No. 18-529

In The
Supreme Court of the United States

JENN-CHING LUO,

Petitioner,

v.

OWEN J. ROBERTS SCHOOL DISTRICT, GEOFFREY BALL, BRIAN SCHNEIDER AND SHARON W. MONTANYE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

The plaintiff's questions presented originate from the consolidation for administrative purposes of substantially similar claims asserted by the plaintiff in addition to dismissal of certain claims pursuant to Fed. R. Civ. P. 12(b)(6). The court of appeals exercised appellate jurisdiction and affirmed the decision of the district court as to all issues. The questions presented by the petition are:

1. Should the Court grant certiorari to consider whether the district court properly ordered consolidation of substantially similar claims asserted in multiple complaints?

2. Should the Court grant certiorari to consider whether a Section 1983 claim for informed consent regarding disclosure of the methodology employed during a behavioral evaluation is a constitutionally protected right?

3. Should the Court grant certiorari to consider whether a federal court is precluded from deciding a Section 1983 claim for malicious abuse of process on the basis that the term "process" has not been defined by Pennsylvania common law?

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INTRODUCTION

Petitioner Jenn-Ching Luo ("Luo") seeks review of three simple questions—none of which present unsettled law or a conflict among the circuits. Despite Luo's inflammatory language to the contrary, the court of appeals correctly applied well-settled law to this case. For several years, Luo has been the catalyst for repetitious litigation throughout the Second and Third Circuits.

Luo's first question addresses the district court's decision to consolidate two lawsuits pursuant to the rule against claim-splitting as well as Fed. R. Civ. P. 42(a). Luo also addresses the order requiring Luo to refile—in a second, consolidated amended complaint—certain claims from a third lawsuit which shared sufficiently common areas of fact and law. The court of appeals correctly held the district court's administrative actions were well within the district court's discretion given the numerous proceedings.

Luo's second question addresses a parent's right of informed consent. Specifically, Luo contends that violation of the Due Process Clause of the Fourteenth Amendment occurs when the methodology by which a behavioral assessment is performed is not in accordance with the assessment's instructions, despite the fact that written consent from a parent was obtained prior to the testing. The court of appeals correctly ruled that the methodology of a certain assessment or evaluation was not a fundamental interest under the purview of substantive due process.

Luo's third and final question seeks to preclude the court of appeals from applying the definition of "process" in a Section 1983 malicious abuse of process claim. The court of appeals correctly agreed with the district court that the issuance of the Notice of Recommended Educational Placement ("NOREP") in the instant matter does not constitute "process" for the purpose of a Section 1983 malicious abuse of process claim. Further, the court of appeals correctly applied the Commonwealth of Pennsylvania's definition of "process" in affirming the decision of the district court.

The petition filed by Luo presents numerous questions which are founded upon misapplied legal bases. Based on Luo's fundamental misunderstanding of the well-settled laws—as well as the lack of error by the court of appeals—there is no justification for granting the petition. Certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background

The heart of the instant matter, a fraction of the protracted and ongoing litigation by Luo against School District, lies in a series of overlapping disputes between Luo and Respondent Owen J. Roberts School District ("the School District") regarding services recommended for the benefit of Luo's son, who requires special education programs pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482 in order to provide Luo's son with a free

appropriate public education ("FAPE"). *See* App. B at 4a. In the summer of 2014, Luo requested that the School District place Luo's son into a residential facility. *Id*. The School District eventually denied the request. *Id*.

The School District thereafter revised the existing Individualized Education Program ("IEP") to specifically reference the determination that Luo's son was ineligible for the residential program. *Id*. The revised IEP also included a Specially Designed Instruction ("SDI") which recommended Luo participate in a parent-training course under the School District's supervision. *Id*. Thereafter, the School District issued a NOREP to Luo which stated the School District's intent to begin the parent-training program pursuant to the SDI in the revised IEP.

After the NOREP was issued, an Independent Educational Evaluation ("IEE") was ordered by Hearing Officer Cathy A. Skidmore ("Hearing Officer Skidmore"). *Id*. In accordance with the order of Hearing Officer Skidmore, the School District hired Dr. Keri Kolbay ("Dr. Kolbay"), an independent psychologist, to conduct the IEE of Luo's son. *Id*. at 5a. Dr. Kolbay recommended that additional observation and evaluation be conducted by a behavioral specialist at home and at school; the recommendation was included in a revised IEP. *Id*. Luo consented to the recommended behavioral observation. *Id*.; *see also* Pet. at 13, 21.

