

No. 25-259

In the Supreme Court of the United States

JANUARY LITTLEJOHN, ET VIR,

Petitioners,

v.

SCHOOL BOARD OF LEON COUNTY, FLORIDA, ET AL.,

Respondents.

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

**BRIEF OF AMICI CURIAE ADVANCING AMERICAN
FREEDOM; ABLE AMERICANS; AFA ACTION; AMERICAN
PRINCIPLES PROJECT; AMERICAN VALUES; AMERICA'S
WOMEN; ARIZONA WOMEN OF ACTION; ASSOCIATION OF
MATURE AMERICAN CITIZENS ACTION; CENTER FOR
POLITICAL RENEWAL; CENTER FOR URBAN RENEWAL AND
EDUCATION (CURE); CHRISTIAN LAW ASSOCIATION;
CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; ET AL. IN
SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

1. When a plaintiff alleges that the application of a state policy infringed a fundamental right “deeply rooted in this Nation’s history and tradition,” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), can a court deny relief because the infringement did not “shock the conscience”?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	5
I. The Eleventh Circuit’s Interpretation of the <i>Lewis</i> Decision is Inconsistent with This Courts Decades-Long Effort to Rein in Judicial Subjectivity.....	5
A. The Eleventh Circuit’s interpretation of this Court’s decision in <i>County of Sacramento v. Lewis</i> subjects state executive action to a subjective judicial standard of review in substantive due process claims in contrast with the objective standard of review available in cases challenging legislative state action	5
B. This Court has made clear that history and tradition are the proper and objective guideposts for judicial review of Fourteenth Amendment substantive due process claims	9

II. Parental Rights Are Deeply Rooted in Our Nation's History and Tradition	11
A. Parental rights in education are a part of the Western tradition.....	12
B. Parental rights in education were ubiquitous in the early Republic	15
C. The Antebellum Period and Reconstruction reaffirmed parental rights in education	17
III. Parental Rights are Essential to Liberty and Justice	21
CONCLUSION	23

TABLE OF CITED AUTHORITIES

	Page(s)
Cases:	
<i>Carlisle v. United States</i> , 517 U.S. 416 (1996)	6
<i>Collins v. Harker Heights</i> , 503 U.S. 115 (1992)	9
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	4-7, 9-11
<i>Davis v. Carter</i> , 555 F.3d 979 (11th Cir. 2009)	7, 8
<i>Dobbs v. Jackson Women’s Health</i> , No. 19-1392 (June 24, 2022)	11
<i>Littlejohn v. Sch. Bd. of Leon Cnty.</i> , No. 23-10385, slip op. (11th Cir. Mar. 12, 2025).....	3, 4, 6-8
<i>Mahmoud v. Taylor</i> , No. 24-297, slip op. (June 27, 2025).....	3, 22
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	10, 11
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	21
<i>Nix v. Franklin Cnty. Sc. Dist.</i> , 311 F.3d 1373 (11th Cir. 2002)	7, 8
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)	10

<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937)	21
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	4, 21-23
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961)	10, 11
<i>Prince v. Commonwealth of Massachusetts</i> , 321 U.S. 158 (1944)	22
<i>United States v. Rahimi</i> , No. 22-915, slip op. (June 21, 2024).....	10
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	6, 9-11, 21, 23
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Statutes & Other Authorities:	
Aristotle, <i>Politics</i> (Benjamin Jowett ed., 1885)	12
William Blackstone, <i>Commentaries on the Laws of England</i> 451 (George Sharswood ed., Lippincott Company 1893) (1753)	14
Robert Bork, <i>Neutral Principles and Some First Amendment Problems</i> , 47 Ind. L. J. 1, 8 (1971)	10
Luray Buckner, <i>A Right Defined by a Duty: The Original Understanding of Parental Rights</i> , 37 Notre Dame J.L. Ethics & Pub. Pol'y 493, 501 (2023)	18

Gershom Carmichael, <i>The Writings of Gershom Carmichael</i> (James Moore ed., Liberty Fund 2002) (1724)	15
M. Tullius Cicero, <i>De Officiis</i> (Walter Miller ed., 1913)	12
Cong. Globe, 38 th Cong., 1 st Sess., 1324 (1864) (Statement of Senator Wilson).....	20
Cong. Globe, 38 th Cong., 1 st Sess., 1439 (1864) (Statement of Senator Harlan)	20
Cong. Globe, 38 th Cong., 1 st Sess., 1479 (1864) (statement of Senate Sumner)	20
Cong. Globe, 39 th Cong., 1 st Sess. 2773 (1866) (Statement of Representative Eliot)	21
Convention of the Colored Freemen of Ohio (1852 : Cincinnati, OH), 275, <i>285 Proceedings of the Convention, of the Colored Freemen of Ohio, Held in Cincinnati, January 14, 15, 16, 17 and 19, 1852</i> , (Colored Conventions Project Digital Records) https://omeka.coloredconventions.org/items/show/250 (last visited June 23, 2025)	19
Convention of the Colored Men of Ohio (1858 : Cincinnati, OH), 333, <i>333 Proceedings of a Convention of the Colored Men of Ohio, Held in the City of Cincinnati, on the 23d, 24th, 25th and 26th days of November, 1858</i> , (Colored Conventions Project Digital Records) https://omeka.coloredconventions.org/items/show/254 (last visited June 23, 2025)	19

