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 A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court continue to adhere to its longstanding holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), that plaintiffs alleging that executive action infringes a fundamental substantive due process right must show that infringement "shocks the conscience"?

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INTRODUCTION

Petitioners do not contend that there is any conflict of authority regarding whether the Constitution dictates how a school must precisely navigate safety and privacy concerns, and balance student and parental rights, when a student wants to deviate from their given name and pronouns. Rather, Petitioners turn to an abstract methodological question—does the threshold shocks-the-conscience standard apply to executive deprivations of substantive due process rights? But there is no split of authority on that issue either. And not surprisingly; this Court answered that question over a quarter century ago in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). *Lewis* properly limits claims based on substantive due process rights, recognizing the dangers of broadly transforming ordinary tort claims into constitutional ones.

Questions of parental notice and consent regarding student name and pronoun choices are best resolved by the elected branches, not the courts. Multiple States (and the Federal Government) are doing exactly that. Indeed, Florida's legislation prompted a revision of the policy giving rise to this litigation and that mooted Petitioners' claims for prospective relief here.

Nor is there any pressing need for this Court to address the question presented. There is no meaningful confusion about when the *Lewis* standard applies. And the practical stakes are low: Under both *Lewis* and Petitioners' favored history-and-tradition-only test, plaintiffs asserting unenumerated sub-

stantive due process claims must still establish the infringement of a fundamental right. Few will be able to do so. Many suits will also fail on other independent grounds, such as qualified immunity. While seeking money damages under the guise of substantive due process is appropriately difficult, plaintiffs can often seek such relief through state-law claims, and possibly on the basis of enumerated constitutional rights.

Petitioners' proposed standard would certainly not change the outcome in this case; their narrow allegations fail under either test. The Petition spins a tale of hostility to parental concerns. The complaint tells a different, more nuanced story. Although a school counselor initially met privately *one time* with the student and declined to disclose information about the Student Support Plan, the higher-level school officials reversed course. They agreed that Petitioners would attend any future meetings, gave them a copy of the Student Support Plan, and ceased using any alternative name or pronouns. In short, Petitioners are trying to make a constitutional case out of their initial exclusion from a single meeting. That is a losing constitutional claim under any potentially applicable standard.

The Court should deny review.

STATEMENT OF THE CASE

The Elected Branches At The State And Federal Levels Are Addressing The Sensitive Issues Of Parental Notice And Consent Regarding Name And Pronoun Use In Schools.

At the time this case arose, Respondent School Board of Leon County, Florida (School Board), lacked clear legislative guidance on how to balance concerns of safety, privacy, student rights, and parental notice that arise when a student wants to deviate from their given name and pronouns.[1]

In 2018, the School Board developed a guide in an effort to balance these sensitive issues. Under the 2018 Guide, "when a student or the student's parent or guardian … notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity." Pet. 240a. "[F]or a student who self-discloses that they are transgender or gender nonconforming," the 2018 Guide provided an "initial intake" checklist of questions and a "Student Support Plan" to be completed at a meeting held within 48 hours. Pet. 240a; *see* Pet. 241a (Intake Checklist Part A); Pet. 242a-252a (Student Support Plan Part B). The 2018 Guide noted that in some instances "[o]uting a student, especially to par-

[1] Because the courts below dismissed Petitioners' claims, the allegations are recounted in the light most favorable to Petitioners. Pet. 3a n.1, 176a.

ents, can be very dangerous to the students[’] health and well-being," Pet. 235a; *see* Pet. 212a (noting increased suicide rates among LGBTQ+ students), and therefore school officials should ask a student for consent to notify parents of the Student Support Plan, *see* Pet. 4a-5a, 241a, 244a.

Clear legislative guidance, which was absent at the outset of this case, soon followed. Pet. 6a n.2. In 2021, Florida enacted its "Parents' Bill of Rights," providing, among other things, that public schools "may not infringe on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means." Fla. Stat. § 1014.03. Consistent with that legislation, the School Board revised its policy in June 2022 (2022 Guide) to provide that "School personnel must not intentionally withhold information from parents unless a reasonably prudent person would believe that disclosure would result in abuse, abandonment, or neglect." Pet. 6a n.2.

Florida is not alone in addressing such matters by legislation. At least 12 other States have recently enacted statutes that address parental notice or consent regarding students' gender identity and/or related issues.[2] And the Federal Government has

[2] Ark. Code § 6-1-108(d); Iowa Code § 279.78(3); Idaho Code § 67-5909B(3); Ky. Rev. Stat. § 158.191(5); La. Stat.

provided guidance. The U.S. Department of Education has informed schools that it "will no longer passively accept school officials' hostility to parental involvement" on matters of "gender ideology."[3] Congress is also contemplating legislation on parental rights in this area. *See* Empower Parents to Protect their Kids Act, H.R. 5116, 119th Cong. (2025); PROTECT Kids Act, H.R. 2616, 119th Cong. (2025).

After Petitioners Raised Objections Following One Meeting With The Student, They Were Invited To Attend All Future Meetings And Provided The Student's Support Plan.

