NO. 25-259

IN THE

Supreme Court of the United States

JANUARY LITTLEJOHN and JEFFREY LITTLEJOHN,
Petitioners,

v.

SCHOOL BOARD OF LEON COUNTY, FLORIDA; et al.,
Respondents.

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

BRIEF OF TAMMY FOURNIER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Tammy Fournier is a Wisconsin mother. When she and her husband learned that their 12-year-old daughter had begun to struggle with anxiety and depression and to question her gender, they immediately researched how best to help her. Based on that research, the parents decided that treating their daughter as a boy—in particular, referring to her with a masculine name and male pronouns—would irreparably harm her. So they instructed her school district to use only her real name and pronouns.

The district refused and insisted that its staff treat the young girl as male. The district's actions forced Tammy and her husband to withdraw their daughter. Under the child's parents' care plan, she soon decided she would no longer ask others to treat her like a boy, and her mental health improved. A Wisconsin court later concluded the district violated the Fourniers' fundamental rights as parents. *T.F.* v. *Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5–8 (Wis. Cir. Ct. Oct. 3, 2023). It enjoined the district from socially transitioning their daughter without their consent. *Id.* at *10. But Tammy still worries. Her daughter's new school district—like more than 1,000 others across the country—*also* has a policy that encourages school teachers and staff to socially transition children while prohibiting disclosure of that scheme to parents without their child's permission.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and her counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

Tammy's concerns about secret-social-transition policies at her daughter's school and others led her to file this brief supporting the Littlejohns' claims here. Reasoning like that used by the court below threatens the rights of other parents in situations like Tammy's. She urges the Court to grant the petition, reverse, and protect parents' rights to raise their own children.

SUMMARY OF THE ARGUMENT

This case presents an entrenched conflict among the courts of appeal that deprives parents of a meaningful opportunity to vindicate their fundamental rights. As illustrated by the concurrently pending petition in *Foote* v. *Ludlow School Committee*, No. 25-77 (U.S. *pet. for cert. filed* July 18, 2025), even when parents overcome threshold barriers like the shocks-the-conscience test, they encounter deep and long-standing circuit splits over the scope of parental rights and the authority of public schools. The result is a patchwork of ahistorical rules that leave courts without clarity and parents without recourse for violations of their fundamental right to direct their children's upbringing, education, and healthcare.

The Eleventh Circuit's fractured decision below exemplifies the need for this Court's intervention. The split panel held that, even if school officials violated a fundamental right, the Littlejohns had no remedy. Although this Court has often said that government conduct violating fundamental rights must satisfy strict scrutiny, the court below held that if conduct can be labeled "executive" in nature, a court must first determine whether the conduct "shocks the conscience." Thus, even when executive action burdens a fundamental right, the Eleventh Circuit would apply strict scrutiny only to conscience-shocking conduct.

The separate opinions criticized that misguided approach to fundamental rights. Concurring, Judge Newsom recognized the lack of consensus about applying the shocks-the-conscience test to all executive action. And he criticized this approach as illogical but required by precedent. Judge Tjoflat's dissent harmonized this Court's precedent by treating the fundamental-rights and shocks-the-conscience tests as alternative theories of Due Process Clause liability. This Court should resolve the split by adopting Judge Tjoflat's approach and holding that plaintiffs alleging fundamental-rights violations need not *also* show that the challenged actions "shock the conscience."

The stakes for American families are profound. Cases like the Littlejohns' are worryingly common, with dozens pending in the federal courts. As for this Court, it recently reaffirmed that "the rights of parents 'to direct the religious upbringing of their' children would be an empty promise if it did not follow those children into the public school classroom." *Mahmoud* v. *Taylor*, 145 S. Ct. 2332, 2351 (2025). And as "perhaps the oldest of the fundamental liberty interests recognized by" this Court, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (opinion of O'Connor, J.), the right to direct a child's upbringing belongs to parents of all creeds.

The Court should also grant the pending petition in *Foote* and hear both cases at the same argument session. It's not enough to fix the Eleventh Circuit's mistaken shocks-the-conscience test when circuits are also deeply divided about the contour of such claims. And every day that passes subjects countless children to harm by public-school officials who think they know better than parents how to deal with children's mental-health issues. Certiorari is warranted.