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David Fordyce, <i>The Elements of Moral Philosophy</i> (Thomas Kennedy ed., Liberty Fund 2003) (1754)	13
John M. Gould, Preface to James Kent, Commentaries on American Law (Little, Brown & Co. 14th ed. 1896)	17
Joseph K. Griffith II, <i>Is the Right of Parents to Direct Their Children's Education "Deeply Rooted" in Our "History and Tradition"?</i> 28 Tex. Rev. L. & Pols. 795 (2024)	19
"Thomas Jefferson's Bill for Establishing Elementary Schools, [ca. 9 September 1817]," <i>Founders Online</i> , National Archives, https://founders.archives.gov/documents/Jefferson/03-12-02-0007	16, 17
Joint Comm. on Reconstruction, Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866)	21
Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/	1

- Henry Kames, *Principles of Equity* (Michael Lobban ed., The Liberty Fund 2014) (1760)..... 13
- Henry Kames, *Sketches of the History of Man Considerably enlarged by the last additions and corrections of the author* (James A. Harris ed., Liberty Fund 2007) (1788) 13
- James Kent, *Commentaries on American Law* 233 (Oliver Wendell Holmes ed., Twelfth Edition 1873) 17, 18
- John Locke, *Two Treatises on Government*, 252-53 (Hollis ed., 1764) (1689) 12
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Antonin Scalia, <i>The Rule of Law as a Law of Rules</i> , 56 U. Chi. L. Rev. 1175 (1989).....	10
Samuel Harrison Smith, <i>Remarks on education: illustrating the close connection between virtue and wisdom. To which is annexed, a system of liberal education</i> (1797)	16
1 Joseph Story, <i>Commentaries on Equity Jurisprudence</i> 328 (Charles C. Little & James Brown) (4 th ed. 1846) (1836).....	18
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David Saunders eds., Liberty Fund 2003) (1673)	12
J. Marc Wheat, <i>Religious Liberty is Essential to American Freedom. So Are Parental Rights</i> , Real Clear Religion (May 6, 2025) https://www.realclearreligion.org/articles/2025/05/06/religious_liberty_is_essential_to_american_freedom_so_are_parental_rights_1108436.html	23
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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power.¹ AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”² and believes American prosperity depends on ordered liberty and self-government.³ AAF files this brief on behalf of its 8,792 members in the state of Florida and 15,008 members in the Eleventh Circuit.

Amici Able Americans; AFA Action; American Principles Project; American Values; America’s Women; Arizona Women of Action; Association of Mature American Citizens Action; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Christian Law Association; Christian Medical & Dental Associations; Christians Engaged; Coalition for Jewish Values; Concerned Women for America; Cornwall Alliance for the Stewardship of Creation; Defense of Freedom Institute for Policy

¹ All parties have received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

³ Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at <https://advancingamericanfreedom.com/aaff-independence-index/>.

Studies, Inc.; Eagle Forum; Faith and Freedom Coalition; Family Institute of Connecticut Action; Family Policy Institute of Washington; Family Policy Alliance; Frontiers of Freedom; Frontline Policy Action; Global Liberty Alliance; Congresswoman Vicky Hartzler (2013-2022); Intercessors for America; International Conference of Evangelical Chaplain Endorsers; James Dobson Family Institute; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; Missouri Center-Right Coalition; National Apostolic Christian Leadership Conference; National Association of Parents, Inc. dba ParentsUSA; National Center for Public Policy Research; National Religious Broadcasters; Nevada Policy; New Jersey Family Policy Center; New York State Conservative Party; New Mexico Family Action Movement; Noah Webster Educational Foundation; Orthodox Jewish Chamber Of Commerce; Melissa Ortiz, Principal & Founder, Capability Consulting; Power2Parent Union; Russell Kirk Center for Cultural Renewal; Setting Things Right; Southeastern Legal Foundation; Stand for Georgia Values Action; Students for Life of America; The Institute for Faith & Family; Tradition, Family, Property, Inc.; Wisconsin Family Action, Inc.; Women for Democracy in America, Inc.; Yankee Institute; and Young America's Foundation believe that the government's compliance with the Constitution's limits on government power is essential to the preservation of American freedom.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

No parents should have their children indoctrinated in school. This Court recently held that the religious rights of parents are violated when schools condition public education on parents' "willingness to surrender" their religious views. *Mahmoud v. Taylor*, No. 24-297, slip op. at 32 (June 27, 2025). The fundamental right to raise one's children consistent with one's beliefs belongs to all parents, as the court should find in this case.

