No. _____

In The
Supreme Court of the United States

JENN-CHING LUO,
Petitioner,

v.

OWEN J. ROBERTS SCHOOL DISTRICT,
GEOFFREY BALL,
BRAIN SCHNEIDER
SHARON W. MONTANYE
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Jenn-Ching Luo, Pro se
PO Box 261
Birchrunville, PA 19421
(516)3430088
E-mail: jennchingluo@gmail.com

QUESTION PRESENTED

1. Whether the decision of the Third Circuit conflicts with the Supreme Court decision by holding in this instant case that the District Court effectively consolidated two complaints by dismissing the second complaint and instructing Petitioner to "combine like claims and include all factual allegations relating to a particular claim within that claim", which is in direct conflict with the holding of published opinion in Hall v. Hall, 584 U.S. __ (2018), for example, "*consolidation did not result in the merger of constituent cases*" and "*preserves the distinct identities of the cases*"?

2. Whether the Third Circuit has departed from accepted judicial practice, refusing to follow controlling provisions to determine right to informed consent and also making an immoral ruling that a free individual has no right to be informed and to reject unapproved method that shall be done with his or her body?

3. Whether the decision of Third Circuit conflicts with the Supreme Court decision by applying U.S. Codes to construe tort of abuse of process which is in direct conflict with the Supreme Court holding in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938), "*There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts*"?

PARTIES TO THE PROCEEDING

Petitioner, JENN-CHING LUO, was the only appellant in the court of appeals. The four respondents were appellees in the court of appeals: Owen J. Roberts School District, Geoffrey Ball, Brain Schneider, and Sharon W. Montanye.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The Supreme Court of the United States

No.

JENN-CHING LUO,
Petitioner,

v.

OWEN J. ROBERTS SCHOOL DISTRICT,
GEOFFREY BALL,
BRAIN SCHNEIDER
SHARON W. MONTANYE
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner JENN-CHING LUO respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The panel order denying the petition for panel rehearing and rehearing *en banc* (App. *infra*, 1a-2a) is not published. Only Honorable Michael Fisher

voted for panel rehearing; The panel opinion of the Third Circuit that affirmed the district court judgment is in the Appendix (App. *infra*, 3a-12a); The opinion of the District Court that partially granted Respondents' pre-answer motions is in the Appendix (App. *infra*, 13a-81a); The amended order of the District Court that partially granted Respondents' motion to dismiss and consolidated the complaints is in the Appendix (App. *infra*, 82a-86a); The order of District Court that denied reconsideration is in the Appendix (App. *infra*, 87a-89a)

JURISDICTION

On July 5, 2018, the Third Circuit denied the petition for panel rehearing and rehearing *en banc*. This jurisdiction of this Court is invoked under under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> *nor shall any State deprive any person of life, liberty, or property, without due process of law;*

---

20 U.S.C. §1414(b)(3)(A)

> *... assessments and other evaluation materials used to assess a child under this section— **(v)** are administered in accordance with any instructions provided by the*

producer of such assessments;

---

20 U.S.C. §1415(b)(3)
Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—
(A) proposes to initiate or change; or
(B) refuses to initiate or change,
the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

---

20 U.S.C. §1415(c)(1)
Content of prior written notice. The notice required by subsection (b)(3) shall include—
(A) a description of the action proposed or refused by the agency;
(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;
(E) a description of other options considered by

the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

---

34 C.F.R. §300.9 Consent.

Consent means that—

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or through another mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

(2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special

education and related services because of the revocation of consent.

---

34 C.F.R. §300.300(c)
Parental consent for reevaluations. (1) Subject to paragraph (c)(2) of this section, each public agency— (i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

STATEMENT

1. Petitioner has a child with special needs. Respondent Owen J. Roberts School District provides the Student with a special education under the Individuals With Disabilities Education Act ("the IDEA"). At the time when the instant case was commenced, disputes on the special education have been resolved by eight due process hearings, and Petitioner prevailed 7.5 due process hearings out of 8. The background of the case was the special education. However, the instant case was not arisen from the IDEA, but arising from deprivation of Petitioner's constitutional right and tort of abuse of process. (App. *infra*, 4a- 5a)

2. The instant case was filed on July 31, 2015, and was docketed in (PAED No. 15-cv-4248), and the court identified it as LUO III. Respondents Owen J. Roberts School District, Geoffrey Ball, and Brian Schneider (collectively, "the School District") and Respondent Sharon W. Montanye filed a pre-answer motion to dismiss the instant case, e.g., LUO III.