ARGUMENT

I. This Court should resolve the circuit split by holding fundamental-rights claims need not allege conscience-shocking conduct.

Deep divisions among the lower courts over this Court's precedent demand resolution. And only this Court's swift intervention can resolve that intractable confusion here. In doing so, this Court should reaffirm that fundamental rights be treated as fundamental. Under the longstanding, substantive-due-process framework that requires strict scrutiny to protect rights anchored in our history and tradition, that means rejecting "the comically vacuous 'shocks the conscience' test" as a threshold for stating a claim. Pet.App.104a (Newsom, J., concurring).

A. The sharply divided decision below exemplifies the intractable confusion.

In the court below, a three-judge panel issued four fractured opinions underscoring deep disagreement about substantive-due-process precedent. Not just parents but *all* future substantive-due-process plaintiffs will struggle to make sense of that disagreement. This Court should bring order to the chaos.

Start with the majority opinion, one of four. It began by assuming—correctly—that the Littlejohns alleged a fundamental-rights violation. Pet.App.9a. No one disputes this Court's repeated affirmation that parents possess the fundamental right to "make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66 (opinion of O'Connor, J.); accord, *e.g.*, *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 256 (2022); *Meyer* v. *Nebraska*, 262 U.S. 390, 399–403 (1923).

Yet that's where the agreement ended. Because the claim arose from "executive" action, the majority held that the Littlejohns were *also* required to show that the school officials' conduct "shock[ed] the conscience." Pet.App.10a. The panel grounded that requirement in a single footnote in *County of Sacramento* v. *Lewis*, 523 U.S. 833, 847 n.8 (1998). Pet.App.11a–17a. But as the majority acknowledged, other decisions of this Court point in the opposite direction. *Id.* at 14a–15a & n.7; see, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 746 (1987) (discussing "shocks the conscience" and "implicit in the concept of ordered liberty" as alternative tests).

Judge Newsom concurred. For his part, he recognized that substantive-due-process doctrine "is anything but clean" when it comes to executive action. Pet.App.106a (Newsom, J., concurring). He read this Court to "seem[] (?) to have said" that the shocks-the-conscience test applies to all executive actions, *id.* at 106a–107a, a result he termed "totally bizarre," *id.* at 118a. He found the doctrine "a mess," with "no clear rule." *Id.* at 110a, 117a.

Judge Tjoflat's dissent rejected the notion that *Lewis* imposed a universal, threshold test for all executive-action claims. *Id.* at 124a. The shocks-the-conscience test is simply a second way of demonstrating a substantive-due-process violation. *Id.* at 147a–148a. The answer to the "question of great and growing importance" this case posed was clear: The "Constitution still protect[s] parents' fundamental right to direct the upbringing of their children when government actors intrude without their knowledge or consent[.]" *Id.* at 172a–73a (citation modified). A single footnote was never meant to "muzzle the vindication of fundamental rights." *Id.* at 135a.

B. This Court's precedent has sown inter- and intra-circuit conflict.

The fractured opinions below are the result of conflicting guidance. Decades ago, the Court delineated two tests for showing a substantive-due-process violation: the government may not "engag[e] in conduct that 'shocks the conscience,' *or* interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746 (emphasis added) (citation modified). Critically, *Salerno* spoke of these as alternative liability theories—not two steps of a single analysis. So a decade later, when the Court authoritatively detailed modern substantive-due-process doctrine, it said that the "established method of substantive-due-process analysis" considers whether the asserted right is "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg*, 521 U.S. 701, 720–21 (1997) (citation modified).

Glucksberg didn't use the phrase "shocks the conscience" even once. But just 11 months later (to the day), *Lewis* muddied the waters. There, the Court considered "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Lewis*, 523 U.S. at 836. To decide that question, the Court asked only whether the high-speed chase in question was an "abuse of power" that "shocks the conscience." *Id.* at 846. And in a single footnote, it referred to the shocks-the-conscience test as a "threshold question" in executive-action challenges. *Id.* at 847 n.8.

Lewis never asked whether the police officer's deliberately or recklessly indifferent action violated a fundamental right; in fact, the term "fundamental rights" appears only in a concurrence. 523 U.S. at 860–61 (Scalia, J., concurring in the judgment) (questioning the Court's decision to employ a different test than the one used "[j]ust last term"). By failing to discuss *Glucksberg*, *Lewis* left it unclear whether the shocks-the-conscience test applies to fundamental-rights claims, or if it is simply another route to show a constitutional violation, as *Salerno* held.