In this case, January and Jeffrey Littlejohn sued after their then-thirteen-year-old daughter's school facilitated her social gender transition against direct parental instruction. In 2020, the Littlejohn's daughter asked her parents if she could go by a male name and be referred to by they/them pronouns. *Littlejohn v. Sch. Bd. of Leon Cnty.*, No. 23-10385, slip op. at 3 (11th Cir. Mar. 12, 2025). The Littlejohns declined her requests but did allow her to go by a nickname, "J." *Id.* at 3-4.

Mrs. Littlejohn informed their daughter's teacher that they had hired a private therapist for their daughter and asked that the teacher use her name and sex-appropriate pronouns. *Id.* at 4. Rather than complying with that clear parental directive, when the Littlejohns' daughter told the school counselor that she wanted to use a male name and they/them pronouns, the school's staff met with the Littlejohns' daughter without informing her parents. *Id.* at 5. That response followed the direction of the school board's "Lesbian, Gay, Bisexual, Transgender, Gender Nonconforming and Questioning Support Guide," which included the claim that "Outing a

student to parents can be very dangerous to the student's health and wellbeing." *Id.* at 4-5.

When the Littlejohns learned what was happening and received a recalcitrant response from school staff, they brought this lawsuit.

The school officials in this case did not accuse the parents of abuse or neglect. They did not involve any state agency for protecting children and they did not bring their claims to court. Rather, they intentionally and unilaterally inserted themselves between parents and child, claiming ultimate and final authority to decide what was best for that child with regards to her gender identity.

This Court has explained that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction . . . The child is not the mere creature of the State." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

Despite the school's clear violation of the Littlejohns' parental rights in this case, the Eleventh Circuit ruled against the Littlejohns, finding that their claim had not met the "shocks the conscience" standard laid out, according to the Eleventh Circuit's interpretation, in the decision of this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

If the Eleventh Circuit's interpretation of *Lewis* were correct, fundamental rights secured against the states by the Fourteenth Amendment would effectively stand or fall based on whether the rights-violation resulted from executive or legislative action. Such a reading neuters the Fourteenth Amendment.

As noted by the Petitioners, there is significant confusion among the lower courts as to how to apply the *Lewis* standard. Rather than leaving fundamental rights, like those of the Littlejohns here, susceptible to irremediable violation, the Court should grant the petition for certiorari, rule for Petitioners, and make clear that the Fourteenth Amendment is more than a “parchment barrier”⁴ against state abuse.

ARGUMENT

I. The Eleventh Circuit’s Interpretation of the *Lewis* Decision is Inconsistent with This Courts Decades-Long Effort to Rein in Judicial Subjectivity.

A. The Eleventh Circuit’s interpretation of this Court’s decision in County of Sacramento v. Lewis subjects state executive action to a subjective judicial standard of review in substantive due process claims in contrast with the objective standard of review available in cases challenging legislative state action.

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court considered whether a law enforcement officer’s alleged recklessness could support a claim under the Fourteenth Amendment’s due process clause. In finding that, in that case, it could not, the Court explained that “for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.” *Lewis*, 523 U.S. at 846. In a footnote, the Court explained further that “in a due process challenge to executive action, the threshold question

⁴ The Federalist No. 48 at 256 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Id.* at 848 n.8.

Justice Scalia criticized the majority’s “shocks-the-conscience” test as “atavistic” and said that it was “even more of a throwback to highly *subjective* substantive-due-process methodologies than” the one proposed in Justice Souter’s *Glucksberg* concurrence. *Lewis*, 523 U.S. at 861 (emphasis added) (Scalia, J., concurring in the judgment). According to Justice Scalia, the Court had “characterized” the then most recent “‘shocks-the-conscience’ claim to come before [the Court] as ‘nothing more than a bald assertion,’ and had rejected it on the *objective* ground that the petitioner ‘failed to proffer any historical, textual, or controlling precedential support for his alleged due process right.’” *Id.* at 862 (Scalia, J., concurring in the judgment) (quoting *Carlisle v. United States*, 517 U.S. 416, 429 (1996)). Justice Scalia recognized that, whatever the relationship between *Glucksberg* and *Lewis* as a whole, the “shocks-the-conscience” test invited subjectivity on the part of judges while the history and tradition test restrains them. *See id.*