The District Court partially granted the motions to dismiss, and there were four remaining claims (e.g., claims two, four, five and six) in LUO III. All other claims, including abuse of process and right to informed consent, were dismissed with prejudice. (App. *infra*, 56a-79a)

3. There were two related cases which the court identified as LUO I (PAED No. 14-cv-6354) and LUO II (PAED No. 15-cv-2952), respectively. The LUO II was filed by the Respondent Owen J. Roberts School District. LUO I and LUO III were filed by Petitioner. The petition will show that the District Court invented an erroneous way to consolidate the four remaining claims in LUO III with LUO I, which is in direct conflict with published opinion of Supreme Court. (App. *infra*, 4a-6a)

4. The complaint of the case includes thirteen claims. The appeal to the Third Circuit only reviewed 6 claims in three orders: (1) the order in dismissing four remaining claims because Petitioner did not make a second amended consolidated complaint (App. *infra*, 9a); (2) the order in dismissing the abuse of process claim (App. *infra*, 10a); (3) the order in dismissing the right to informed consent claim (App. *infra*, 11a).

Consolidation

5. The School District's pre-answer motion included the defense of claim splitting, to dismiss the Complaint in its entirety. The District Court examined the complaint, and found claim splitting

was not applicable because the instant case was arisen from new occurrence that was not set out in the first case. That's was why there were four remaining claims that were not dismissed. (App. *infra* 7a)

6. However, the Third Circuit, copying Respondents' statements, interpreted "claim splitting" erroneously and very confusing. Claim splitting prohibits a plaintiff from presenting only a portion of demands in the first case, and then plaintiff presents the remaining demands in the second case. Claim splitting focuses on the date when the first complaint was filed, and examines if there was "leftover" before that date that plaintiff did not include in the first complaint. See Stark v. Starr, 94 U.S. 477, 485 (1876) (A plaintiff "*is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit if the first fail. There would be no end to litigation if such a practice were permissible.*") However, the Third Circuit interpreted claim splitting erroneously that a plaintiff can have only one case and must add new occurrence to the first case. That is terribly wrong. The Second Circuit rejects such interpretation of claim splitting. See Curtis v. Citibank, *NA.*, 226 F.3d 133, 139 (2d Cir. 2000) ("*The crucial date is the date the complaint was filed. The plaintiff has no continuing obligation to file amendments to the complaint to stay abreast of subsequent events; plaintiff may simply bring a later suit on those later-arising claims.*")

7. The Third Circuit interpreted "claim splitting" oddly. For example, the District Court held the following from claim #2:

> *Magistrate Judge Wells determined that this claim depends on the identical conduct set forth in Luo I --- requirement for parent training --- but simply includes additional instances of IEP requirement in* ***January and March 2015****. In turn, Magistrate Judge Wells recommended that, under the doctrine of claim-splitting, the claims be consolidated with Luo I. Luo now objects to such consolidation.*

(App. *infra* 59a-60a) The first case (PAED, 14-cv-6354) was commenced in year 2014; While the claim #2 in the instant case was arisen from the occurrence of **January and March 2015**. At the time when the first case was commenced in year 2014, the transactions of **January and March 2015** did not exist, which were not a split or leftover from the first case of year 2014. Clearly, claim splitting is not applicable. However, the Third Circuit ruled it was a claim splitting; While, the Second Circuit ruled it was not a claim splitting.

8. Because the Third Circuit interpreted claim splitting a little bit odd, the opinions of the Third Circuit and the District court have the words "duplicative case/complaint" (App. *Infra*, 9, 9a, 10a,35a,...) or "same operative fact" (App. *Infra*, 8, 10a, 51a,...). In fact, the instant case was arisen from new events that were occurred after the date the first case was filed.

9. This Petition could skip the question of claim splitting. Even there were different interpretations of claim splitting, the question here is an erroneous "consolidation". For example, the court has the following opinion:

- "*... ... claims two, four and six be consolidated with like claims already presented in Luo I*" (App. *infra*, 57a)
- "*I likewise find consolidation to be the appropriate remedy. Federal Rule of Civil Procedure 42(a) grants trial courts broad discretion to "streamline and economize pretrial proceedings so as to avoid duplication of effort, and to prevent conflicting outcomes in cases involving similar legal and factual issues" by consolidating related cases.*" (App. *infra*, 67a)
- "*A district court has 'broad discretion' when determining whether consolidation is appropriate.*" (App. *infra*, 67a)

10. The District Court invented an erroneous way to consolidate the four remaining claims with the first case, e.g., LUO I. The District Court's consolidation includes two steps.