Petitioners January and Jeffrey Littlejohn are the parents of A.G., a middle school student in Leon County, Florida. First Amend. Compl. ¶¶ 9, 18 (Compl.), D. Ct. Dkt. No. 38. In spring 2020, "A.G. told her parents that she was confused about her gender," and Petitioners, in turn, informed a middle school counselor. *Id.* ¶¶ 86, 88. "A.G. asked her parents to permit her to change her name to 'J.' and to use 'they/them' pronouns." *Id.* ¶ 91. Petitioners "did not agree" but "said that A.G. could use J. as a 'nick-

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§ 17:2125(B)(2), (C); Mont. Code § 49-2-307(2); N.C. Gen. Stat. § 115C-76.45(a)(5); N.D. Cent. Code § 15.1-06-21(1), (6); S.C. Code § 59-32-36; Tenn. Code § 49-6-315(a), (b); Utah Code § 53E-9-205(2), (3); W. Va. Code § 18-5-29(d); *see* Va. Dep't of Educ., *Model Policies on Ensuring Privacy, Dignity, and Respect for All Students and Parents in Virginia's Public Schools* 3, 5, 14 (July 18, 2023), https://perma.cc/22ES-Y7TS.

[3] Letter from Linda E. McMahon, Sec'y of Education, to Educators (Mar. 28, 2025), https://perma.cc/AT4E-CRSK.

name' at school but would continue to be referred to [at home] as A.G. and a female." *Id.* ¶ 92.

On August 27, 2020, Petitioners told A.G.'s math teacher "that A.G. had expressed confusion about her gender" and "that A.G. could use J. as a 'nickname' with classmates and teachers if she desired," Compl. ¶ 94, but that Petitioners "did not consent to having A.G.'s name changed at school," *id.* ¶ 100.[4]

Soon thereafter, "A.G. approached [Respondent] Thomas," a middle school counselor, "and requested to use a different name and pronouns." Compl. ¶ 95. On September 8, 2020, Thomas and two other school staff members met with A.G. to complete a Student Support Plan, asking A.G. for various information, including A.G.'s preferred name and pronouns. *Id.* ¶¶ 96, 109, 114, 133. Petitioners were not informed of or invited to the meeting because A.G. did not ask for them to be present. *Id.* ¶¶ 110, 112-113; *see infra* 25 & n. 11. The resulting Student Support Plan indicated that the Littlejohns were "aware, but not supportive" of A.G.'s decision to use a preferred name and pronouns. Compl. ¶ 134.

Petitioners learned about the meeting six days later, when A.G. told them about the meeting and told them that she thought aspects of it were "funny." Compl. ¶ 98. Petitioners emailed Thomas to ask

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[4] Neither the school counselor nor the math teacher was named as a defendant and the complaint does not allege that either one informed any Respondents of the contents of these conversations.

for a meeting to discuss their concerns and stated that Petitioners did not consent to A.G. using a different name at school. *Id.* ¶¶ 99, 100. Thomas advised Petitioners to contact the Assistant Superintendent. *Id.* ¶¶ 102, 105-106.

Four days later, Petitioners emailed the Assistant Superintendent, objecting that they "were not invited or notified of the [September 8, 2020] meeting," and asked "what do we need to do moving forward for [Petitioners] to be present at these meetings and be involved in the plans?" Compl. ¶ 115. The Assistant Superintendent responded "that [Petitioners] *would be permitted* to be in future meetings." *Id.* ¶ 116 (emphasis added).

The middle school staff scheduled a meeting for November 3, 2020. Compl. ¶ 126. The Assistant Superintendent asked Petitioners in advance for permission to meet with A.G. privately. *Id.* ¶ 122. Petitioners refused and do not claim that any such private meeting occurred. *Id.* ¶ 123. The Principal then met with Petitioners, "provided them with a copy of the … Student Support Plan [for A.G.] that had been created on September 8, 2020," and told Petitioners "that they could be present at the [next] meeting" with A.G. *Id.* ¶¶ 124, 128. Instead, Petitioners told the Principal that "no further meetings regarding A.G.'s gender identity should be scheduled," and that Petitioners "did not consent to any more private meetings" with A.G. *Id.* ¶¶ 129-130. Petitioners do not claim that their wishes were not followed. The complaint does not allege that after the initial single meeting, Respondents (or any other school official or employee) met or scheduled a meet-

ing with A.G., privately or otherwise, or that Respondents persisted in using a different name or pronouns when referring to A.G.

The Lower Courts Dismissed Petitioners' Claims.

Petitioners filed a complaint that, as amended, alleges five causes of action, including three claims under 42 U.S.C. § 1983, asserting violations of substantive due process, and two claims under the Florida constitution. Compl. 39-115. The complaint sought declaratory relief and nominal and compensatory damages. *Id.* at 115-120.

Respondents moved to dismiss the complaint, contending (among other things) that Petitioners' challenges to the policy were moot and their substantive due process challenge to Respondents' actions failed to state conscience-shocking behavior. D. Ct. Dkt. 56. In response, Petitioners did *not* argue that the shocks-the-conscience test is inapplicable here, nor did they assert any alternative test. Pet. 12a n.6; *see* Respondents' Ct. App. Br. 10-17.