Dr. Brian Schneider ("Dr. Schneider") conducted the evaluation and concluded that the requested

parent-training be implemented due to a difference in levels of independence between home and school. *Id*. Specifically, Dr. Schneider conducted an adaptive behavior assessment of Luo's son. *See* App. C at 18a. In calculating the scores, Dr. Schneider compared Luo's parent ratings to the teacher's ratings. *Id*. This action—the comparison of the parent's scores with the teacher's scores—is the basis for multiple allegations and causes of actions regarding liberty right violations and substantive due process violations. Based on Dr. Schneider's findings, another NOREP was issued which again proposed the recommended SDI regarding parent-training. *Id*. Luo never agreed to participate in the recommended parent-training program.

II. Procedural History

While the procedural history of this matter does not occur over a considerable amount of time, the numerous administrative and federal actions have created a number of hurdles which the district court and the court of appeals successfully overcame. Shortly after the School District issued its first NOREP, Luo filed the first in a series of due process complaints purportedly arising from the School District's planned implementation of the parent-training program for Luo. *See* App. C at 16a. The School District's planned parent-training program resulted in numerous administrative special education due process complaints filed by Luo beginning in July 2014 through March 2015. *See* App. C at 16a-19a. Some of these administrative actions were consolidated at the administrative level. *See* App.

B at 5a. In addition, a series of federal actions were filed regarding the NOREP and the comparison of the teacher and parent rating scores. *See* App. C at 16a-21a. As discussed in greater detail *infra*, these federal actions included requests for review of the hearing officers' decisions in addition to related federal claims and counterclaims. *Id*. Following the guidance of the district court and the court of appeals, Respondents will refer to these actions as "*Luo I*," "*Luo II*," and "*Luo III*." *See* App. B at 4a-8a.

a. *Luo I*

The first due process complaint was filed in November of 2014 in response to the School District's conclusion that Luo's son was not eligible for residential placement. *See* App. C at 16a. After Hearing Officer Skidmore ordered an IEE to determine the needs of Luo's son, Luo appealed, thereby initiating the first action in the district court—*Luo I*. Luo named not only the School District as a party, but also the following individuals: the School District's Supervisor of Special Education Geoffrey Ball ("Ball"); the School District's attorney, Sharon Montanye ("Attorney Montanye"); Hearing Officer Skidmore; and Dr. Kolbay. *See* App. B at 4a-5a.

Luo alleged numerous violations, including the following: violation of Luo's liberty right by recommending parent-training and failure to provide residential placement for Luo's son; violation of Luo's liberty right to informed consent and due process by Hearing

Officer Skidmore after ordering the IEE; violation of Luo's right to privacy and due process by the School District, Ball and Dr. Kolbay through reviewing Luo's son's records; and violation of Luo's due process rights by conducting the IEE after the federal lawsuit of *Luo I* was filed. *Id*. at 5a.[1]

The School District filed its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on January 16, 2015. *Id*. at 21a. Attorney Montanye, Hearing Officer Skidmore, and Dr. Kolbay moved to dismiss on January 19, 27, and 29, 2015, respectively. *Id*.

b. *Luo II*

After the second NOREP recommending parent-training was provided to Luo, Luo filed an additional five (5) administrative due process complaints. *See* App. B at 5a; *see also* App. C at 18a. These complaints were consolidated by agreement and were decided after a single due process hearing in February of 2015. *See* App. C at 18a-19a. The hearing officer decided that the IEE which was implemented pursuant to the decision of Hearing Officer Skidmore in *Luo I* must be removed from Luo's son's educational record. *Id*. at 20a. In addition, the IEP revisions contested by Luo were ordered to be removed from the IEP. *Id*. Thereafter, the School District commenced an action in federal court

[1] While the portion of the opinion included in Luo's Petition appears to be accurate, Luo's Footnote 1 in Appendix B omits a sizeable portion of the original footnote located in the court of appeals' decision. *See* App. B at 4a-5a.

seeking review of the hearing officer's decision—*Luo II*.