According to the Eleventh Circuit panel majority below, while plaintiffs can rely on *Glucksberg*’s history and tradition test and tiered scrutiny if the state action they challenge is legislative in nature, plaintiffs challenging executive state action must first pass *Lewis*’s “shocks the conscience” test. According to the court, the proper reading of *Lewis* is that “[e]xecutive’ action violates a plaintiff’s substantive due-process rights—even if the right involved is a fundamental one—if the action ‘shocks the conscience.’” *Littlejohn*, No. 23-10385, slip op. at

12 (quoting *Lewis*, 523 U.S. at 846). On the other hand, the court explained, “we use different levels of scrutiny to determine whether legislative action violates a plaintiff’s substantive due-process rights.” *Id.*

Attempting to apply this necessarily subjective standard, the Eleventh Circuit panel did not, in fact, ask whether the school officials’ actions in this case shocked either the judges’ or the contemporary conscience. Instead, the court relied on previous Eleventh Circuit applications of the test and found that shocking earlier judges’ consciences was quite difficult. “Taken together, *Nix [v. Franklin Cnty. Sc. Dist.]*, 311 F.3d 1373 (11th Cir. 2002)] and *Davis [v. Carter]*, 555 F.3d 979 (11th Cir. 2009)] impose a high bar: even where a student dies, school officials’ behavior does not ‘shock the conscience’ if it is no more than reckless or deliberately indifferent.” *Littlejohn*, No. 23-10385, slip op. at 24.

The court explained that it could not “conclude that Defendants actions with respect to the Littlejohns’ child ‘shocked the conscience’” because “[t]he child was not physically harmed, much less permanently so,” “[d]efendants did not remove the Littlejohns’ child from their custody,” and “[d]efendants did not force the child to attend a Student Support Plan meeting, to not invite the Littlejohns to that meeting, or to socially transition at school.” *Littlejohn*, No. 23-10385, slip op. at 24 (citations omitted). “In fact,” the court explains, “Defendants did not force the Littlejohns’ child to do anything at all.” *Id.*

But “perhaps most importantly,” according to the court, “Defendants did not act with intent to

injure” but instead “sought to help the child.” *Id.* at 25. The court concludes, “under these circumstances, even if the Littlejohns felt that Defendants efforts to help their child were misguided or wrong, the mere fact that the school officials acted contrary to the Littlejohns’ wishes does not mean that the conduct ‘shocks the conscience’ in a constitutional sense.” *Id.*

Though no doubt attempting to faithfully apply Eleventh Circuit precedent, the panel’s reasoning demonstrates the weakness and inherent subjectivity of the “shocks the conscience” test.

In *Davis* and *Nix*, which the court cites to show that even recklessness on the part of school officials that leads to death does not necessarily “shock the conscience,” the question was whether the Fourteenth Amendment due process rights of the *child* had been violated. *Nix*, 311 F.3d at 1375; *Davis*, 555 F.3d at 980. Despite the extreme and tragic outcome, the school officials’ lack of intent to harm was a significant factor in determining that their behavior did not “shock the conscience.” *Nix*, 311 F.3d at 1378 (“[S]pecifically, in a classroom setting, courts have not allowed due-process liability for deliberate indifference, and, moreover, will only allow recovery for intentional conduct under limited circumstances.”); *Davis*, 555 F.3d at 984 (“The allegations in the complaint do not support a finding that the coaches acted willfully or maliciously with an intent to injure Davis.”). Thus, the opinion for the court below found it significant that the school officials in this case did not intend to harm the Littlejohns’ daughter.

That analysis misses the point. While the fundamental rights of the Littlejohns’ daughter were harmed by the school officials’ actions here, the

Fourteenth Amendment due process rights that gave rise to this case are those of the Littlejohns, themselves.

Thus, rather than asking whether the school officials in this case sought to harm the Littlejohns' daughter, the court should have asked whether the school officials' intentional withholding of critical information about the Littlejohns daughter and violation of a clear parental directive harmed the rights of the Littlejohns, which it certainly did.

That such a basic question could be a point of confusion simply demonstrates that the *Lewis* test as applied by the court below is subjective and unworkable.

B. This Court has made clear that history and tradition are the proper and objective guideposts for judicial review of Fourteenth Amendment substantive due process claims.