The district court dismissed Petitioners' claims. It held that claims for prospective relief are moot following the new Florida legislation and the School Board's concomitant policy change. Pet. 181a-182a. With respect to Petitioners' damage claims, the court concluded that the individual Respondents are entitled to qualified immunity, Pet. 182a-183, and Petitioners failed to state a substantive due process claim against the School Board because the allegations in the complaint do not "meet the high thresh-

old of shocking the conscience." Pet. 184a. The court declined to exercise supplemental jurisdiction over the remaining state law claims. Pet. 201a-202a.

Petitioners did not appeal the district court's dismissal of their claims for prospective relief or their state-law claims for lack of supplemental jurisdiction. Pet. 8a. As to Petitioners' substantive due process claims for damages, the Eleventh Circuit affirmed. The court held that under *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), there is no viable constitutional claim for violation of Petitioners' substantive due process rights unless the executive action at issue "'shocks the conscience.'" Pet. 11a-12a. The court quoted *Lewis* in noting that the shocks-the-conscience test "is a 'threshold question' that necessarily precedes any fundamental-rights analysis." Pet. 14a (quoting *Lewis*, 523 U.S. at 847 n.8).

The court held that Petitioners challenged "textbook executive acts" because they "waived any general challenged to the [2018] Guide" and chose instead to focus exclusively on Respondents' "course of conduct." Pet. 19a. And even assuming Petitioners "invoke 'fundamental' rights," Pet. 9a, their substantive due process claims fail because they do not satisfy the threshold shocks-the-conscience standard. A.G. "was not physically harmed" and Respondents "did not remove [Petitioners'] child from their custody." Pet. 24a. Respondents "did not force the child to attend a Student Support Plan meeting, to not invite [Petitioners] to that meeting, or to socially transition at school. In fact, [Respondents] did not force [Petitioners'] child to do anything at all." Pet. 24a-25a.

"And perhaps most importantly, [Respondents] did not act with intent to injure. To the contrary, they sought to help the child." Pet. 25a.

Judges Rosenbaum and Newsom joined the panel's decision but also wrote separately to express their different general views on the concept of substantive due process. *Compare* Pet. 27a-102a, *with* Pet. 103a-121a.

Judge Tjoflat dissented, arguing that *Lewis* does not require a shocks-the-conscience inquiry preceding any fundamental-rights analysis in these circumstances. Pet. 124a-174a.

REASONS TO DENY CERTIORARI

The Petition presents no circuit split requiring this Court's resolution. The courts of appeals are in agreement that *Lewis*' shocks-the-conscience test applies to a claim that executive action violates a fundamental substantive due process right. They are likewise in accord in determining whether challenged conduct is executive or legislative.

Nor do the issues Petitioners raise warrant resolution by this Court in this case—or others. The issue of parental rights in this area is best resolved by the elected branches. Here, the State's legislature has, after the facts at issue here, acted to provide clear direction to the School Board moving forward.

This Court's intervention is also unwarranted because the question presented is unlikely to matter in most cases. Petitioners' history-and-tradition-only

test still requires plaintiffs to establish a fundamental right. That is a high hurdle that few plaintiffs asserting unenumerated rights can overcome, regardless of whether a shocks-the-conscience test also applies at the threshold. Nor would applying Petitioners' preferred test alter the result in this case. Petitioners' allegations—that they were not invited to participate in a single meeting with their child before the school agreed to include them in future meetings and provide a copy of their child's Student Support Plan—would not state a viable substantive due process claim under any applicable test. In addition, it may prove particularly challenging to resolve any uncertainty about the standard for substantive due process claims against executive actors in a case where the breadth of the asserted underlying right (parental rights) has long bedeviled the Court.

Finally, the court of appeals was right to apply *Lewis*' shocks-the-conscience test. This Court's precedent requires it. And the rule sensibly takes into account the different ways in which executive and legislative actors operate and appropriately cabins the substantive due process inquiry to distinguish genuine constitutional concerns from ordinary tort claims. Its application to this context makes perfect sense, where any claims, if they are to be brought at all, are more appropriately asserted in state court via tort law or other state-law remedies, rather than litigated as matters of federal constitutional law.

Accordingly, the Court should deny the Petition.

I. The Circuits Are In Agreement On The Question Presented.

The courts of appeals are not divided—and certainly not "intractabl[y]" so—over how to evaluate claims of executive deprivation of substantive due process rights. Pet. 13. The "lopsided" split (Pet. 27) is, in truth, no split at all.

A. There is no circuit split on whether *Lewis* requires the shocks-the-conscience test for substantive due process challenges to executive action.

As the Petition acknowledges, seven circuits agree with the Eleventh Circuit that claims of executive infringements of substantive due process rights must shock the conscience to state a viable constitutional claim. Pet. 25-26. The Fifth Circuit is also in agreement with that approach. *See M.D. by Stukenberg v. Abbott*, 907 F.3d 237, 248-51 (5th Cir. 2018); *Sterling v. City of Jackson*, No. 24-60370, 2025 WL 3205505 at *5 & n.5 (5th Cir. Nov. 17, 2025); *id.* at *31 (Engelhardt, J., dissenting). And contrary to Petitioners' claim, Pet. 26-27, the Sixth and Ninth Circuits have not rejected this uniform view, which explains why the court below cited those circuits as being in agreement with its approach, Pet. 20a.