In response, Luo filed a counterclaim which again challenged the IEE in addition to causes of action for breach of good faith and fair dealing and malicious abuse of process. *Id*. at 20a. Luo also filed a third party complaint alleging due process violations in addition to malicious abuse of process claims against attorneys for the School District, Sweet, Stevens, Katz & Williams, LLP ("SSKW"), Attorney Montanye, and Attorney Jonathan P. Riba ("Attorney Riba"). *Id*.

Luo filed a motion for judgment on the pleadings on August 11, 2015. *Id*. at 21a. The School District moved to dismiss the counterclaims on August 28, 2015. *Id*. Attorneys Montanye and Riba and SSKW moved to dismiss the third-party complaint on September 18, 2015. *Id*. at 21a-22a.

c. *Luo III*

Approximately one month after the School District filed *Luo II*, Luo filed another lawsuit in the district court. *Id*. at 20a-21a. Luo alleged that another federal action was necessary because the School District sought to include additional parent-training in an IEP presented after the conclusion of the consolidated hearing at issue in *Luo II*.

This time, Luo sued the School District, Ball, Attorney Montanye, and Dr. Schneider. *Id*. at 21a. *Luo III* set forth thirteen (13) causes of action. *Id*. Luo asserted

the following claims—some were asserted on more than one occasion: violation of equal protection rights; violation of liberty rights; malicious abuse of process; violation of substantive due process rights; breach of duty of good faith and fair dealing; defamation; harassment; and negligence. *Id*.

The School District, Ball, and Dr. Schneider filed their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on September 9, 2015. *Id*. at 22a.

d. Findings of District Court Affirmed by the Court of Appeals

The matters were eventually assigned to a magistrate judge for review and recommendation. After briefing and review, the district court decided as follows: *Luo I* and *Luo II* were consolidated for administrative purposes pursuant to Fed. R. Civ. P. 42(a); *Luo III* was closed; and Luo was instructed to refile all claims dismissed without prejudice within thirty (30) days of the district court's order. *Id*. at 7a-8a. The district court granted Luo the opportunity to timely refile Claims 1-3 and 5-8 from *Luo I*. *See* App. D at 83a-84a.

Luo also seeks review of four claims from *Luo III* which were dismissed without prejudice. *Id*. The *Luo III* claims—Counts 2, 4, 5, and 6—are as follows: violation of Luo's "liberty right to contract" as a result of the IEP team's recommendation that Luo participate in a parent-training program (Count 2); violation of substantive due process as a result of a comparison of the teacher and parent rating scores for purposes of the

adaptive behavior assessment (Count 4); violation of the "liberty right to privacy" as a result of the comparison of the teacher and parent rating scores for purposes of the adaptive behavior assessment (Count 5); and violation of Luo's "liberty right" as a result of the IEP team's recommendation that Luo participate in a parent-training program (Count 6). Upon refiling, Luo was instructed to "take care to combine like claims and include all factual allegations relating to a particular claim within that claim." *Id*.

Luo was further advised that failure to refile the claims within the 30-day window as provided by the district court would result in the dismissal with prejudice of all remaining claims. *Id*. at 8a. Luo declined to refile a consolidated amended complaint within the 30-day window and, instead, appealed the district court's order. The court of appeals correctly found no error in the decision of the district court and affirmed the order.

The issues raised by Luo in the instant Petition appear essentially the same as the issues correctly decided by the court of appeals.

REASONS FOR DENYING THE WRIT

The Petition should be denied certiorari for three reasons, each of which presents sufficient basis for denial. First, the consolidation of numerous claims was proper pursuant to the rule against claim-splitting as well as Fed. R. Civ. P. 42(a). Second, informed consent with regard to the disclosure of methodologies in a

behavioral evaluation performed with the prior, written consent of the parent is not a constitutionally protected right. And third, there is no prohibition on a federal court's ability to review the validity of a Section 1983 malicious abuse of process claim. For each issue presented, Luo presents a serious misunderstanding and misapplication of the facts and law at issue. Sup. Ct. R. 10. In addition, Luo attempts to advance each flawed position through repeated attacks on both the district court and the court of appeals. Further, Luo's arguments are advanced in a manner seriously lacking in both accuracy and clarity and, thus, preclude this Court, and Respondents, from adequately understanding the basis of Luo's Petition. Sup. Ct. R. 14.4.