The splits caused by this Court's confusing precedent "span[] virtually every circuit" and "run[] so deep that several circuits have split *internally*." Pet.24. Compare, *e.g.*, *Dacosta* v. *Nwachukwa*, 304 F.3d 1045, 1048 (11th Cir. 2002) (framing the tests as two separate ways to show a substantive-due-process violation), with *Maddox* v. *Stephens*, 727 F.3d 1109, 1121 (11th Cir. 2013) (implying that executive action must satisfy both tests).

More important for present purposes, the decision below directly conflicts with at least one other court of appeals facing almost identical facts. *E.g.*, *Regino* v. *Staley*, 133 F.4th 951, 960 n.5 (9th Cir. 2025). Unlike the court of appeals here, the Ninth Circuit there correctly treated the two tests as alternative theories of liability. *Ibid.*

This Court should end the confusion and resolve this split. The shocks-the-conscience test has become a doctrinal snare, leading to conflicting rules and arbitrary outcomes. A clear standard would ensure civil-rights plaintiffs can pursue meaningful remedies and protect parents like the Littlejohns in exercising their fundamental parental rights.

C. A threshold shocks-the-conscience test fails to treat fundamental rights as fundamental.

By failing to apply strict scrutiny to the Littlejohns' parental-rights claims, the court of appeals failed to treat those rights as fundamental. To protect families like the Littlejohns, this Court should clarify that violations of parental rights trigger strict scrutiny—regardless of what branch of government is involved—and that no additional hurdle, such as a shocks-the-conscience test, need be cleared.

The appropriate test is straightforward and well established—the Court need simply reassert its standard test for fundamental-rights violations. For unenumerated rights protected by the Fourteenth Amendment, the analysis has two steps: First, a court should ask whether the asserted right is one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720–21 (citation modified). Second, if the government action burdens the exercise of a fundamental right, that deprivation triggers strict scrutiny. *Dep't of State* v. *Muñoz*, 602 U.S. 899, 911 (2024). Full stop.

Reaffirming this long-established framework would ensure that parents' rights receive the protection the Constitution demands, without distortion through an extraneous "conscience-shocking" requirement.

1. The shocks-the-conscience test disregards the history and tradition at the core of fundamental rights.

The shocks-the-conscience doctrine gives short shrift to what lies at the heart of this Court's fundamental-rights analysis—history and tradition. See *Dobbs*, 597 U.S. at 237. That method ensures that courts respect deeply rooted liberties, such as parents' ability to "make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66 (opinion of O'Connor, J.).

This Court has consistently held that courts applying substantive due process must be "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Dobbs*, 597 U.S. at 240. But some courts have read *Lewis* to sideline history and tradition.

Take footnote eight in *Lewis*. There, the Court said that a substantive-due-process challenge to executive action "presents an issue antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed." *Lewis*, 523 U.S. at 847 n.8. Only after a plaintiff shows "the necessary condition of egregious behavior" may "there be a debate about the sufficiency of historical examples of enforcement of the right claims, or its recognition in other ways." *Ibid.*

The decision below understood that footnote as a carveout from this Court's consistent teaching that the substantive-due-process analysis is fundamentally historical. The court of appeals never viewed Respondents' conduct through a historical lens. It never considered whether school officials' power traditionally included covertly contravening fit parents'

instructions about the care of their child. Nor did it consider whether the government has traditionally been allowed to supplant fit parents' express instructions regarding the care of their children—or to keep such actions secret. Pet.App.9a (acknowledging the role of history and tradition in fundamental-rights analysis but concluding it "makes no difference to the outcome here").

Only by omitting history from the analysis could the court of appeals have held that the Constitution authorizes schools to covertly flout parents' express instructions not to socially transition their 13-year-old daughter. Pet.App.24a. Indeed, the decision below consulted no historical sources regarding parental rights or the power of public schools at and around the time of the Fourteenth Amendment's ratification.