First, the District Court applied Walton v. Eaton Corp., 563 F.2d 66, 70 (3d Cir. 1977), holding (a plaintiff has "*no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.*"), as a base to dismiss the second complaint without prejudice (e.g., the four remaining claims in the instant case). However, the Walton's

decision is a holding of claim splitting. The four remaining claims, which were arisen from new events that were occurred after the date the first case was filed, not "leftover" from the first case. Claim splitting is not applicable. The District Court applied the Walton to establish its consolidation theory. (App. *infra,* 9a-10a)

Second, the District Court instructed Petitioner to "*combine like claims and including all factual allegations relating to a particular claim within a single count*", and directed Petitioner to make a second consolidated complaint, as a way to consolidate this instant case with LUO I. (App. *infra,* 80a); (App. *infra,* 8a)

The District Court's consolidation actually merged each of the four remaining claims into a like-claim of the first case. That conflicts with the holding of published opinion in Johnson v. Manhattan Railway Co., 289 U.S. 479, 496-497 (1973), "*consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.*"

11. Petitioner filed a motion for reconsideration the order that merged the four remaining claims into the first case. The District Court denied the motion, and ordered the four remaining claims would be dismissed with prejudice if Petitioner did not make the second amended consolidated complaint before December 23, 2016. Petitioner did not make the second amended complaint, but on December 26, 2016 filed a notice of appeal. (App. *infra,* 8a)

12. On June 11, 2018, the Third Circuit ruled that "*the District Court's effective consolidation of the two complaints was purely for administrative efficiency*" (App. *infra*, 9a-10a), and affirmed the district court order in dismissing the four remaining claims with prejudice because Petitioner did not make a second consolidated complaint as the District Court directed. Apparently, the Third Circuit ruling conflicts with the published opinion in Johnson v. Manhattan Railway Co., 289 U.S. 479, 496-497 (1973) and Hall v. Hall, 584 U.S. __ (2018), "*consolidation did not result in the merger of constituent cases*" and "*preserves the distinct identities of the cases*"

Informed consent

13. Informed consent is a liberty right which entitles every competent person to be involved in knowing what will happen to him or her. The concept of informed consent was mostly developed in medical practice. For example, in Schloendorff v. Society of New York Hospital, 105 NE 92,93 (NY 1914), the court held:

> *Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assult for which he is liable in damages.*

Under the right to informed consent, every competent person has a right to know what will happen to him or her and also has a right to

determine what shall be done with him or her. Disclosure is used as a means of ensuring self-determination.

It is well established that informed consent includes two component: *disclosure* and *self-determination*. Informed consent is well defined, not only in provisions but also in professional journals. For an example, by Paul S. Appelbaum MD, Assessment of patient's competence to consent to treatment, *New England Journal of Medicine*. 2007; 357: 1834-1840 ("*Valid informed consent is premised on* ***the disclosure of appropriate information*** *to a competent patient who is permitted to* ***make a voluntary choice***.").

14. Evaluation is also required an informed consent. See 34 C.F.R. §300.300(c) ("*Parental consent for reevaluations. (1) Subject to paragraph (c)(2) of this section, each public agency— (i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.*") The right entitles a person to have the information that shall happen to him, and to determine what shall be done with him. The IDEA incorporates the two components "*disclosure*" and "*self-determination*" as:

1. *The parent has been* ***fully informed of all information*** *relevant to the activity for which consent is sought, in his or her native language or other mode of communication;*
2. *The parent* ***understands and agrees in writing to the carrying out of the activity for which his or her consent is sought****, and the consent describes that activity and lists the records (if any) that*

will be released and to whom;
(34 C.F.R. §300.9) Informed consent is well written in plain text.