1. The Court of Appeals Correctly Determined Consolidation Was Proper.

Luo first seeks review of the court of appeals' decision affirming the consolidation of "like claims" from *Luo III* within a second amended complaint in *Luo I*. Luo argues that the district court's discretion to consolidate the claims disregarded this Court's recent decision in *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018). Luo's argument principally fails because Luo misinterprets Fed. R. Civ. P. 42(a) and the federal courts' inherent discretion to employ consolidation to avoid duplicative litigation. Neither the district court nor the court of appeals erred in requiring consolidation of the *Luo III* claims which were dismissed without prejudice. Further, Luo fails to present the question with sufficient accuracy or clarity. As such, there is no

compelling reason to expend this Court's resources reviewing the instant issue.

When faced with "common questions of law or fact," Fed. R. Civ. P. 42(a) provides ample discretion for a district court to order consolidation of the matters. The court may also "issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a)(3). The Rule allows a court to "streamline and economize" actions in an effort to avoid "duplication of effort" and "conflicting outcomes in cases involving *similar* legal and factual issues." *In re TMI Litig.*, 193 F.3d 613, 724 (3d Cir. 1999) (emphasis added). Thus, the Rule does not require *identical* questions of law.

The court of appeals succinctly restated a long-standing, and well-settled, principle against claim-splitting not revisited since the seminal case of *The Haytian Republic*, 154 U.S. 118, 14 S. Ct. 992 (1894). In sum, the court of appeals opined that "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.'" *See* App. B at 9a-10a (quoting *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977)). Further, the court of appeals' decision in *Walton* presented a hypothetical which proves to be determinative in the instant situation:

> If the second complaint proves to contain some new matters, consolidation unlike dismissal of the second complaint without prejudice or staying the second action will avoid two trials on closely related matters. If, on the other hand, the second complaint proves to

> contain nothing new, consolidation of the two actions will cause no harm provided that the district court carefully insures that the plaintiff does not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed.

Walton, 563 F.2d at 70. The *Walton* decision makes clear that a district court is vested with the authority to consolidate issues for purposes of judicial economy even if the second complaint contains new matter. *Id*.

Despite Luo's argument to the contrary, the decision in *Hall* did not prevent or otherwise curtail the discretion of a district court to consolidate identical or substantially similar claims. In fact, this Court specifically tailored *Hall* to address the "appealability" of constituent cases after consolidation:

> None of this means that district courts may not consolidate cases for "all purposes" in appropriate circumstances . . . . What our decision does mean is that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party.

Hall, 138 S. Ct. at 1131 (citing 9A Wright & Miller § 2383). Therefore, the decision in *Hall* explicitly provides that a final judgment in one constituent case makes that case immediately appealable regardless of the pendency of additional constituent cases joined through consolidation. Thus, the decision of the court of appeals is in sync with this Court's guidance on

consolidation, including the recent decision in *Hall*: "[d]istrict courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases." *Id*.

Presently, and despite the convoluted procedural history of Luo's numerous federal and administrative proceedings, it is clear that the nearly two dozen causes of action emerged from a singular assertion, namely: the School District's allegedly unlawful efforts seeking to procure Luo's participation in parent-training in an effort to provide FAPE to Luo's son.

The court of appeals recognized the substantial similarity among Luo's claims and agreed that claims in *Luo III* were duplicative of those found in *Luo I*: "We have reviewed the pleadings and agree with the District Court that the disputed claims were substantially similar." *See* App. B at 10a. Further, "even assuming that the complaint in *Luo III* contained some distinct allegations, we fail to see how Luo was prejudiced by the district court's action given that he was permitted to re-plead each of these claims in a new complaint in *Luo I*." *Id*. Thus, *Hall* and *Walton* were correctly applied to the specific facts of this matter such that consolidation was the appropriate remedy for Luo's duplicative litigation. As such, the finding by the court of appeals that the matters were appropriately consolidated should not be reviewed by this Court.

