about who is right, given how recent of a trend this is. *See supra* n.15

Even setting aside the debate about socially transitioning, there is near universal agreement that, when a child or adolescent exhibits signs of gender incongruence (and a request to change name/pronouns would certainly qualify), each should be considered separately and individually and can benefit from the assistance of a mental-health professional, for multiple reasons.

Every major professional association recommends a thorough professional evaluation to assess, among other things, the underlying causes of the child's or adolescent's feelings and consider whether a transition will be beneficial. The American Psychological Association, for example, recommends a "comprehensive evaluation" and consultation with the parents and youth to discuss, among other things, "the advantages and disadvantages of social transition during childhood and adolescence."[16] The Endocrine Society likewise recommends "a complete psychodiagnostic assessment." *Supra* n.14, at 3877. WPATH, too, recommends a comprehensive "psychodiagnostic and psychiatric assessment," covering "areas of emotional functioning, peer and other social relationships, and intellectual functioning/school achievement," "an evaluation of the strengths and weaknesses of family functioning," any "emotional or behavioral problems," and any "unresolved issues in a child's or youth's environment." WPATH SOC7, *supra* n.3, at 15.[17]

[16] American Psychological Association, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70(9) APA 832–64, at 843 (2015), https://www.apa.org/practice/guidelines/transgender.pdf.

[17] WPATH SOC8, *supra* n. 15, at S45, likewise states that "a comprehensive clinical approach is important and necessary," "[s]ince it

WPATH also recommends that mental health professionals "discuss the potential benefits and risks of a social transition with families who are considering it." WPATH SOC8, *supra* n.15, at S69.

A professional assessment is especially important given the "sharp increase in the number of adolescents requesting gender care" recently, particularly among adolescent girls ("2.5-7.1 times" adolescent boys). WPATH SOC8, *supra* n.15, at S43. As WPATH acknowledges, an increasing number of "adolescents [are] seeking care who have not seemingly experienced, expressed (or experienced and expressed) gender diversity during their childhood years," indicating that "social factors also play a role," including "susceptibility to social influence." *Id.* at S44–S45.

There is also growing awareness of adolescents who come to "regret gender-affirming decisions made during adolescence" and later "detransition," which many find to be a "difficult[ ]" and "isolating experience." *Id.* at S47. In one recent survey of 237 detransitioners (over

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is impossible to definitively delineate the contribution of various factors contributing to gender identity development for any given young person."

90% of which were natal females), 70% said they realized their "gender dysphoria was related to other issues," and half reported that transitioning did not help.[18]

Another reason for professional involvement is to assess whether the child or adolescent needs mental-health support. Many transgender youth experience dysphoria—psychological distress—associated with the mismatch between their natal sex and perceived or desired gender identity. Indeed, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders' (DSM-V) official diagnosis for "gender dysphoria" is *defined by* "clinically significant distress" associated with the mismatch. *See What Is Gender Dysphoria?*, American Psychiatric Association.[19]

Gender incongruence is also frequently associated with other mental-health issues. WPATH's SOC8 surveys studies showing that transgender youth have higher rates of depression, anxiety, self-harm,

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[18] Vandenbussche, E., *Detransition-Related Needs and Support: A Cross-Sectional Online Survey*, 69(9) Journal of Homosexuality 1602–1620, at 1606 (2022), https://doi.org/10.1080/00918369.2021.1919479.

[19] American Psychiatric Association, *What is Gender Dysphoria?* https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

suicide attempts, eating disorders, autism spectrum disorders, and other emotional and behavioral problems than the general population. *Supra* n.15, at S62–63. All major professional organizations recommend screening for these coexisting issues and treating them, if needed. *Id.*; APA Guidelines, *supra* n.16, at 845; Endocrine Society Guidelines, *supra* n.14, at 3876.

Finally, professional support can be vital *during* any transition. A transition can "test [a young] person's resolve, the capacity to function in the affirmed gender, and the adequacy of social, economic, and psychological supports," and "[d]uring social transitioning, the person's feelings about the social transformation (including coping with the responses of others) is a major focus of [ ] counseling." Endocrine Society Guidelines, *supra* n.14, at 3877.