15. Before the February 2015 reevaluation, the School District gave Petitioner a prior written notice that described the assessments that School District planned to administrate, and sought a consent for those assessments. Petitioner gave a consent for those assessments, one of which was "adaptive behavior Assessment System" that is well recognized. However, the School District did not follow the instruction to administrate the assessment, but reckless did it (or modified) by its own. The School District is not the producer of the assessment, and was not permitted to modify the assessment. The School District also did not follow the manual to interpret the result. What the School District did was completely a violation of the laws. For example, see 20 U.S.C. §1414(b)(3)(A) ("*assessments and other evaluation materials used to assess a child under this section— **(v)** are **administered in accordance with any instructions provided by the producer of such assessments;***") The violation further deprived Petitioner of the right to informed consent. The prior written notice, which the School District gave to Petitioner, did not disclose that the School District would administrate an "unapproved" method. Further, Petitioner also did not give a consent to the unapproved method. A claim under the right to informed consent was commenced.(App. *infra*, 11a)

16. The District Court dismissed the right to

informed consent claim. The Third Circuit affirmed the District Court order by holding "*[Petitioner] does not have a constitutionally protected interest in being advised of the methodology Dr. Schneider used in the adaptive behavior assessment*" (App. *infra*, 12a) Apparently, the Third Circuit refused to follow the established laws to make the determination. First, the law is clear that the School District must administrate the assessment **in accordance with the instructions**, and the School District had no authority to modify the assessment. See 20 U.S.C. §1414(b)(3)(A) ("*assessments and other evaluation materials used to assess a child under this section— **(v)** are **administered in accordance with any instructions provided by the producer of such assessments,***") Second, informed consent never says the disclosure must be information that is constitutionally protected. On contrary, as shown above, informed consent entitles a person to know what will happen to him and to determine that shall be done with his body. The Third Circuit refused to follow the established laws to determine the appeal.

Abuse of Process

17. Abuse of process is a recognized cause of action in Pennsylvania state, which "*is defined as the use of legal process against another 'primarily to accomplish a purpose for which it is not designed.'*" Shiner v. Moriarty, 706 A.2d 1228, 1236 (Pa. Super. Ct. 1998)

18. The School District used NOREP to accomplish a purpose for which it is not designed.

NOREP stands for *Notice of Recommended Educational Placement.* NOREP is designed for public school districts to implement educational program that is developed by the IEP team; While, Respondent Geoffrey Ball used the NOREP to implement his personal desire. Respondent Geoffrey Ball used the NOREP to demand Petitioner to consent himself to be supervised by the School District and to take School District's training. NOREP is designed to implement educational program that is developed by IEP team, not to implement Respondent Geoffrey Ball's personal desire. Accordingly, the School District used NOREP for a purpose for which it is not designed.

19. NOREP is not merely a notice. Pennsylvania state NOREP is different from other states. Pennsylvania state NOREP includes a Direction for parent (e.g, Petitioner) to perform a "prescribed act". For example, The Pennsylvania State NOREP includes the following direction:

Directions for Parent/Guardian/Surrogate:
Please check one of the options, sign this form, and return it within 10 calendar days. In circumstances when this form is NOT completed and parent consent is NOT required, the school will proceed as proposed after 10 calendar days.

- □ I request a meeting to discuss this recommendation with school personnel
- □ I approve this action/recommendation.

□ I do not approve this action/recommendation. * My reason for disapproval is:

I request: (Contact the Office for Dispute Resolution at 800-360-7282 for additional information)

□ Mediation

□ Due process hearing

*If you do not approve the action/recommendation(s), your child will remain in the current program/placement only if you request a due process hearing or mediation through the Office for Dispute Resolution. If you do not request Due Process or Mediation through the Office for Dispute Resolution, the LEA will implement the action/recommendation(s).

According to the above Direction, If Petitioner did not perform the "prescribed act", the School District had authority to implement the NOREP, e.g., gaining a legal authority to supervise Petitioner. After Petitioner performs the "prescribed act" to request a hearing or a Mediation (which will lead to a hearing if no agreement was reached), Petitioner was compelled to litigation. Pennsylvania state NOREP starts a litigation. Similar to summons, it is a process.