Luo also misrepresents the district court's action in dismissing the four claims from *Luo III*. Luo asserts that "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 why there were four remaining claims that were not dismissed." *See* Pet. at 6-7. To the contrary, the district court actually dismissed the claims specifically because the claims in *Luo III* were "substantially identical" to the claims in *Luo I*. *See* App. B at 7a. The court of appeals correctly affirmed the dismissal of the *Luo III* claims. *Id*. at 9a-10a.

Luo's argument that the claims arose from a "new occurrence" is also inaccurate. *See* Pet. at 7. The separate actions filed by Luo shared a common set of facts which, if allowed to be presented in separate actions, would have amounted to duplication of litigation. As alluded to *supra*, Luo's bases for Counts 2 and 6 were founded upon the School District's allegedly unlawful recommendations that Luo participate in parent-training for the benefit of Luo's son. The allegations regarding parent-training also permeate *Luo I*. *See* App. C at 59a-62a, 70a. Counts 4 and 5 allege that the School District and Ball unlawfully compared the parent and teacher ratings from the adaptive behavior assessment. Luo's allegations relate back to the School District and Ball's purported actions aimed at coercing Luo into agreeing to the recommended training in the NOREP. *See* App. C at 66a. Further, the court of appeals, in affirming the decision of the district court, recognized that although some of Luo's allegations could have occurred after the filing of the first complaint, Counts 4 and 5 "challenge Ball's inclusion of a parent training requirement in the IEP." *Id*. at 67a. Again,

both claims closely relate to claims in *Luo I* and were appropriately dismissed without prejudice,[2] with instruction for Luo to refile with like claims in an amended complaint. *Id*. at 68a.

Luo also references a split between the Second and Third Circuit: "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." *Id*. Luo's argument incorrectly characterizes the holding of the Second Circuit. Despite Luo's assertion that *Curtis* represents a split between the circuits, *Curtis* reached the same conclusion with respect to dismissal of duplicative lawsuits: "As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S. Ct. 1236 (1976)). Further, *Curtis* actually cites as guidance the court of appeals' decision in *Walton*, discussed *supra*. *Id*. Moreover, the Second Circuit in *Devlin* held that "[t]he proper solution to the problems created by the existence of two or more cases involving the same parties and issues, simultaneously pending in the same court would be to

[2] There appears to be a typographical error in the memorandum opinion of the district court wherein the court ruled that Count 4 was dismissed with prejudice. *See* App. C at 67a. However, the order of the district court clarifies that Counts 2, 4, 5, and 6 were, in fact, all dismissed without prejudice. *See* App. D at 85a-86a.

consolidate them under Rule 42(a) of the Federal Rules of Civil Procedure." *Devlin v. Transportation Commc'ns Int'l Union*, 175 F.3d 121, 130 (2d Cir. 1999) (internal quotations omitted). Accordingly, there is no split between the courts of appeals in this matter. The court of appeals correctly recognized that Luo's claims throughout the numerous administrative and federal actions were based on a common set of facts and claims, were duplicative, and, therefore, warranted consolidation.

2. There Is no Constitutionally Protected Right of Informed Consent to a Particular Methodology Employed During a Behavioral Assessment.

Luo's argument seeking review of the claim for violation of a presumed right to informed consent also fails for several reasons. Luo's interpretation of informed consent is wrong; there is no uncertainty surrounding the doctrine of informed consent; and the court of appeals correctly determined the absence of the alleged right. In short, there exists no compelling reason to require this Court to expend resources reviewing the instant issue. This is further compounded by the fact that Luo explicitly consented to the adaptive behavioral assessment about which Luo now complains. *See* App. B at 4a; *see also* Pet. at 13, 21.

The district court noted, and the court of appeals did not disagree, that "Luo appears to allege a deprivation of her liberty right to informed consent regarding the care of [Luo's son]." *See* App. C at 75a; *see also* App.

B at 11a-12a. Luo's allegation rests upon 42 U.S.C. § 1983 and, therefore, requires Luo to "identify a 'recognized liberty or property' interest within the purview of the Fourteenth Amendment, and show [intentional or reckless deprivation] of that interest, even temporarily, under color of state law." *Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 262 (3d Cir. 2007) (quoting *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991)).