Washington v. Glucksberg, decided a year before *Lewis* in 1997, held that the Due Process Clause of the Fourteenth Amendment did not protect a fundamental right to assisted suicide. 521 U.S. 702 (1997). The Court began its analysis, as it does “in all due process cases, by examining our Nation’s history, legal traditions, and practices.” *Glucksberg*, 521 U.S. at 710. History and tradition are a crucial part of the Court’s due process analysis because they “provide the crucial ‘guideposts for *responsible decision-making*,’ that *direct and restrain* our exposition of the Due Process Clause.” *Glucksberg*, 521 U.S. at 721 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

As Justice Kavanaugh has explained, “there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: history and policy.” *United States v. Rahimi*, No. 22-915, slip op. at 4 (June 21, 2024) (Kavanaugh, J., concurring). Unwisely, “[t]he policy approach rests on the philosophical or policy dispositions of the individual judge.” *Id.* But “[h]istory, not policy, is the proper guide.” *Id.* Judges, in our constitutional system, “must act like umpires,” which, in turn, requires that they “‘stick close to the text and the history, and their fair implications’ because there ‘is no principled way’ for a neutral judge ‘to prefer any claimed human value over any other.’” *Id.* at 5 (quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 8 (1971)). “[H]istory helps ensure that judges do not simply create constitutional meaning ‘out of whole cloth.’” *Id.* (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989)).

In *Glucksberg*, the Court explicitly rejected Justice Souter’s proposed due process analysis which “rel[ie]d] on Justice Harlan’s dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961)” because that analysis would “abandon” the “restrained methodology” of history and tradition. *Glucksberg*, 521 U.S. at 721.

Since *Glucksberg* and *Lewis* were decided, this Court has continued to apply and justify the *Glucksberg* test as it did, for example, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Nor did the Court’s decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015) displace *Glucksberg*, despite claims that the former decision “ha[d] definitively replaced *Washington v. Glucksberg*’s wooden three-prong test

focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan’s justly famous 1961 dissent in *Poe v. Ullman*.⁵ After all, the Court applied *Glucksberg* in so recent and significant a decision as *Dobbs v. Jackson Women’s Health*, No. 19-1392 (June 24, 2022).

McDonald and *Dobbs*, of course, concerned legislative state action, not executive action. But fundamental rights enshrined in the Constitution should not be subject to abuse merely because the state actor is exercising executive power. Plaintiffs should not find the Court’s objective history and tradition analysis locked behind a door to which a judge’s “still, soft voice within,” *Lewis*, 523 U.S. at 865 (Scalia, J., concurring in the judgment), is the only key.

II. Parental Rights Are Deeply Rooted in Our Nation's History and Tradition.

This Court has explained that “[o]ur Nation’s history, legal traditions, and practices . . . provide the crucial ‘guideposts for responsible [judicial] decision-making.’” *Glucksberg*, 521 U.S. at 721. Parental rights have been recognized throughout American history and even earlier as among the most fundamental of rights.

⁵ Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16, 16 (2015).

A. Parental rights in education are a part of the Western tradition.

Parental authority has long been recognized as the first form of government⁶ because it is “the most Sacred and Ancient Kind of Authority.”⁷ This part of Western Tradition runs stretches back to antiquity, when Aristotle and Cicero recognized parental authority as the foundation for a free and flourishing state.⁸ More recently, philosophers, politicians, and judges who were influential during the Founding era recognized the fundamentality of the parent-child relationship to freedom.

Parental rights are, according to Lord Kames, the leading British jurist on the eve of the American Revolution who was sympathetic to American

⁶ John Locke, *Two Treatises on Government*, 252-53 (Hollis ed., 1764) (1689) (“The subjection of a minor places in the father a temporary government, which terminates with the minority of the child.”).

⁷ Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature* at 179-180 (Ian Hunter & David Saunders eds., Liberty Fund 2003) (1673).

⁸ Aristotle, *Politics* at 3-4, 16 (Benjamin Jowett ed., 1885) (“[W]hen several families are united, and the association aims at something more than the supply of daily needs, the first society to be formed is the village... the first community, indeed... is the family.”). M. Tullius Cicero, *De Officiis* at 54 (Walter Miller ed., 1913) (“For since the reproductive instinct is by Nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state.”).

concerns, the “corner-stone of society.”⁹ Scottish Enlightenment thinker David Fordyce, whose books were part of Harvard’s curriculum during the colonial period,¹⁰ wrote that the “weak and ignorant State of Children, seems plainly to invest their Parents with such Authority and Power as is necessary to their Support, Protection, and Education.”¹¹ The natural law theorist Samuel von Pufendorf, whose works were bought for the use of the Continental Congress,¹² observed that “nature has implanted in parents a tender affection for their offspring, so that no one can be willing readily to neglect that office.”¹³ Lord Kames described the parent-child relationship as “one of the strongest that can exist among individuals.”¹⁴

These writers understood providing an education to be both a chief parental right and duty. Sir William Blackstone described education as “the

⁹ Henry Kames, *Sketches of the History of Man Considerably enlarged by the last additions and corrections of the author* at 80 (James A. Harris ed., Liberty Fund 2007) (1788).