The Sixth Circuit has made this clear. In *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019), the court held that the claimed substantive due process "right to bodily integrity" is "an indispensable right," *id.* at 918, and that the plaintiff's claim must be analyzed "us[ing] the 'shocks the conscience' rubric," *id.* at

922. "Thus, a 'plaintiff must show as a predicate the deprivation of a liberty or property interest' *and* conscience-shocking conduct." *Id.* (emphasis added); *see id.* at 946 (McKeague, J., concurring in part and dissenting in part) ("We measure whether the deprivation of a right to bodily integrity—or any other substantive-due-process right—actually occurred by determining whether a defendant's alleged conduct was so heinous and arbitrary that it can fairly be said to 'shock the conscience.'"); *accord Siefert v. Hamilton Cnty.*, 951 F.3d 753, 766 (6th Cir. 2020).

Kanuszewski v. Michigan Department of Health & Human Services, 927 F.3d 396 (6th Cir. 2019) (cited at Pet. 27), is not to the contrary. The court did not apply *Lewis*' shocks-the-conscience test because executive action was not at issue.[5] *See infra* 33-34 (discussing the legislative-executive distinction). Nor does *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), create a split. *Seal* also involved plainly legislative action: a Tennessee statute requiring school boards, under a "zero-tolerance policy" to "impose swift, certain and severe discipline" for students who bring a dangerous weapon to school. *Id.* at 573.

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[5] The plaintiffs in that case challenged legislative conduct—routine application of a program reaching "nearly every newborn baby in Michigan." *Id.* at 404. The court discussed *Lewis* only to opine on an entirely a different question: whether the court "should not address Plaintiffs' substantive due process claims because Plaintiffs also raise Fourth Amendment claims." *Id.* at 414 n.9; *see Lewis*, 523 U.S. at 843 (discussing why claim is not "'covered by' the Fourth Amendment").

The Ninth Circuit also follows the same approach as the other circuits—as, again, the Eleventh Circuit recognized (Pet. 20a). *See Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) (plaintiff "must show *both* a deprivation of her liberty *and* conscience shocking behavior by the government" (emphasis added)). Despite Petitioners' claims (Pet. 26-27), *Regino v. Staley*, 133 F.4th 951 (9th Cir. 2025), did not adopt a new rule (nor could it overrule prior circuit precedent aligning with the other courts of appeals). *Regino* held only that where the plaintiff asserted claims for declaratory and injunctive relief, *id.* at 958, the district court "failed to conduct the proper analysis" because it mistakenly "borrowed a standard from the qualified immunity context" rather than determining whether plaintiff stated a fundamental right, *id.* at 961.[6]

The circuits, then, are not divided. And any supposed "confusion," in the absence of actual conflict, is insufficient grounds for granting review, especially when many courts easily resolved the issue decades ago. *Contra* Pet. 13. As the First Circuit put it, "*Lewis* … clarified the law of substantive due process and *made pellucid* that conscience-shocking conduct is an indispensable element of a substantive due process challenge to executive action." *DePoutot v. Raffaelly*, 424 F.3d 112, 118 n.4 (1st Cir. 2005); *see Christensen*

[6] The court's footnote commentary regarding *Lewis* is therefore at best dicta. *Id.* at 960 n.5. In any event, the plaintiff's "vague, protean conception of the right [she] is asserting," made it "difficult to discern" its nature, *id.* at 963, including whether the challenged conduct was executive or legislative.

v. Cnty. of Boone, 483 F.3d 454, 462 n.2 (7th Cir. 2007) (*Lewis* "clarif[ies]" that "[w]hen … a plaintiff complains of abusive executive action, this 'conscience shocking' test determines liability"); *Hawkins v. Freeman*, 195 F.3d 732, 738 n.1 (4th Cir. 1999) (en banc) (*Lewis* "*clearly holds* both that the 'shocks-the-conscience' test has continued vitality in actions challenging executive acts on substantive due process grounds and that in those it should be applied as a threshold test" (emphasis added)). Whatever else may be unclear, there can be no doubt that "*Lewis*'s holding" is "that the 'arbitrary or conscience shocking' test is the appropriate one for executive action." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 n.1 (10th Cir. 2015) (Gorsuch, J.).[7]

And whatever initial difficulty the Second, Eighth, Tenth, and Eleventh Circuits might have had in resolving the question, *see* Pet. 28-29, they have now settled on the same approach as every other circuit. *Compare Dawson v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 732 F. App'x 624, 634 & n.1 (10th Cir. 2018) (Tymokovich, C.J., concurring) (asserting that "the circuits have adopted varying approaches"), *with* Pet. 25-26 (acknowledging alignment of these circuits).

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[7] Several of the cited statements expressing lower courts' supposed "confusion" (Pet. 24-25) concern *how* to apply the conscience-shocking test, not *whether* it applies. *See Browder*, 787 F.3d at 1080; *Hawkins*, 195 F.3d at 738 n.1 Those fact-bound uncertainties do not warrant this Court's review.

B. There is no circuit split on the definition of "executive action."

The lower courts are similarly in step on where to draw the line between legislative and executive action, which turns largely on fact-specific determinations rather than on a threshold question of law.