20. Respondent Geoffrey Ball used NOREP to compel Petitioner to be under the School District's supervision. Petitioner was compelled to litigation. Hearing Officer struck such NOREP. After Hearing

Officer struck the NOREP, Respondent Geoffrey Ball realized it is not possible to carry out such NOREP. Under the circumstance that it was not possible to carry out the NOREP, Respondent Geoffrey Ball issued another identical NOREP to compel Petitioner to litigate again. Hearing Officer again struck such NOREP again, Respondent Geoffrey Ball then issued another one. Respondent Geoffrey Ball repeated doing it, a total of four times until Hearing Officer expressed that the School District should stop doing it. Under the circumstance that Respondent Geoffrey Ball was aware that it is not possible to carry out the NOREP, Respondent Geoffrey Ball persisted in issuing such NOREP for no purpose but harassing Petitioner. Harassment is also a perversion of process because process is not designed for harassment. Shiner v. Moriarty, 706 A.2d 1228, 1236 (Pa. Super. Ct. 1998) (the court held "abuse of process claim can be based on motive of harassment") Respondent Sharon W. Montanye, School District counsel, willfully assisted in the School District in perverting the process. A claim for abuse of process was then commenced. (App. *infra*, 10a)

21. The District Court dismissed the claim for abuse of process with prejudice. The Third Circuit affirmed the District Court order by holding "*A NOREP is a form completed at the end of the IEP development process that must be provided to parents whenever the school district proposes a change. 20 U.S.C. §1415(b)(3), (c)(1). A NOREP is not a form of legal process*" (App. *infra*, 11a) The Third Circuit overlooked the NOREP. The

Pennsylvania state NOREP includes a Direction for parent to perform a "prescribed act", which is not merely a notice. Further, the Third Circuit's holding conflicts with published opinion of the Supreme Court. Whether Pennsylvania NOREP is a process is a matter of legal definition of process. Legal definition is part of tort of abuse of process. In Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938), this court held it is state court authority and obligation to interpret state laws, e.g., "*There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.*" It is erroneous for the Third Circuit to cite U. S. Code to interpret the state law of abuse of process. Especially, the paragraphs 20 U.S.C. §1415(b)(3) and (c)(1), (see above, p. 3-4), are irrelevant, having nothing for a determination of process.

REASONS FOR GRANTING THE PETITION

The Third Circuit refused to follow established laws and published opinions of the Supreme Court to decide the appeal, and has departed from accepted judicial practice. This court should exercise supervisor authority, and grants the Petition for Writ of Certiorari.

A. The Third Circuit Refuses To Follow The Holding In Hall v. Hall, 584 U.S. __ (2018) To

Vacate The Erroneous Consolidation. The Third Circuit Has Departed From Accepted Judicial Practice. This Court Should Exercise Supervisor Authority And Grants The Petition For Writ Of Certiorari.

As shown above (p. 6-11), the District Court invented an erroneous consolidation. First the District Court dismissed the four remaining claims in the instant case without prejudice, and then instructed Petitioner to "*take care to combine like claims and include all factual allegations relating to a particular claim within that claim*" and to make a second consolidated complaint. Because of erroneous consolidation, Petitioner did not make the second amended consolidated complaint. (App. *infra*, 8a) Then, the District Court dismissed the four remaining claims with prejudice as penalty for failing to make the consolidated complaint.

The District Court's consolidation actually merged the four remaining claims in the instant case into a like-claim of the first case. That conflicts with the holding of published opinion in Hall v. Hall, 584 U.S. __ (2018), for example,

— "*consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another*"

— "*consolidation not as completely merging the constituent cases into one, but instead as enabling more efficient case management while preserving the distinct identities of the*

cases and the rights of the separate parties in them."

— "*consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before.*"

The erroneous consolidation conflicts with the Supreme Court holding. However, the Third Circuit refused to follow the published opinion of the Supreme Court to vacate the erroneous consolidation. On contrary, the Third Circuit ruled the erroneous consolidation as an effective consolidation by holding "*the District Court's effective consolidation of the two complaints was purely for administrative efficiency*" (App. *infra*, 10a).

The Third Circuit has departed from accepted judicial practice by refusing to follow the Supreme Court precedent. This court should exercise supervisor authority and grants the Petition for Writ of Certiorari. The District Court's erroneous consolidation caused Petitioner's four remaining claims to have be dismissed with prejudice. The penalty is too severe.

B. The Third Circuit Refused To Follow Controlling Provisions To Review Right To Informed Consent, And Made An Immorally Holding That An Individual Has No Right To Be Informed And To Reject Unapproved Method That Shall Be Done With His Body. The Third Circuit Has Departed From

Accepted Judicial Practice. This Court Should Exercise Supervisor Authority and Grants The Petition for Writ of Certiorari.