Luo's argument that the allegedly tortious conduct of the Defendants in *Luo III* amounted to a violation of Luo's 14th Amendment Due Process Rights is without merit. The court of appeals agreed that no fundamental interest exists regarding the specific methodology employed during a behavioral assessment—and no authority from this Court exists to the contrary. *See* App. B at 12a. Assuming *arguendo*, the School District's adaptive behavioral assessment somehow deprived Luo of the ability to provide informed consent, Luo's allegations do not invoke any fundamental rights. Rather, Luo's allegations more appropriately fall within the realm of tort law. *See Baker v. McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."); *see also Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269, 110 S. Ct. 2841, 2847 (1990) ("The informed consent doctrine has become firmly entrenched in American tort law.") The nature of the doctrine of informed consent

as a tort rather than the basis of a constitutional right is well-settled for the purposes of the instant Petition—there is no substantive due process violation based upon the allegations in Luo's numerous complaints.

Luo's argument, therefore, presents a fundamental misunderstanding of the doctrine of informed consent. Luo additionally provides zero guidance from this Court to support the argument that the common law doctrine of informed consent should be elevated to a fundamental interest "entitled to the protection of substantive due process." *See* App. C at 76a.

The crux of the informed consent claim can be traced to Dr. Schneider's adaptive behavior assessment. Luo did not object to the assessment being performed. In fact, Luo fully consented to the assessment. *See* App. B at 4a; *see also* Pet. at 13, 21. Specifically, Luo asserts a violation of a fundamental liberty right because Dr. Schneider compared the results of the parent scores to those scores submitted by the school staff during the adaptive behavior assessment. *See* Pet. at 14; *see also* App. C at 76a. Only after the results showed a disconnect between the home and school did Luo take issue with the specific method of the assessment. *See* App. C at 76a. Luo also does not allege that the methodology was unlawfully intrusive nor does Luo argue the assessment itself was contrary to established procedure. *See* Pet. at 21. Instead, Luo contends the violation of a fundamental right based solely on the School District's alleged failure to "administrate the assessment in accordance with the instructions, and

the School District had no authority to modify the assessment." *See* Pet. at 14. The district court correctly found the School District's alleged misconduct merely "amounts to a disagreement with the manner in which the assessment was conducted." *See* App. C at 76a.

Appropriately adhering to this Court's guidance in *Glucksberg*, the court of appeals held that Luo's interest in the methodology of a behavioral assessment does not amount to a fundamental interest "entitled to protection of substantive due process." *See* App. B at 12a. Further, this Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 2267 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 1068-69 (1992)). The court of appeals therefore properly decided that Luo's argument seeking to elevate the doctrine of informed consent to the status of a fundamental right is contrary to established law and, thus, fails.

3. Both the District Court and the Court of Appeals Have Discretion to Review a Claim for Malicious Abuse of Process Under Section 1983 and Luo's Argument to the Contrary Is Incorrect.

Luo also argues that the district court and the court of appeals erred because the Commonwealth of Pennsylvania has never defined the term "process." Luo therefore appears to conclude that any

interpretation of "process" by the federal courts herein would constitute an impermissible overreach as contemplated by the *Erie* Doctrine. Luo's argument fails principally because: Luo incorrectly interprets the well-settled malicious abuse of process standard and Luo incorrectly interprets the applicability of the *Erie* Doctrine. As such, there exists no compelling reason to require this Court to expend resources reviewing the instant issue.

Luo's first argument fails because the School District's NOREP is not a legal "process" such that use of a NOREP for improper purposes does not amount to abuse of process. As the district court and the court of appeals correctly held, "a section 1983 claim for malicious abuse of process lies where prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law." *Rose v. Bartle*, 871 F.2d 331, 350 n.17 (3d Cir. 1989). This Court has referred to the unintended use of legal process as a "perversion" of the legal process. *Heck v. Humphrey*, 512 U.S. 477, 486 n.5, 114 S. Ct. 2364, 2372 n.5 (1994).