Petitioners (Pet. 30-31) make much of the Eleventh Circuit's acknowledgment that it "reach[ed] a different conclusion" than *Foote v. Ludlow School Committee*, 128 F.4th 336 (1st Cir. 2025), which also addressed "a similar school-gender-identity policy" and concluded that the challenged conduct "was legislative action," Pet. 19a n.8. But the court below noted the critical, fact-bound distinction separating the two results: "the Littlejohns litigated the case differently than did the plaintiffs in *Foote*," namely, "the Littlejohns waived their general challenges to the [2018] Guide, its adoption, and its broad implementation," whereas "in *Foote*, the Protocol was itself the 'chief target of the Parents' complaint.'" Pet. 19a n.8 (quoting *Foote*, 128 F.4th at 347).

Beyond that, the Eleventh Circuit does not diverge with the First Circuit (or any other circuit) by holding that all applications of policy are necessarily executive. *Contra* Pet. 31-32. Indeed, the Eleventh Circuit agrees with the First Circuit that "routine applications" of general policy *are* "characteristically legislative." Pet. 19a-20a n.8 (endorsing *Foote*). To the extent the Eleventh Circuit does take, at the margins, a broader view of executive action than the First Circuit, *see id.*, that is unlikely to make much practical difference. The Eleventh Circuit made clear

that laws or policies that can be called executive because they apply to a limited class of persons "may [also] be legislative acts." Pet. 19a-20a n.8. In such cases, "plaintiffs could surely style their complaints to challenge them as legislative action" *or* executive action. Pet. 19a-20a n.8; *see Foote*, 128 F.4th at 345 (recognizing that "some government conduct can even straddle the line" between executive and legislative). Petitioners simply "didn't do that here." Pet. 20a n.8.

Nor is there any split between the Eleventh Circuit and the Third or Tenth Circuits on how to determine if challenged conduct is executive or legislative. Pet. 31. The Third Circuit holds that "[e]xecutive acts … typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society." *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 n.1 (3d Cir. 2000) (Alito, J.) (alterations omitted). That conclusion is in accord with the decision below, which held that "the application of a broad rule to 'only a limited class of persons'" is "executive action." Pet. 20a. Likewise, the Tenth Circuit asks whether the action is "undertaken pursuant to *broad* government polices" (legislative) versus the "'specific act of a governmental officer'" (executive). *Abdi v. Wray*, 942 F.3d 1019, 1027 (10th Cir. 2019) (emphasis added) (quoting *Lewis*, 523 U.S. at 846-49).

II. This Court's Resolution Of The Question Presented Is Unnecessary.

The question presented does not warrant this Court's review. Petitioners' concerns about parental consent and notification are more appropriately resolved by the elected branches, who are in fact highly engaged on this issue at both the federal and state levels. Nor is there a pressing need for this Court to address when the shocks-the-conscience test should apply; that test is unlikely to be outcome-determinative in many cases asserting unenumerated substantive due process rights, including this one.

A. The political branches are better positioned to resolve the underlying issues here.

Tellingly, Petitioners' argument for the national importance of their Petition focuses principally on a question their Petition does not actually present: the constitutionality of "parental-exclusion policies." Pet. 33-35. While questions of notice and consent are surely important to parents, children, and schools, it is not "vital[]" that *this Court* definitively resolve them as a matter of substantive due process. Pet. 33. Rather, the appropriate balancing of parental notice and related issues in the context of schools is generally better left to the political process. As Justice Scalia put it:

> [W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in elec-

> toral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right. … I have no reason to believe that federal judges will be better at this than state legislatures.

Troxel v. Granville, 530 U.S. 57, 91-93 (2000) (Scalia, J., dissenting).

The political process is indeed trained on this issue. Several state legislatures have enacted "parental rights legislation," Pet. 34, including laws restricting students' use of preferred pronouns and names without parental notice and consent. *Supra* 4. Indeed, when Florida did so, it prompted Respondents' revised 2022 Guide that, in turn, mooted Petitioners' claims for prospective relief. *Supra* 4, 8. The Federal Government is also attuned to this issue, with pending bills in Congress and guidance provided by the U.S. Department of Education. *Supra* 5.[8]

This is as it should be. The issues raised when a student desires to be called a different name and to

[8] Other jurisdictions have laws and policies that are more protective of students' privacy, reflecting a different balancing of interests. *See* Pet. 34. Parents opposed to those legislative judgments can avail themselves of Petitioners' preferred test, so long as they do not, like Petitioners, waive their challenges to these legislative acts.

use different pronouns in school can raise sensitive interests of privacy, safety, student rights, and parental rights. School boards and officials do the best they can in balancing such interests, but they also benefit from clear legislative guidance. Legislatures and other elected officials can respond with greater nuance than courts can, and legislatures can quickly adapt as new information emerges or new views prevail. This Court should not invoke substantive due process to "usurp[] the power [of elected officials] to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people," "short-circuit[ing] the democratic process" and "fan[ning] into life an issue that [will] inflame[] our national politics in general." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268-69 (2022).

Taking a step back, this case involves just one meeting, initiated by the student, that the parents did not attend. When Petitioners complained, school officials agreed to invite them to all meetings and to provide the Student Support Plan. And thereafter, the Florida Legislature codified a standard, making parental notice and involvement the norm and exception rare. There simply is no cause in this context for the Court to step in and impose a constitutional solution to these sensitive local matters, when none is needed or appropriate.