¹⁰ Daniel N. Robinson, *The Scottish Enlightenment and the American Founding* 90 *The Monist* 170, 174 (2007).

¹¹ David Fordyce, *The Elements of Moral Philosophy* at 8 (Thomas Kennedy ed., Liberty Fund 2003) (1754).

¹² “Report on Books for Congress, [23 January] 1783,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-06-02-0031>.

¹³ Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence* at 380 (Thomas Behme ed., The Liberty Fund 2009) (1660).

¹⁴ Henry Kames, *Principles of Equity* at 15-16 (Michael Lobban ed., The Liberty Fund 2014) (1760).

last duty of parents toward their children.”¹⁵ However, education did not just mean teaching mere arithmetic or literacy. At the time of the founding, the end of education was virtue.¹⁶ Christian Thomasius, whose books James Madison ordered for the Continental Congress,¹⁷ wrote that parental authority entails “leading the child from first infancy to the maturity of body and mind,” a responsibility that “contains two parts, namely, nourishment, which pertains to the infant’s body, and learning, which pertains to his mind.”¹⁸

According to the legal theorists of the time, the right of parents to directly oversee the education of their children could be delegated, but it could never be destroyed even by those with whom parents entrusted their children. Gershom Carmichael wrote that it is

¹⁵ William Blackstone, *Commentaries on the Laws of England* 451 (George Sharswood ed., Lippincott Company 1893) (1753).

¹⁶ Benjamin Rush, *Essays, literary, moral & philosophical* at 8 (1798) in *Evans Early American Imprint Collection*, <https://name.umdl.umich.edu/N25938.0001.001>.

University of Michigan Library Digital Collections. Accessed June 17, 2025. (“I beg leave to remark, that the only foundation for a useful education in a republic is to be laid in Religion. Without this there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments.”).

¹⁷ “Report on Books for Congress, [23 January] 1783,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-06-02-0031>.

¹⁸ Christian Thomasius, *Institutes of Divine Jurisprudence. With Selections from Foundations of the Law of Nature and Nations* 466-67 (Thomas Ahnert ed., Liberty Fund 2011) (1688).

“an indissolubly integral part of parental power.”¹⁹ Pufendorf wrote that, although parents may entrust their children’s education to others, it is a duty that “the Parent reserve to himself the Oversight of the Person deputed.”²⁰ This recognition of parental authority continued into the nation’s infancy.

B. Parental rights in education were ubiquitous in the early Republic.

Parental rights in education were also broadly recognized in America’s founding era. James Wilson, a signer of both the Declaration of Independence and the Constitution and later a Justice of this Court appointed by President Washington,²¹ contrasted, in his 1791 lectures on law, ancient and modern modes of education to illustrate the American view of parental rights. Spurning the example of the Spartans where “the care and education of children were taken entirely out of the hands of their parents,” Wilson commended American law which recognized that “to parental affection the care of education may, in most instances, be safely intrusted.”²²

Benjamin Rush, also a signer of the Declaration of Independence, was one of the foremost advocates for public schooling. In 1786, Rush published a pamphlet

¹⁹ Gershom Carmichael, *The Writings of Gershom Carmichael* at 134-35 (emphasis added) (James Moore ed., Liberty Fund 2002) (1724).

²⁰ Pufendorf, *supra*, at 183-84 (emphasis added).

²¹ *James Wilson* in *Biographical Directory of the United States Congress*, <https://bioguide.congress.gov/search/bio/W000591>.

²² James Wilson, *Collected Works of James Wilson* 908-910 (Kermit L. Hall & Mark David Hall ed., Liberty Fund 2007) (1791) (Emphasis added).

setting out a plan for public schools in which teachers were to inculcate morality, but only in “a strict conformity to . . . the inclinations of their parents.”²³

Samuel Harrison Smith, a newspaper publisher and friend of Thomas Jefferson, was one of the few opponents of parental rights in the founding era. In a pamphlet he authored for the American Philosophical Society he argued that “[e]rror is never more dangerous than in the mouth of a parent.”²⁴ The solution, according to Smith, was the complete removal of parental oversight: when “education [is] remote from parental influence, the errors of the father cease to be entailed upon the child.”²⁵

However, Jefferson rejected his friend's theory of education. In the margins of his 1817 draft plan for public schooling in Virginia, Jefferson wrestled with parental rights and influence in education.²⁶

²³ Benjamin Rush, *A plan for the establishment of public schools and the diffusion of knowledge in Pennsylvania; to which are added thoughts upon the mode of education, proper in a republic: Addressed to the legislature and citizens of the state* at 18 (1786) in *Evans Early American Imprint Collection*.