It should go without saying, but parents cannot obtain a professional evaluation, screen for dysphoria and other coexisting issues, or provide professional mental-health support for their children, if their school hides from them what is happening at school.

To summarize, no professional association recommends that teachers and school officials, who have no expertise whatsoever in these

issues, should facilitate a social transition while at school, treating minors as if they are really the opposite sex, in secret from their parents.

II. Parental Decision-Making Authority Over Their Minor Children Includes the Right to be Involved in How School Staff Refer to Their Child While at School.

A long line of cases from the United States Supreme Court establishes that parents have a constitutional right "to direct the upbringing and education of children under their control." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)). This is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court," *Troxel*, 530 U.S. at 65 (plurality op.), and is "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Indeed, it is a "basic civil right[ ] of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), "far more precious … than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953),

This line of cases establishes four important principles with respect to parents' rights that are relevant to the case at hand.

First, parents are the primary decision-makers with respect to their minor children—not their school, or even the children themselves.

Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Troxel*, 530 U.S. at 66 (plurality op.) ("[W]e have recognized the fundamental right of parents to *make decisions* concerning the care, custody, and control of their children.") (emphasis added); *Yoder*, 406 U.S. at 232 (emphasizing the "primary role of the parents in the upbringing of their children"). Parental decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602, and that "natural bonds of affection lead parents to act in the best interests of their children," far more than anyone else. *Parham*, 442 U.S. at 602; *Yoder*, 406 U.S. at 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.")

Second, parental rights reach their peak, and thus receive the greatest constitutional protection, on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (calling this "the heart of parental decision-making authority"); *Yoder*, 406 U.S. at 233–34. One such area traditionally

reserved for parents is medical and health-related decisions, as the United States Supreme Court recognized long ago: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603.

Third, a child's disagreement with a parent's decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 603–04. *Parham* illustrates how far this principle goes. That case involved a Georgia statute that allowed parents to voluntarily commit their minor children to a mental hospital (subject to review by medical professionals). *Id.* at 591–92. A committed minor argued that the statute violated his due process rights by failing to provide him with an adversarial hearing, instead giving his parents substantial authority over the commitment decision. *Id.* at 587. The Court rejected the minor's argument, confirming that parents "retain a substantial, if not the dominant, role in the [commitment] decision." *Id.* at 603–04. "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." *Id.* at 604.

Fourth, the fact that "the decision of a parent is not agreeable to a child or … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603. Likewise, the unfortunate reality that some parents "act[ ] against the interests of their children" does not justify "discard[ing] wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602–03. The "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is "statist" and "repugnant to American tradition." *Id.* at 603 (emphasis in original). Thus, as long as a parent is fit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69 (plurality op.).

In accordance with these principles, courts have recognized that a school violates parents' constitutional rights if it attempts to usurp their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), for example, a high school swim coach suspected that a team

member was pregnant, and, rather than notifying her parents, discussed the matter with other coaches, guidance counselors, and teammates, and eventually pressured her into taking a pregnancy test. *Id*. at 295–97, 306. The mother sued the coach for a violation of parental rights, explaining that, had she been notified, she would have "quietly withdrawn [her daughter] from school" and sent her to live with her sister until the baby was born. *Id*. at 306. "[M]anagement of this teenage pregnancy was a family crisis," she argued, and the coach's "failure to notify her" "obstruct[ed] the parental right to choose the proper method of resolution." *Id*. at 306. The court found that the mother had "sufficiently alleged a constitutional violation" against the coach and condemned his "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Id*. at 306–07.

Three Justices of the Wisconsin Supreme Court, in a case similar to this one, recently recognized that "allowing a school to reassign a child's gender" "without parental consent" violates parents' constitutional rights. *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65,

¶¶ 77–95, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting). "[S]ocial transitioning is a healthcare choice for parents to make," and putting a school district "in charge of enabling healthcare choices without parental consent," especially on such a "fundamental decision," deprives parents of their constitutionally protected "decision-making [authority] for their children." *Id.* ¶¶ 89, 92, 94. Although this was a dissent, the four Justices in the majority remanded to the trial court for procedural reasons, without commenting on the merits. *Id.* ¶¶ 30–40. Thus, the dissenting Justices' opinion may become the majority when the case returns, and in the meantime, their opinion is highly persuasive.