The court of appeals held that "[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 . . . . A NOREP is not a form of legal process." *See* App. B at 11a (internal citation omitted). The issuance of a NOREP, therefore, does not result in the initiation of any legal process nor does it result in the initiation of criminal or civil proceedings, as opposed to a summons or a subpoena. The issuance of a NOREP is a wholly administrative

action. Luo provides no applicable case law or statutory authority to the contrary. Instead, Luo provides portions of opinions from various jurisdictions and authorities—none of which resolve the question in Luo's favor.

For example, Luo's selected quotation from the 1940 Kings County, New York Surrogate's Court decision *In re Smith's Will* reads as follows: "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." *See* Pet. at 25 (quoting *In re Smith's Will*, 175 Misc. 688, 692-93, 24 N.Y.S.2d 704 (Sur. 1940)) (emphasis added). Luo omits the preceding portion of that excerpt, which actually reads:

> New York definitions of "process" are few [. . .] but these are in agreement with the conception which is apparently accepted in all other jurisdictions that *to constitute a "process" in court procedure*, 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 described act.

Id. (emphasis added). As the court of appeals correctly found, the issuance of the NOREP does not occur "in court procedure" and is instead tantamount to an administrative action. *Id*.; *see also* App. B at 11a.

Luo additionally argues that the NOREP at issue must rest "upon court authority" in order for it to constitute "process." *See* Pet. at 26 (quoting *Misischia v. St.*

John's Mercy Med. Ctr., 30 S.W.3d 848, 862 (Mo. App. E.D. 2000). The NOREP at issue is not incident to the litigation process—it does not involve discovery, depositions, or subpoenas—nor does the NOREP rest upon court authority. Again, the School District's use of a NOREP does not invoke the authority of the court and merely constitutes administrative action to ensure compliance with 20 U.S.C. § 1415(b)(3).

It follows that, without "process," there can be no abuse of process. In an effort to thoroughly address Luo's argument, the district court addressed the second prong of the malicious abuse of process claim, whether any perversion of the process occurred:

> Luo argues that by requiring her to respond and object to the NOREP in order to avoid implementation of an improper IEP, the District was "coercing" her into taking action . . . . The mere fact that Luo was required to respond to the notice in order to register her disagreement with the IEP decision does not transform it into a perversion of the process.

See App. C at 64a-65a. As such, there was neither process nor perversion of process.

Second, Luo incorrectly argues that the court of appeals is prohibited from applying the well-settled definition of "process" in order to decide whether Luo properly pled a claim for Section 1983 malicious abuse of process. Luo initially argues that *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938) applies to prevent the district court and the court of appeals from applying any definition of "process." *See* Pet. at 18, 27-

28. Luo then argues that the courts could not define process because, at the Commonwealth level, the term "process" has not been defined. Both arguments fail.

As this Court is well aware, *Erie* provides that a federal court sitting in diversity is bound to apply substantive state law. *Erie R. Co.*, 58 S. Ct. at 821-22. Diversity jurisdiction is non-existent in the instant matter. Further, there is no need to apply the framework of *Erie* because there is no reasonable dispute as to the definition of "process" or the fact that Pennsylvania has thoroughly defined "process." Assuming *arguendo* the case law cited by Luo would somehow lend credence to the position that the district court and the court of appeals were precluded from deciding the validity of Luo's Section 1983 malicious abuse of process claim because the term "process" has not yet been defined by the Pennsylvania courts, Luo's argument still fails completely. Contrary to Luo's argument, Pennsylvania common law has definitively established the definition of "process:"

> The word "process" as used in the tort of abuse of process "has been interpreted broadly, and encompasses the entire range of procedures *incident to the litigation process*." Thus, it is broad enough to include discovery proceedings, the noticing of depositions and the issuing of subpoenas.

Rosen v. Am. Bank of Rolla, 627 A.2d 190, 192 (Pa. Super. 1993) (internal citations omitted). As noted *supra*, the NOREP at issue is not a procedure "incident to the litigation process." *Id*. Thus, the *Rosen* decision clearly presents Pennsylvania's definition of "process" despite

Luo's argument to the contrary. The district court and the court of appeals therefore correctly applied the well-settled definition of "process" and malicious abuse of process to resolve Luo's Section 1983 malicious abuse of process claim.

CONCLUSION

Accordingly, the Petition for certiorari should be denied.

Respectfully submitted,

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