Instead, the decision below compared the conduct here to prior, inapposite cases to subjectively ask, "Well, was it worse than *that*?" For example, the court reasoned that Respondents did not *permanently blind* the child by intentionally using "a metal weight lock" as corporal punishment, Pet.App.22a, or pummel a child "in the head, ribs and back" with a metal cane, *ibid.* (quotation omitted). So because state agents here did not beat the child with metal objects, her parents were powerless to challenge "executive" conduct at schools.

In doing so, the court of appeals exchanged this Court's objective and historical fundamental-rights framework for an interpretation this Court expressly warns against—"the natural human tendency to confuse what the Amendment protects with our own ardent views" and "policy preferences." *Dobbs*, 597 U.S. at 239–40 (quotation omitted).

And that subjective standard allows school officials to violate fundamental parental rights provided they avoid “intentional malice or sadism.” Rosalie Berger Levinson, *Time to Bury the Shocks-the-Conscience Test*, 13 Chap. L. Rev. 307, 327 (2010).

Judge Newsom recognized that these subjective judgment calls are “totally bizarre.” Pet.App.118a (Newsom, J., concurring). On the one hand, when “infring[ing] a fundamental right via legislative act,” the government “will almost certainly lose,” because strict scrutiny applies. *Ibid.* On the other, when “infring[ing] that right through executive action, it will almost certainly win—because, as the case law bears out, pretty much *nothing* shocks the conscience.” *Ibid.* The question Judge Newsom was left with was: “Why should the executive branch of the government be given more leeway to violate constitutional rights than the legislative branch?” *Id.* at 119a. Judge Tjoflat’s dissent put the stakes bluntly: if the majority’s opinion stands, “then enforcement in the Eleventh Circuit of the fundamental liberty interests the Littlejohns seek to vindicate … has come to an end.” *Id.* at 124a.

Throwing history and tradition by the wayside guts this Court’s fundamental-rights precedent. True, *Lewis* said that “in none of our prior cases have we considered the necessity for such [historical] examples.” 523 U.S. at 847 n.8. But that just further demonstrates the problem with reading too much into *Lewis*. History has long been central to this Court’s substantive-due-process analysis. See *Dobbs*, 597 U.S. at 239 (describing “[h]istorical inquires” as “essential”). The Court instructs courts to “engage[ ] in a careful analysis of the history of the right at issue.” *Id.* at 238.

If a plaintiff can demonstrate that a right is both "essential to our Nation's scheme of ordered liberty" and "deeply rooted in our history and tradition," then it receives constitutional protection. *Ibid.* (citation modified). This Court should clarify that history and tradition aren't left at the door when a plaintiff challenges "executive" action.

2. History and tradition protect parental rights as fundamental.

A proper historical analysis would have yielded a different outcome for the Littlejohns. Executive authority has never traditionally extended to overriding fit parents' decisions regarding their children. If a parent is "fit," i.e., "adequately cares for his or her children," the government may not "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 (opinion of O'Connor, J.).

At common law, schools exercised only as much power over a child as a parent might delegate. A father could "delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge." 1 William Blackstone, *Commentaries on the Laws of England* 441 (1st ed. 1765), http://bit.ly/3VLwpge. The authority belongs first to parents because, unlike other adults, nothing "can totally suppress or extinguish" the "insuperable degree of affection" of parents for their children. *Id.* at 435.

A school's authority over a child derives from parents' delegation of their own authority. After all, the school can only claim authority over a child *after* the parents choose to partner with that school. Exercising delegated authority means a school generally should not contravene parents' express instructions about a child. Cf. Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 Lewis & Clark L. Rev. 111, 119 (2008) ("Parents entrust the public schools with their children for important but particular purposes."). And it certainly should not hide its treatment of a child from her parents.

So the traditional understanding of executive power in a school context does not include overriding fit parents' instructions about the care of their child. And they *especially* can't do so in secret on something as controversial as socially transitioning a minor to another gender. Cf. *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 913–14 (2018) ("gender identity" is one of several "sensitive political topics … of profound value and concern to the public" (citation modified)). The power Respondents assert lacks any historical analogue. Cf. *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 30 (2022) (requiring government to "identify a well-established and representative historical *analogue*"); *Mahmoud*, 145 S. Ct. at 1275–76 (Thomas, J., concurring) (noting that gender-identity education is a new and controversial invention with no historical pedigree).