A federal district court has granted a preliminary injunction against a similar policy, recognizing that parents' decision-making authority necessarily "includes the right … to have a say in what a minor child is called and by what pronouns they are referred." *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). The Court added, "[i]t is 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."

The Ludlow Public Schools' policy violates parents' decision-making authority over their minor children in at least three different ways.

First, the Policy violates parents' constitutional right to make the decision about whether a social transition is in their child's best interest. When children or adolescents experience gender dysphoria, the decision whether they should socially transition is a significant and impactful healthcare-related decision that falls squarely within "the heart of parental decision-making authority," *C.N.*, 430 F.3d at 184; *Parham*, 442 U.S. at 603. As described in more detail above, there is an ongoing debate among mental health professionals over how to respond when a child experiences gender incongruence, and, in particular, whether and when children should socially transition by being addressed as though they were the opposite sex.

The District's Policy takes this life-altering decision out of parents' hands and places it with educators and young children, who lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 602. By enabling children

to transition at school, in secret from parents, without parental involvement, the District is effectively making a treatment decision without the legal authority to do so and without informed consent from the parents. Given the significance of changing gender identity, especially at a young age, parents "can and must" make this decision. *Parham*, 442 U.S. at 603.

A child's fear that his or her parents might not support a transition is not sufficient to override their decision-making authority. Parents' role is sometimes to say "no" to protect their children from decisions against their long-term interests.

The recent experience of some parents in Wisconsin illustrates the point.[20] During COVID, their 12-year-old daughter began to have a serious mental health crisis, and, for a time, believed she was transgender and expressed a desire to adopt a male name and pronouns

[20] Undersigned counsel represents these parents; their story is described in the complaint, and in the article cited in footnote 21 below. *T.F.*, *et al. v. Kettle Moraine School District*, No. 21-CV-1650 (Waukesha Cnty. Wis., Cir. Ct., filed Nov. 17, 2021), *complaint available at* https://will-law.org/wp-content/uploads/2021/11/Kettle-Moraine-Complaint-Redacted.pdf.

while at school.[21] Everyone around her rushed to "affirm" her new identity, but her parents decided that an immediate transition was not in her best interest, at least not until she met with a professional to understand what she was feeling and to "educat[e] herself about what gender transitioning really entails." *Supra* n.21. The mother told her daughter, "I'm not telling you that you can't be transgender. … I'm telling you that you can't change your name and your gender *right now*. You have a lot of underlying issues that need to be addressed before you make the decision that you were born in the wrong body. I understand that all these people around you are appeasing you and giving you want you want, and I'm not doing that, and that makes you angry. But I am your best friend. I am looking out for your best interest." *Id.* They communicated their decision to the school, but the school responded that they would call their daughter whatever she wanted at school, regardless of the parents' decision, forcing them to immediately withdraw her from the District. *Id.* Just a few weeks later, after being removed from those

[21] Mills, Ryan, *A Mom's Fight to Save Her Daughter from Trans Orthodoxy at School*, National Review (Apr. 5, 2022), https://www.nationalreview.com/news/a-moms-fight-to-save-her-daughter-from-trans-orthodoxy-at-school/.

"affirming" that she was really a boy, their daughter realized that her parents were right, and told her mother that "affirmative care really messed me up." *Id*. This story powerfully illustrates that immediately transitioning is not *always* the best option for *every* child, that parents know and love their children better than anyone else, and that school districts must defer to parents about what is best for their children.

Second, the District's Policy also violates parental rights by concealing a serious mental-health issue from parents, circumventing their involvement altogether on this sensitive issue. *See H. L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "presumptively include[ ] counseling [their children] on important decisions"); *Arnold v. Board of Education of Excambia County, Alabama*, 880 F.2d 305, 313 (11th Cir. 1989). Parents cannot guide their children through difficult decisions without knowing what their children are facing. That is why federal and state laws give parents complete access to all of their children's education records. *E.g.*, 20 U.S.C. § 1232g(a)(1)(A). By prohibiting staff from communicating with parents about this one issue, the District's Policy effectively substitutes school staff for parents as the

primary source of input for children navigating difficult decisions, with long-term implications. *See Gruenke*, 225 F.3d at 306–07.