<https://name.umd.umich.edu/N15652.0001.001>. University of Michigan Library Digital Collections. Accessed June 18, 2025.

²⁴ Samuel Harrison Smith, *Remarks on education: illustrating the close connection between virtue and wisdom. To which is annexed, a system of liberal education* at 64 (1797).

²⁵ *Id.*

²⁶ “Thomas Jefferson’s Bill for Establishing Elementary Schools, [ca. 9 September 1817],” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Jefferson/03-12-02-0007>. (“A question of some doubt might be raised on the latter part of this section, as to the rights & duties of society towards it’s members infant & adult. is it a right or a duty in

Ultimately, he concluded that “it is better to tolerate the rare instance of a parent refusing to let his child be educated, than to *shock the common feelings & ideas* by the forcible asportation & education of the infant against the will of the father.”²⁷

This respect for parental rights, including in education, continued through the Reconstruction era and the ratification of the Fourteenth Amendment.

C. The Antebellum Period and Reconstruction reaffirmed parental rights in education.

Parental control over the inculcation of virtue in children who attended public schools was reaffirmed throughout the antebellum period, even as changes in American society over questions of race and religion put strains on the tradition. James Kent, first professor of law at Columbia University from 1826-1830, turned his series of lectures into the widely popular *Commentaries on American Law*.²⁸ Kent started with antiquity and remarked that some ancient states had refused to trust education to parents.²⁹ Such an idea in America was “totally

society to take care of their infant members, in opposition to the will of the parent? how far does this right & duty extend?”).

²⁷ *Id.*

²⁸ John M. Gould, Preface to James Kent, *Commentaries on American Law*, at v (Little, Brown & Co. 14th ed. 1896) (stating that “the masterpiece of Chancellor Kent has now become so interwoven with judicial decisions that these commentaries upon our frame of government and system of laws will doubtless continue to rank as the first of American legal classics so long as the present order shall prevail”).

²⁹ James Kent, *Commentaries on American Law* 233 (Oliver Wendell Holmes ed., Twelfth Edition 1873).

inadmissible.”³⁰ Because nature bound parents to “maintain and educate their children, the law has given them a right to such authority.”³¹ This was “the true foundation of parental power.”³²

Justice Joseph Story agreed. In his *Commentaries on Equity Jurisprudence*, Justice Story quoted the case of *Jenkins v. Peter*: “the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view.”³³ The “natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of a moral and parental duty.”³⁴ Anything else would be “a principle at war with all filial as well as parental duty and affection.”³⁵

The horrors of American slavery became the catalyst for enshrining into the Constitution parental rights to oversee the moral upbringing of one’s children. Slave narratives following the Civil War were replete with the tearing apart of children from their parents’ oversight.³⁶ Freed former slaves organized “Colored Conventions” throughout the

³⁰ *Id.*

³¹ *Id.* at 252.

³² *Id.*

³³ 1 Joseph Story, *Commentaries on Equity Jurisprudence* 328 (Charles C. Little & James Brown) (4th ed. 1846) (1836) (internal quotation marks omitted).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Luray Buckner, *A Right Defined by a Duty: The Original Understanding of Parental Rights*, 37 Notre Dame J.L. Ethics & Pub. Pol’y 493, 501 (2023).

antebellum period and through the Civil War, in which they petitioned for laws and amendments to protect their rights as citizens. One of the petitioned grievances was a lack of state protection for black parental rights. The 1851 Colored Convention of Ohio lamented that black Americans had “no parental or filial rights; but husband and wife, parent and child, may be torn from each other.”³⁷ Other conventions recognized parental rights and education were intertwined, writing they, as former slaves, were “denied the control of their children” who were “debarred an education.”³⁸ Abolitionist and anti-slavery Republicans regularly intertwined the denial to educate and oversee one’s own children as one of the badges of slavery.³⁹

The Congressional debates on the Thirteenth and Fourteenth Amendments make clear that one purpose of the amendments was to protect the fundamental right of parents to oversee the

³⁷ Convention of the Colored Freemen of Ohio (1852 : Cincinnati, OH), 275, 285 *Proceedings of the Convention, of the Colored Freemen of Ohio, Held in Cincinnati, January 14, 15, 16, 17 and 19, 1852*, (Colored Conventions Project Digital Records) <https://omeka.coloredconventions.org/items/show/250> (last visited June 23, 2025).