B. The question presented lacks practical significance.

Turning to the actual question presented, employing a threshold shocks-the-conscience test is not

likely to be outcome-determinative in many cases asserting unenumerated substantive due process rights. *Contra* Pet. 32.

For starters, most plaintiffs will fail to state a substantive due process claim based on an unenumerated right under either *Lewis* or Petitioners' history-and-tradition-only test. *Both* approaches require a plaintiff to establish a fundamental right. That is a high bar, as courts are appropriately reluctant "to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [courts]." *Dobbs*, 597 U.S. at 240 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). And if plaintiffs are unable to meet that demanding standard, as few can, their substantive due process claim will fail, regardless of whether the shocks-the-conscience test also applies as a threshold requirement.

Moreover, the shocks-the-conscience test itself "may be informed by a history of liberty protection." *Lewis*, 523 U.S. at 847 n.8; *see id.* at 857 (Kennedy, J., concurring) (similar); *see Browder*, 787 F.3d at 1079 (Gorsuch, J.) (*Lewis* "told us to consult history and precedent" in determining what shocks the conscience). That belies Petitioners' assertion of a yawning gap separating the shocks-the-conscience and history-and-tradition-only tests. Courts have also suggested that in some circumstances—such as where "forethought is feasible"—deliberate indifference, not specific or malicious intent, can qualify as conscience-shocking. *Browder*, 787 F.3d at 1080 (Gorsuch, J.); *see Rosales-Mireles v. United States*, 585 U.S. 129, 138 (2018) ("[T]he 'shocks the con-

science' standard is satisfied … in some circumstances if [the executive actor's conduct] resulted from deliberate indifference."); *Lewis*, 523 U.S. at 849-54. In appropriate cases these considerations may further whittle the practical difference between the two approaches.

The question presented is unlikely to be dispositive for another reason: Many substantive due process challenges to executive action will fail to overcome other, independent hurdles. When those claims are brought against individual officers, they will often be defeated on qualified-immunity grounds, as occurred with Petitioners' claims against the individual defendants here. *Supra* 8. And when cases are brought against municipal entities under Section 1983, plaintiffs may fail to satisfy the requirements for liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *E.g.*, *Lee v. Poudre Sch. Dist. R-1*, 135 F.4th 924, 934 (10th Cir. 2025), *cert. denied*, No. 25-89 (U.S. Oct. 14, 2025) (declining to "decide whether the parents have sufficiently identified a fundamental right that would afford them relief because we conclude that they've failed to plausibly allege municipal liability" (citation omitted)); *see* Pet. 37 (acknowledging that "courts often affirm on alternative grounds, like *Monell* or qualified immunity"). In both instances, a plaintiff may also fail to establish the elements of the most closely analogous tort, as may be required for a Sec-

tion 1983 damages claim. *See Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017).[9]

Finally, resolution of the question presented is not practically significant for yet another reason: Plaintiffs challenging executive action have other avenues to pursue relief. Some parents may be able to pursue First Amendment claims. Pet. 22 (citing *Mahmoud v. Taylor*, 606 U.S. 522 (2025)). For others, there is a "perfectly adequate existing state tort law system." *Browder*, 787 F.3d at 1085 (Gorsuch, J., concurring). There is "little reason to think that state courts" are not up to the task, so "why take up the [constitutional] challenge needlessly?" *Id.* at 1084-85.

C. Petitioners' claims would fail even under their preferred test.

This case proves the point that resolving the question presented makes little practical difference: Petitioners' substantive due process claims would fail even under their preferred history-and-tradition-only test.

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[9] Petitioners likely would fail such a requirement. While "[t]he early common law recognized a tort claim based on wrongful interference with the parent-child relationship"—the most closely analogous tort to the conduct alleged in the complaint—it includes "the prerequisite of physical separation" and "the cause of action ... demands the wrongful deprivation of physical custody." Restatement (Third) of Torts: Miscellaneous Provisions § 48J; *see Stone v. Wall*, 734 So. 2d 1038 (Fla. 1999). The court of appeals found that no such conduct occurred here. Pet. 24a.

From its very first page, the Petition attempts to concoct a substantive due process claim by distorting and mischaracterizing the record. Petitioners contend that "[w]hen the Littlejohns asked to participate, the school said they had no right." Pet. 2. Their own complaint says otherwise: the Assistant Superintendent "told Mrs. Littlejohn that the parents would be permitted to be in future meetings," and the Principal "told Mr. and Mrs. Littlejohn that they could be present at the [November] meeting." Compl. ¶¶ 116, 128.

Petitioners assert that "[w]hen the Littlejohns found out and asked the school to stop, the school refused." Pet. 2. Not so. Petitioners told Respondent Thomas, the counselor, that they "did not consent to having A.G.'s name changed at school," Compl. ¶ 100, only *after* Thomas had already met privately with A.G. and created a Student Support Plan, *id.* ¶ 133.[10] The complaint does not allege that the school continued to use a different name or alternative pronouns for A.G., or engaged in private meetings, after that point. Petitioners likewise argue that "when the Littlejohns asked for records of the meetings with their daughter, the school said those records were private." Pet. 2. Again, their own

[10] Petitioners allege they had earlier told A.G.'s math teacher that they "did not consent to A.G.'s request to change her name and pronouns," Compl. ¶ 94, but they also consented to "us[ing] J. as a 'nickname' with classmates and teachers," *id.* Regardless, the math teacher was not a named defendant and the complaint does not allege that she conveyed Petitioners' message to any Respondent. *Supra* 6 n.4.

complaint says otherwise: Petitioners "met [the] Principal … who provided them with a copy of the … Student Support Plan that had been created on September 8, 2020, for A.G." Compl. ¶ 124.