Third, the Policy interferes with parents' ability to provide professional assistance their children may urgently need. As explained above, gender dysphoria can be a serious psychological issue that requires support from mental health professionals. And gender incongruent children often present other psychiatric co-morbidities, including depression, anxiety, suicidal ideation and attempts, and self-harm. Teachers and staff do not have the training and experience necessary to properly diagnose children with gender dysphoria or to opine and advise on the treatment options. They cannot provide professional assistance for children dealing with these issues, and parents cannot obtain it either for their child if they are kept in the dark. Thus, parents must be notified and involved not only to make the decision about whether a social transition is in their child's best interest, but also to obtain professional support for their child.

III. None of the District Court's Reasons Justify Excluding Parents from This Decision.

The District Court made multiple errors in its analysis. First, the District Court erroneously held that treating a child as the opposite sex

is not "mental health treatment." Appx. 158–59.[22] As an initial matter, holding this *on a motion to dismiss*, while disregarding Appellants' allegations in the complaint to the contrary as "conclusory" (even though they cited experts), violated the well-established standards for such motions, as Appellants explain in more detail. *E.g.*, *Gottlieb v. Amica Mut. Ins. Co.*, 57 F.4th 1, 6 (1st Cir. 2022).

But even setting that point aside, the District Court was wrong in that conclusion. Many mental-health professionals with decades of experience view an "affirmed" social transition during childhood as a form of "psychosocial treatment" and an "active intervention." *Supra* p. 6, Part I. Indeed, even WPATH lists "[c]hanges in gender expression and role" *first* among "[t]reatment options" for gender dysphoria. WPATH SOC7, *supra* n.3, at 9.

The District Court reasoned that addressing Appellants' children as the opposite sex was not mental-health treatment because it was done by school staff with "no special training or skill" and without any "treatment plan or diagnosis in place," Appx. 159—but that makes it

[22] Citations to "Appx." are to Appellants' Appendix.

worse, not better. Indeed, that is exactly the problem. Many mental-health professionals believe children should *not* transition without a careful professional evaluation precisely because of the long-term implications, and *no professional organization* recommends that untrained school staff should secretly facilitate a social transition without involving parents and experts. *Supra* Part I.

Relatedly, the Court held that Appellants did not explain the "clinical significance" of addressing children as the opposite sex. Appx. 159. Again, this applied the wrong standard on a motion to dismiss, but the "clinical significance" is that "affirmation" by respected adults that a child is really the opposite sex reinforces their belief that this is who they are, which may cause that belief to persist when it otherwise might not have (and it does not persist for most children, if they do not transition). *Supra* Part I. This is one of the reasons why professionals recommend a thorough evaluation before transitioning.

The District Court acknowledged that gender dysphoria can be a serious mental-health issue, but dismissed this as irrelevant because "Plaintiffs have not alleged either child has been diagnosed with gender dysphoria." Appx. 159. But seeking to present as the opposite sex is a

well-recognized indication that a child *may* be dealing with gender dysphoria and should, at the very least, be professionally evaluated, which only parents can provide. *Supra* pp. 12–13. Appellants were working with a professional and asked the school to allow them to "address this as a family and with the proper professionals," which Defendants disregarded. Appx. 28, ¶¶ 69–70.

The District Court also erroneously held that "there are no non-conclusory allegations that social transitioning was actually occurring," Appx. 159–60—even though it acknowledged the allegations that Defendants were referring to Appellants' children by opposite-sex names and pronouns and had even allowed one of their children to begin using opposite-sex bathrooms. Appx. 154. The Court appears to have been confused about terms. Professionals in the field use the phrase "social transition" as a shorthand for, primarily, a name and pronoun change. WPATH, for example, describes a change of name and pronouns *at school* as a "complete[ ]" (as opposed to partial) "social transition." WPATH SOC7, supra n.3, at 16.

All of that aside, it should not ultimately matter whether treating a child as the opposite sex is characterized as "mental health treatment"

or not. The Constitution protects parents' authority to make decisions with respect to their minor children, *supra* Part II, which sometimes includes saying "no," and a gender-identity transition during childhood is a major decision with long-term implications.