³⁸ Convention of the Colored Men of Ohio (1858 : Cincinnati, OH), 333, 333 *Proceedings of a Convention of the Colored Men of Ohio, Held in the City of Cincinnati, on the 23d, 24th, 25th and 26th days of November, 1858*, (Colored Conventions Project Digital Records) <https://omeka.coloredconventions.org/items/show/254> (last visited June 23, 2025).

³⁹ 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. & Pols. 795. 803-04 (2024).

upbringing of their children. Senator James Harlan said that a consequence of slavery was “the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents.”⁴⁰ Senator Charles Sumner, a political leader of the abolitionist movement (who was famously caned nearly to death on the Senate floor after attacking slavery), decried slavery’s destruction “of all rights, even . . . the sacred right of family; so that the relation of husband and wife was impossible and no parent could claim his own child.”⁴¹

When speaking in support of the Thirteenth Amendment, Senator Henry Wilson, author of the bills which outlawed slavery in Washington, D.C., said, “the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.”⁴²

During the drafting of the Fourteenth Amendment in the 39th Congress, the Joint Committee on Reconstruction inquired into whether certain fundamental rights were being respected in the occupied South. The Joint Committee asked whether Southern whites objected to “the legal establishment of the domestic relations among the blacks, such as the relation of husband and wife,

⁴⁰ Cong. Globe, 38th Cong., 1st Sess., 1439 (1864) (Statement of Senator Harlan).

⁴¹ Cong. Globe, 38th Cong., 1st Sess., 1479 (1864) (statement of Senate Sumner).

⁴² Cong. Globe, 38th Cong., 1st Sess., 1324 (1864) (Statement of Senator Wilson).

of parent and child, and the securing by law to the negro the rights of those relations?”⁴³ Likewise, Representative Thomas Dawes Eliot spoke of the need to protect the right of “husband, wife, and parent.”⁴⁴

Few if any fundamental rights not enumerated in the Constitution are more deeply rooted in American history and tradition than parental rights.

III. Parental Rights are Essential to Liberty and Justice.

This Court’s precedent demonstrates that parental rights are not only deeply rooted in American history and tradition but are also “implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Glucksberg*, 521 U.S. at 702 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

In *Meyer v. Nebraska*, this Court explained that “Without doubt,” the Fourteenth Amendment protects “the right of the individual to . . . marry, establish a home and bring up children.” 262 U.S. 390, 399 (1923). The parental right to educate one’s children is among those essential to liberty, and “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children . . . The child is not the mere creature of the State.” *Pierce*, 268 U.S. at 535.

⁴³ Joint Comm. on Reconstruction, Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. (1866) at 171.

⁴⁴ Cong. Globe, 39th Cong., 1st Sess. 2773 (1866) (Statement of Representative Eliot).

The Court has also been clear about the content of that right. Parents “have the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations.” *Id.* The state may not enter “the private realm of family life” because “the custody, care, and nurture of the child reside[s] first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

The Court’s parental rights doctrine has developed in cases many of which are brought by religious parents seeking to ensure that their children’s education does not undermine their religious values. Recently, in *Mahmoud*, No. 24-297 slip op. at 18, the Court explained that the right of religious parents is “not merely a right to teach religion in the confines of one’s own home,” but “extends to the choices that parents wish to make for their children outside the home.” *Id.* The religious liberty right of parents exists, though, not in exclusion, but in addition, to the rights of all parents.⁴⁵

For example, in *Wisconsin v. Yoder*, the Court recognized “the fundamental interest of parents, as contrasted with that of the State, to guide the religious future *and education* of their children,” noting that the “history and culture of Western civilization reflect a

⁴⁵ J. Marc Wheat, *Religious Liberty is Essential to American Freedom. So Are Parental Rights*, Real Clear Religion (May 6, 2025) https://www.realclearreligion.org/articles/2025/05/06/religious_liberty_is_essential_to_american_freedom_so_are_parental_rights_1108436.html.

strong tradition of parental concern for the nurture and upbringing of their children.” 406 U.S. 205, 232 (1972) (emphasis added). Thus, the rights of parents generally, and of religious parents specifically, exist together and do not detract from one another.

“The child is not the mere creature of the state,” *Pierce*, 268 U.S. at 535, and parents, not school officials, have the right and responsibility “to direct the education and upbringing” of their children. *Glucksberg*, 521 U.S. at 720. School officials may not conceal from parents some of the most sensitive matters a family may face, except in the most extreme circumstances. The Court’s consistent and clear recognition of parental rights demands on the part of public educators a high regard for the will of parents. The school district’s active attempt at concealment and unqualified denial of parental rights to oversight compound the harm done in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and rule for Petitioners.

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