As shown above (p. 11-14), informed consent is a liberty right that entitles every competent person to be involved in knowing what will happen to him and to determine what shall be done with his own body. Informed consent is written in two components: *disclosure* and *self-determination*. Evaluation requires an informed consent. (See Above, p. 5, for 34 C.F.R. §300.300(c)) Before the reevaluation, the School District gave Petitioner a prior written notice, describing the assessments the School District planned to administrate, one of which is the well-recognized "Adaptive Behavior Assessment System". Petitioner gave a consent for those assessments.

However, the School District did not follow the instruction to administrate the assessment, but arbitrarily did it by its own. The modification was not approved. The School District also did not follow the manual to interpret the result. Before the reevaluation, the School District did not disclose that it would administrate an "unapproved method", and Petitioner also did not give a consent for the "unapproved method". That violated the two components, "disclosure" and "self-determination" of the informed consent.

The Third Circuit affirmed the District Court order in dismissing the claim by holding:

> *Borrowing the concept of informed consent from the medical context, Luo contended that Dr. Schneider's "unapproved assessment" amounted to a violation of "the liberty right to*

> *informed consent." We agree with the District Court that Luo does not have a constitutionally protected interest in being advised of the methodology Dr. Schneider used in the adaptive behavior assessment.*

(App. *infra*, 12a) The threshold flaw in the decision below is that the Third Circuit refused to follow controlling provisions for the decision.

The first controlling provision, which the Third Circuit refused to follow, is 20 U.S.C. §1414 (b)(3)(A) ("*assessments and other evaluation materials used to assess a child under this section— **(v) are administered in accordance with any instructions provided by the producer of such assessments**;*") The controlling provision says that the School District must follow the instructions to administrate the assessment. The School District could not arbitrarily did it in an unapproved way. The Third Circuit refused to follow the controlling provisions, which is an abuse of discretion.

Second, informed consent entitles a competent person, to be involved, to be fully informed and to decide what shall be done with his body. The controlling provisions do not say that the information, which should be disclosed, must be a constitutionally protected interest. On contrary, informed consent require "all" information should be fully disclosed. For example, the IDEA incorporates the two components of the informed consent as:

1. *The parent has been **fully informed of all information** relevant to the activity for which consent is sought, in his or her native language or other mode of communication;*
2. *The parent **understands and agrees in writing to***

> ***the carrying out of the activity*** *for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom;*

(34 C.F.R. §300.9) The Third Circuit refuses to follow the controlling provisions, but blindly copied Respondents' baseless contention that Petitioner "does not have a constitutionally protected interest in being advised of the methodology".

The Third Circuit's ruling is even immoral. If such ruling could be held, then an individual has no right to know and to determine the method that shall be done with his body. It implies an individual has no right to be informed and to reject unapproved method that shall be done with his body. That is highly immoral, against humanity. If we put the question on the internet for people to vote:

> "Would you agree with the Third Circuit that an individual has no right to be informed and to reject an unapproved method that shall be done with his body?"

Every rational people would vote against the Third Circuit. If we asked the three-judge Panel the same question

> "if they agree to be administrated an unapproved method without a prior notice and without their consent"?

It is 100% sure the three-judge Panel would say "NO". They cannot stand on their own ruling that an individual *"does not have a constitutionally protected interest in being advised of the methodology"*. How come the three-judge Panel make such immoral ruling against the Petitioner, a nobody? The Third Circuit has departed from

accepted judicial practice, but acting as a murder machine to execute the Respondents' statements. This Court should exercise supervisor authority and grants the petition for writ of certiorari.

C. The Third Circuit Has Departed From Accepted Judicial Practice In Applying U.S. Code To Construe State Law Of Abuse Of Process Which Is In Direct Conflict With Decisions Of The Supreme Court.

As shown above (p. 14-18), the School District improperly used NOREP for a purpose that is not designed and committed a tort of abuse of process. The Third Circuit affirmed the District Court order in dismissing the abuse of process claim by holding:

> "*A NOREP is a form completed at the end of the IEP development process that must be provided to parents whenever the school district proposes a change. 20 U.S.C. §1415(b)(3), (c)(1). A NOREP is not a form of legal process.*" (App. *infra*, 11a)

The Third Circuit's decision conflicts with published opinions of the Supreme Court.