On the contrary, at common law, historical practice confirms that parents had "both the responsibility and the authority to guide their children's development and make important decisions on their behalf." Eric A. DeGroff, *Parental Rights & Public School*

Curricula: Revisiting Mozert *after 20 Years*, 38 J.L. & Educ. 83, 108 (2009). This common-law parental right included a right to make educational decisions.

A core motivation of the abolitionist movement, after all, was to eradicate "the slaveowner's power over the enslaved family," and the "den[ial] [of] the 'parental rights' of enslaved men and women." Joseph K. Griffith II, *Is the Right of Parents to Direct Their Children's Education "Deeply Rooted" in Our "History and Tradition"?* 28 Tex. Rev. L. & Pol. 795, 803 (2024). Indeed, Republicans in Congress heralded the Reconstruction Amendments as a "proposal [that] would abolish not only slavery but also its necessary incidents, including slavery's violation of the parental relation." *Ibid.* (citation omitted).

Other early authorities also "established the right of parents to make educational choices for their children," even against "the preferences of civil authorities." DeGroff, *supra*, at 110 & n.178. "[B]y the nineteenth century, legal scholars were describing the right of parents to control the education of their children as 'practically … absolute' or 'absolute against all the world.'" *Id.* at 111–12 (footnotes omitted; omission in original). Early American sources like Justice Joseph Story and Chancellor James Kent affirmed that parents are best positioned to make decisions for their children. Griffith, *supra*, at 799–800. And that view persisted through the Reconstruction Era and into the early twentieth century. *Id.* at 806–07.

American courts also enabled "parents to exercise those duties"—namely, the duties "to provide for their [children's] support and education"—"largely unhindered by the state." DeGroff, *supra*, at 112. This

principle held true even as public schooling became the norm. In the late-19th century, "courts held that parents had a common law right to exempt their children from courses established by, and in some cases even required by, the state legislatures or local school districts." *Id.* at 113; see, *e.g.*, *State* v. *Sch. Dist. No. 1*, 48 N.W. 393, 394–95 (Neb. 1891) (grammar); *Trustees of Schs.* v. *Van Allen*, 87 Ill. 303, 308–09 (1877) (grammar); *Rulison* v. *Post*, 79 Ill. 567, 571 (1875) (bookkeeping); *Morrow* v. *Wood*, 35 Wis. 59, 65–66 (1874) (geography).

These common-law principles led this Court to acknowledge over a century ago that the Fourteenth Amendment protects "the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401. For "[t]he child is not the mere creature of the state," as the Court would elaborate two years later. *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 535 (1925). "[T]hose who nurture him and direct his destiny"—that is, the child's parents—"have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Ibid.* And this duty or right, the Court would go on to say, "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972).

Given this historical backdrop, when the Court in *Glucksberg* foregrounded the question whether a right is "deeply rooted in this Nation's history and tradition," it unsurprisingly left no doubt about parental rights. 521 U.S. at 721 (citation modified). The Court listed the "fundamental rights and liberty interests" for which the Due Process Clause "provides heightened protection." *Id.* at 720 (citation modified). And it *expressly included* the right to "direct the

education and upbringing of one's children." *Id.* (citation modified). Because this right is fundamental, the government may not infringe it "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721 (citation modified).

Three years after *Glucksberg*, the plurality in *Troxel* reaffirmed that parents have a "fundamental liberty interest[]" in the "care, custody, and control of their children." *Troxel*, 530 U.S. at 65 (opinion of O'Connor, J.); see *id.* at 80 (Thomas, J., concurring in the judgment) (agreeing with "plurality that [the] Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case"). That liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Id.* at 65 (opinion of O'Connor, J.). And as *Troxel* acknowledged, the Due Process Clause "provides heightened protection against government interference with [such] fundamental rights and liberty interests." *Ibid.* (citation modified); accord *id.* at 80 (Thomas, J., concurring in the judgment) (endorsing "strict scrutiny" as the correct test for infringements on the "fundamental right of parents to direct the upbringing of their children").

In sum, this Court has used many formulations to describe the historical, fundamental right central to the Littlejohns' claims: the right to "direct the education and upbringing of one's children," *Glucksberg*, 521 U.S. at 720 (citation modified); the liberty "interest of parents in the care, custody, and control of their children," *Troxel*, 530 U.S. at 65 (opinion of O'Connor, J.); and, "the right to make decisions about the education of one's children," *Dobbs*, 597 U.S. at 256.