There's more. Petitioners object that "[t]o keep parents in the dark, administrators use the child's preferred name and pronouns at school, but use the child's actual name and biological pronouns when speaking to parents." Pet. 5-6. But it was Petitioners who first told a teacher that A.G. "could use J. as a 'nickname'" "with classmates and teachers if she desired," "but would continue to be referred to as A.G. and a female" at home. Compl. ¶¶ 92, 94. Petitioners also state that "[t]hey did all this without even asking A.G. if she wanted her parents to be involved." Pet. 2. But the complaint acknowledges that Respondent Thomas asked A.G. "about *each item* on the [Student Support Plan] form," Compl. ¶ 114 (emphasis added), which includes questions about whether a parent or guardian should be notified, Pet. 241a, 243a-244a, 247a.[11]

Similarly, Petitioners rely on the fact that the Student Support Plan "covered" topics such as bathroom use and sharing rooms with boys on overnight school trips. Pet. 9; *see* Pet. 248a. But there are no allegations that Respondents implemented any of

[11] Petitioners allege that A.G. told them "she was not asked if she wanted a parent there," but acknowledge that their then-13-year-old child had "inattention and focus issues" and that "the reality may be different" from A.G.'s "account of the meeting." Compl. ¶¶ 115, 118.

those aspects of the plan. For instance, the complaint does not allege that A.G. in fact used a boys' bathroom or roomed with a boy on an overnight school trip, nor does it state what answers A.G. gave when asked these questions. Finally, Petitioners insinuate that Respondents lured A.G. into social transitioning; in fact, the court of appeals found that the record shows otherwise. Pet. 24a-25a. It was Petitioners who first brought A.G.'s "confus[ion] about her gender" to a school counselor and teacher, Compl. ¶¶ 88, 94, and it was "A.G. [who] approached [another counselor] and requested to use a different name and pronouns," *id.* ¶ 95. And Petitioners even expressly told a teacher to let A.G. use her preferred name at school as a nickname. *Id.* ¶ 92.

Thus, in the end, Petitioners' asserted substantive due process claim turns entirely on the brief use of A.G.'s preferred name/nickname and pronouns, and on the allegations that Respondent Thomas did not include Petitioners in the initial private meeting with A.G. on September 8, 2020, and told Petitioners days later that she would not disclose the details of the Student Support Plan. But higher-up school officials reversed course, well before this litigation ensued. After Petitioners elevated the issue within the school system, both the Assistant Superintendent and Principal invited Petitioners to attend all future meetings and the Principal gave them a copy of A.G.'s Student Support Plan. *See supra* 7.

And after Petitioners told the Principal to cancel all future meetings with A.G., there is nothing in the complaint alleging that Respondents did anything to contravene those instructions or persist in using

A.G.'s preferred name and pronouns. Those narrow facts do not fall within this Court's prior precedents and cannot state a claim for an unenumerated substantive due process right even under Petitioners' preferred history-and-tradition-only test.

According to Petitioners, "[n]o one doubts that parental rights satisfy the history-and-tradition test." Pet. 16. Yet this Court has "not set out exact metes and bounds to the protected interest of a parent in the relationship with his child." *Troxel*, 530 U.S. at 78 (Souter, J., concurring in the judgment). And "[o]nly three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children," two of which are a century old and "from an era rich in substantive due process holdings that have since been repudiated." *Id.* at 92 (Scalia, J., dissenting). Respondents do not contend that those cases are no longer good law or should be overruled, but this Court should not "extend the theory upon which they rested to this new context." *Id.*

Notably, Petitioners' claims do not involve action compelling children to do anything, such as attend school, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or listen to or affirm a particular message, *Mahmoud v. Taylor*, 606 U.S. 522 (2025); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Respondents "did not force [Petitioners'] child to do anything at all." Pet. 25a. Nor have Respondents prohibited children from learning specific subjects or languages, *Meyer v. Nebraska*, 262 U.S. 390 (1923), or from practicing their religion as directed by their parents,

Prince v. Massachusetts, 321 U.S. 158 (1944). And despite Petitioners' far-fetched insistence, Pet. 6-8, the complaint does not plausibly allege that Respondents administered any medical treatment or its equivalent in their single September 8, 2020, private meeting with A.G.[12]

In the end, Petitioners' argument comes down to their view—as expressed in the first sentence of the Petition, quoting Judge Newsom's concurring opinion below—that the school district's behavior in not inviting the parents to the first meeting "was 'shameful.'" Pet. 2 (quoting Pet. 103a). It is easy to second guess the decision in hindsight and in light of the new state legislation (setting standards for parental notice and protecting a student's safety). But