As shown above (p. 15-16), the Pennsylvania State NOREP includes a Direction for parent to perform a "prescribed act". The matter is regarding the legal definition of process. The legal definition is part of the law of abuse of process. In Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938), this court held that federal courts must respect the definition of state laws and obligations by the state courts, e.g.,

> "*There is no federal general common law. Congress has no power to declare*

> *substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.*"

Also see Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535 (1958). Whether the Pennsylvania State NOREP is a legal process should be determined by state definition or decision. It is erroneous for the Third Circuit to cite 20 U.S.C. §1415(b)(3) and (c)(1) to construe the tort of abuse of process, which is in direct conflict with the Supreme Court court holding. Further, the 20 U.S.C. §1415(b)(3) and (c)(1), as shown above (p. 3-4), are irrelevant to the matter, which has nothing for a determination of "process". The Third Circuit committed a sequence of errors in applying irrelevant U.S. Codes to construe the state law of abuse of process.

The Third Circuit's opinion states "Luo fails to cite any authority to support ... ." (App. *infra*, 11a). That is untrue. Petitioner's brief cited several authorities that define "process". However, the Third Circuit did not apply any of them for the determination. For example,

— In the Matter of Smith, 175 Misc. 688, 692-693 (N.Y. Misc. 1940), the court defined the "process" as "*it is essential that the document or writ in question must contain a direction or demand that the person to whom it is directed shall perform or refrain from the doing of some prescribed act.*"

— Williams v. Williams, 23 N.Y.2d 592,596, 246 N.E.2d 333, 335, 298 N.Y.S.2d 473, 476-77

(1969) ("*process is a direction or demand that the person to whom it is directed shall perform or refrain from doing some prescribed act*")

— 1 Am. Jur. 2d Abuse of Process §2 (1994); ("process" is generally defined as that "*which emanates from or rests upon court authority, and which constitutes a direction or demand that the person to whom it is addressed perform or refrain from doing some prescribed act.*")

— Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848, 862 (Mo. App. E.D. 2000) "*Legal process is defined as 'process which emanates from or rests upon court authority, and which constitutes a direction or demand that the person to whom it is addressed perform or refrain from doing some prescribed act.*"

Any of the above definitions implies that summons is a process. For example, summons includes a "prescribed act" for defendant to perform. Defendant shall answer a complaint within 21 days or make other defense, or a default judgment will be entered. After defendant performs the "prescribed act", defendant is compelled to litigation. Indeed, summons is a well-known process.

Pennsylvania State NOREP serves a function similar to summons. As shown above (p. 15-16), Pennsylvania State NOREP also includes a "prescribed act" for parent to perform. If parent disagrees the action that school district proposes in NOREP, parent should request a due process hearing, or school district could implement the proposed action (e.g., similar to a default). After

Parent performs the "prescribed act", Parent is compelled to litigation. According to the above definition of process, Pennsylvania state NOREP is also a process. However, the Third Circuit did not apply the above definition to determine if Pennsylvania state NOREP is a process.

Further, the Third Circuit also failed to follow other Supreme Court's holdings. Presently, Pennsylvania state does not have a definition of process for the tort of abuse of process, in low courts, intermediate courts, and high court. The Third Circuit is certainly not permitted to define "process" on its own without a state decision or construe. See Fidelity Union Trust Co. *v.* Field, 311 U.S. 169,178(1940) ("*The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute.*");

Further, it is state courts' authority and obligation to define "process" for the state law of abuse of process. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("*This Court, however, repeatedly has held that state courts are the ultimate expositors of state law*"); Also see King v. Order of United Commercial Travelers, 333 U.S. 153, 157-158 (1948) ("*The ideal aimed at by the Act is, of course, uniformity of decision within each state. So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit, and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts.*")

Since state court has not made the definition of

process for the tort of abuse of process, the Third Circuit has the obligation to stay the appeal and certified the question to state court. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496,498 (1941) ("*Decision of the issue of unconstitutional discrimination should be withheld pending proceedings to be taken in the state courts to secure a definitive construction of the state statute.*") However, the Third Circuit failed to follow the published opinion of the Supreme Court, and failed to follow the accepted judicial practice. This Court should exercise supervisor authority. The petition for writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JENN-CHING LUO
Pro Se
PO Box 261
Birchrunville, PA 19421
JENNCHINGLUO@GMAIL.COM

September 20, 2018