The District Court's second main error was to frame the policy as a matter of "curriculum." *E.g.*, Appx. 156 (citing *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008)), 168. Appellants' claim has nothing at all to do with curriculum. Parents of course cannot dictate what a school district teaches during the day, but they do have authority over their minor children, and when a major decision-point arises—like whether staff will treat their child as the opposite sex—schools must defer to parents, even if the issue surfaces at school. Indeed, the Third Circuit has drawn this exact distinction, emphasizing that exposing children to an objectionable survey is not "of comparable gravity" to "depriv[ing] [parents] of their right to make decisions concerning their child." *C.N.*, 430 F.3d at 184. That is exactly what is at stake here.

The District Court also invoked Massachusetts' anti-discrimination statute and regulations as providing a "strong government interest" that supports the District's policy. Appx. 165; *id.* 156–57, 160. The Court

briefly acknowledged that the law "[o]n its face … does not require such a policy," but nevertheless reasoned that the policy is "consistent with" the anti-discrimination law. *Id.* 164, 166. This argument is a red herring. The suggestion that requiring parental consent is somehow "discriminatory" does not even make sense. *Id.* 163. Appellants are not asking for some students to be treated differently than others—the claim is that all minor students must obtain parent permission before school staff treat them as the opposite sex while at school, just as they need parent permission to change their names in school records,[23] to take medication at school,[24] to go on field trips,[25] or to participate in athletics,[26]

[23] FERPA regulations require parental consent to change records. See 34 CFR §§ 99.20(a); 99.3 (defining "eligible student" as one who has "reached 18 years of age")

[24] Ludlow Public Schools, *Health Procedures and Guidelines* ("All medication …must be accompanied by … written parental permission), https://sites.google.com/ludlowps.org/lps-health-services/health-procedures-and-guidelines?authuser=0

[25] Ludlow Public Schools, *Student/Parent Handbook* ("Permission forms must be signed by parents for each field trip."), https://docs.google.com/document/d/e/2PACX-1vQnjJFO2Tom3j61lLPTeRrXVs-cY7llr2eSYnk4IGMRdPzo3INZhIS3-1mcRAOoN228p4X-bDtYV-LT/pub (linked from https://www.ludlowps.org/home).

[26] *E.g.*, Ludlow High School, *Athletic Guidebook* ("Students must submit an Athletic Permission Waiver that is signed by both the student-athlete and a parent/guardian."), https://docs.google.com/document/d/10Iz69OFmAPCTEgTURKHn9RykF8ZvGWK6gNop_BQqHFw/edit (linked from https://ludlowathletics.org/).

to give just a few examples. Some parents will say yes and others no, but that does not give school districts leeway to override parents in the name of uniformity. *Parham*, 442 U.S. at 603 ("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.").

Finally, the District Court suggested that the Policy is justified to protect children *from their own parents*. Appx. 163 (to "safely express their gender identities"). This rationale flies directly in the face of the "traditional *presumption*"—constitutionally mandated, by the way—that parents act in their children's best interests. *Troxel*, 530 U.S. at 69; *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (finding a violation of parents' rights where 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."). It is never constitutionally permissible to usurp parental authority solely at the say-so of a minor, without requiring any evidence or allegation of harm, or providing any process or opportunity for the parents to respond or defend themselves. *See Santosky v. Kramer*, 455 U.S. 745 (1982). School districts do not have power to act as ad hoc

family courts, litigating family law issues or deciding on their own, independent of any court process, which parents have authority over such decisions.

* * * * *

At bottom, the District simply disagrees with parents who might say "no" to an immediate transition. That is not sufficient to override their parental role. Schools cannot and should not exclude parents from decisions involving their own children, solely based on their assessment of how supportive they are of a transition. The District's Policy, and others like it around the country, are a stunning deviation from what parents expect when they send their minor children to school. If this Court affirms the District Court, parents in this circuit, like Appellants, will have no choice but to withdraw their children from public school to preserve their parental role and prevent harm to their children. Parents should not have to cede their decision-making authority merely by sending their children to public school.

CONCLUSION

This Court should reverse the judgment of the District Court.

Dated: March 20, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,221 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: March 20, 2023

/s/ Luke N. Berg

LUKE N. BERG

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2023, I filed the foregoing Amicus Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: March 20, 2023

/s/ Luke N. Berg
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