Whatever formulation, the principle is the same: the Littlejohns' parental rights are fundamental. And government action infringing those rights demands strict scrutiny, as this Court's precedent requires.

3. The shocks-the-conscience test allows lower courts to avoid protecting parental rights.

The uncertainty created by the shocks-the-conscience test implicates a matter of "great and growing national importance: whether a public school district violates parents' fundamental constitutional right to make decisions concerning the rearing of their children, when, without parental knowledge or consent, it encourages a student to transition to a new gender or assists in that process." *Parents Protecting Our Children, UA* v. *Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (citation modified) (Alito, J., dissenting from denial of certiorari). Indeed, "more than 1,000 districts have adopted such policies." *Ibid.*

As with standing doctrine, "some federal courts are succumbing to the temptation to use" the shocks-the-conscience doctrine to "avoid[] some particularly contentious constitutional questions." *Id.* at 14–15. Because the doctrine is so malleable—and "pretty much *nothing* shocks the conscience," Pet.App.118a (Newsom, J., concurring)—courts can dismiss fundamental-rights claims with little analysis.

The consequence is clear. When parents assert fundamental rights—even on an issue of national importance—their claims are effectively foreclosed from the outset. "That makes *no* sense." *Ibid.*

D. Like other fundamental rights, violations of parental rights trigger strict scrutiny.

Once a right is recognized as fundamental, the standard of review clicks into place—strict scrutiny. This Court has been unequivocal: "[T]he Fourteenth Amendment forbids the government to infringe … fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (citation modified); *Muñoz*, 602 U.S. at 911 (describing strict scrutiny as "the most demanding test in constitutional law").

Fundamental parental rights are no exception. Courts have often said strict scrutiny applies to parental-rights claims. *E.g.*, *Stewart* v. *City of Okla. City*, 47 F.4th 1125, 1138 (10th Cir. 2022); *Seal* v. *Morgan*, 229 F.3d 567, 574–75 (6th Cir. 2000); *Gruenke* v. *Seip*, 225 F.3d 290, 305 (3d Cir. 2000). In fact, "the majority of courts" understand this Court's precedent to require strict-scrutiny protections for parental-rights claims. *In re A.A.L.*, 927 N.W.2d 486, 494 (Wis. 2019) (collecting cases from state courts of last resort); accord *Jones* v. *Jones*, 359 P.3d 603, 610 n.10 (Utah 2015) ("Other courts have reached similar conclusions."); *Hiller* v. *Fausey*, 904 A.2d 875, 885 & n.18 (Pa. 2006) (same). Even the decision below recognized that, had it not applied a shocks-the-conscience test, strict scrutiny would've applied. Pet.App.12a. Because the Littlejohns invoked a fundamental right, see *Troxel*, 530 U.S. at 65 (opinion of O'Connor, J.); *Glucksberg*, 521 U.S. at 720, the appropriate test is strict scrutiny. The court below erred in not applying it.

II. The Court should also grant the petition in *Foote* v. *Ludlow* and resolve the parental-rights crisis in one fell swoop.

Another pending petition involves similar facts and parental-rights arguments. In *Foote* v. *Ludlow School Committee*, Massachusetts public-school staff encouraged and facilitated an eleven-year-old girl's social transition to "genderqueer" while affirmatively concealing that transition from her parents. *Foote*, No. 25-77, Pet. 2. Unlike the court below, the First Circuit conducted a fundamental-rights analysis in *Foote*. But as the *Foote* petition explains, that analysis, "ignored this Nation's history and tradition and deepened circuit splits over parental rights in public schools," *id.* at 17, "deepened splits over a child's 'rights' vis-à-vis her parents," *id.* at 25, and rejected "parents' rights to direct their children's mental-health decisions," *id.* at 30.

The questions presented in this case and *Foote* are complementary. Here, the Court must determine whether, as a threshold matter, the constitutional test applicable to any sort of parental-rights claim depends on how the challenged government action is labeled, executive or legislative. In *Foote*, the Court must address whether, within a proper fundamental-rights framework, parents have a constitutional right to know and consent before a public school socially transitions their child.

As in *Foote*, the Littlejohns claim that a school "Board and its officials violated their parental due-process rights" by facilitating their child's social transition. Pet.App.2a. Neither the district court nor the court of appeals reached the merits of that claim. But the First Circuit in *Foote* did. *E.g.*, *Foote*, No. 25-

77, Pet. 25–30 (explaining some of the errors in the First Circuit's parental-rights analysis). By granting the petitions in both this case and *Foote*, the Court can simultaneously clarify the constitutional test, demonstrate its proper application, resolve multiple entrenched circuit splits, and protect countless children and parents.

To ensure parental-rights claims receive proper fundamental-rights review, the Court should grant this petition and the concurrently pending *Foote* petition and hear arguments in the two cases the same day. Granting certiorari in only one or the other would prevent the Court from resolving important questions worthy of review now.

A. Considered alongside *Foote*, this petition presents an even stronger vehicle.

This petition presents an even better vehicle if granted concurrently with the petition in *Foote*. While ruling for the Littlejohns would ensure lower courts apply the fundamental-rights analysis to parental-rights claims, that benefit is incomplete if courts continue to misapply parental-rights doctrine on the merits. The *Foote* petition offers the Court the best opportunity to clarify the Fourteenth Amendment's protections against public schools acting contrary to parental wishes.

The stakes of these pressing constitutional questions cannot be overstated. "[S]ince education is compulsory … parents are not being asked simply to forgo a public benefit." *Mahmoud*, 145 S. Ct. at 2359. Unless willing to risk "fine or imprisonment"—or able to afford the burdens on their finances and time of private school or homeschool—parents must "send

their children to public school." *Ibid.* And "[i]t is both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children" as they believe would be in their children's best interest "when alternatives can be prohibitively expensive and they already contribute to financing the public schools." *Id.* at 2360.

Denying both petitions would leave parents subject to the unilateral and often covert decisions of ideologically driven educational bureaucrats. Even if parents do uncover what's happening behind closed schoolhouse doors, courts could continue "succumbing to the temptation to use" rulings like those here and in *Foote* to "avoid[] some particularly contentious constitutional questions." *Parents Protecting Our Children*, 145 S. Ct. at 14–15 (Alito, J., dissenting from denial of cert.). This Court should grant both petitions so parents can have their day in court.

B. Even if the Court denies this petition, it should grant the *Foote* petition.

Even if this Court isn't inclined to grant this petition, it should still grant the *Foote* petition. The broad question presented here—whether a court can deny relief for a fundamental-rights violation because the challenged government action didn't "shock the conscience"—is not squarely presented in *Foote*. Conversely, the First Circuit in *Foote* held that the challenged conduct there was legislative in nature and applied the fundamental-rights framework. *Foote* v. *Ludlow Sch. Comm.*, 128 F.4th 336, 347 (1st Cir. 2025) (per curiam). No party has disputed that conclusion. *Ibid.* So the shocks-the-conscience test is not at issue in the *Foote* petition.

If this Court is not prepared to address whether a fundamental-rights claim can be denied for failing to "shock the conscience," it need not do so to resolve the question in *Foote*, which is narrower than the one presented here. *Foote* concerns one particular fundamental right—the right of a parent to direct a child's upbringing, education, and healthcare. *Foote*, No. 25-77, Pet. i. But this petition implicates the broader constitutional framework for fundamental rights when challenging "executive" action.

To be clear, it makes sense to grant *both* petitions. Otherwise, the Court will have to address the separate questions presented piecemeal, across multiple Terms. And granting one but not the other would result in drastically disparate outcomes in similar cases. If the Court resolves only the question in *Foote*, then parents' ability to vindicate their rights would inexplicably turn on whether school officials can label their conduct as executive, not legislative. And if the Court resolves only the question presented here, then deep and longstanding circuit splits about the authority of public schools will grow deeper still, opening the door for even more radical and surreptitious conduct in public schools that endangers children.

Granting both petitions would mirror this Court's approach in recent cases. For example, the Court granted two petitions to decide whether affirmative-action programs violate either the Constitution or Title VI. See *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 198 (2023). And it granted both *Little* v. *Hecox*, 145 S. Ct. 2871 (2025), and *West Virginia* v. *B.P.J.*, No. 24-43, 2025 WL 1829164 (U.S. July 3, 2025), to resolve similar challenges to laws designating sports teams based on sex. The Court should do the same here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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