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[12] Petitioners' contention that "social transitions … are the first step on a continuum that leads to a child's medicalization," Pet. 7, is without foundation. The Hall Study on which they rely noted that "[i]t is difficult to assess the impact of social transition on children/adolescents due to the small volume and low quality of research in this area." Ruth Hall et al., *Impact of Social Transition in Relation to Gender for Children and Adolescents: A Systemic Review*, 109 Arch. Dis. Child. 12 (2024), https://perma.cc/R6DS-5Q48. The Cass Study (Pet. 7) likewise noted that "[g]iven the weakness of the research in this area there remain many unknowns about the impact of social transition. In particular, it is unclear whether it alters the trajectory of gender development, and what short- and longer-term impact this may have on mental health." Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 163 (Apr. 2024). All of which "demonstrate[s] the open questions regarding basic factual issues" and that "[s]uch uncertainty affords little basis for judicial responses in absolute terms." *United States v. Skrmetti*, 605 U.S. 495, 525 (2025) (alterations and citation omitted).

if a student indicates they wish to discuss these sensitive issues at first without the parents' presence, there could be lurking concerns of safety and violence that might deter the student from wanting to provide such notice.

Moreover, Petitioners omit Judge Newsom's *constitutional analysis* that immediately followed his comment: "If I were a legislator, I'd vote to change the policy … . But—and it's a big but—judges aren't just politicians in robes, and they don't (or certainly shouldn't) just vote their personal preferences. The question for me, therefore, isn't whether the defendants' conduct was shameful, but rather whether it was *unconstitutional*. And if I've said it once, I've said it a thousand times: Not everything that stinks violates the Constitution." Pet. 103a (quotation marks, citation, and alterations omitted).

III. Petitioners' Parental Rights Claim Is A Poor Vehicle For Addressing The Threshold Due Process Analysis.

As discussed above, there is no meaningful confusion about the appropriate standard to apply to substantive due process claims based on executive action. But to the extent the Court may wish to revisit the issue at some point, it would be wise to avoid addressing the question presented in the context of this case, given the nature of the right being asserted. The last time the Court attempted to delineate the contours of parents' unenumerated substantive due process rights, it split six different ways. *See Troxel*, 530 U.S. at 60 (plurality); *id.* at 75 (Souter, J., concurring in the judgment); *id.* at 80

(Thomas, J., concurring in the judgment); *id.* at 80 (Stevens, J., dissenting); *id.* at 91 (Scalia, J., dissenting); *id.* at 93 (Kennedy, J., dissenting). The Court could not even agree if the asserted right is located in the Due Process Clause. *See id.* at 80 n.* (Thomas, J., concurring in the judgment) (suggesting right may be based on the Privileges and Immunities Clause); *id.* at 91-92 (Scalia, J., dissenting) (suggesting Ninth Amendment right that may not be judicially enforceable).

Even if Petitioners' asserted rights are appropriately found in the Due Process Clause, the claim here sounds more in *procedural* due process than *substantive* due process. Petitioners repeatedly emphasize a lack of notice and an opportunity to participate in a meeting, Pet. 5 ("without parental notice"); Pet. 9 ("policy instructed staff 'not to notify parents'"); Pet. 10 ("would not disclose any details"); Compl. ¶ 32 ("Plaintiffs were not notified about … the 2018 Guide"); *id.* ¶ 55 ("no notification"); *id.* ¶ 58 ("not permitted to attend gender support plan meetings"); *id.* ¶ 96 ("Without notifying Plaintiffs"); *id.* ¶ 118 ("without parental notice"); *id.* ¶ 279 ("no notice"). Those arguments are traditionally analyzed under the rubric of procedural due process. The quasi-procedural, quasi-substantive nature of Petitioners' claims would only further complicate this Court's consideration of the question presented. *Cf. Dep't of State v. Muñoz*, 602 U.S. 899, 911 (2024) (noting due process claim that "is neither fish nor fowl"); *Homar v. Gilbert*, 89 F.3d 1009, 1027 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part), *rev'd,* 520 U.S. 924 (1997) (characterizing

plaintiff's claim as a "sort of 'substantive procedural due process claim'" that should not be recognized).

As Petitioners acknowledge, the question presented affects "*all* cases alleging fundamental unenumerated rights." Pet. 13 (emphasis added). Accordingly, there would be little compelling reason to address that question against the backdrop of an asserted right that is more likely to sew confusion than yield clarity.

IV. The Decision Below Is Correct.

The court of appeals correctly applied the shocks-the-conscience test here.

A. *Lewis* applies to asserted fundamental rights.

Petitioners contend that the shocks-the-conscience test does not apply to infringements of fundamental substantive due process rights by executive actors. Pet. 15-19. *Lewis* says the opposite. There, an executive actor (a police officer) infringed a fundamental right: "[the] substantive due process right to life." 523 U.S. at 837; *see id.* at 840 ("[t]he allegation here [is] that Lewis was deprived of his right to life in violation of substantive due process"). Even though fundamental rights were at issue, this Court held that the shocks-the-conscience test was a "threshold question" that is "antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed." *Id.* at 847 n.8. "Only if" the conscience-shocking test is satisfied "would there be a possibility of recognizing a sub-

stantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed." *Id.*

As then-Judge Gorsuch later recognized in *Browder*, the *Lewis* shocks-the-conscience threshold test applies even where the claims involve obvious fundamental rights. The Tenth Circuit applied *Lewis*' shocks-the-conscience test, even though fundamental rights were at issue: "No one before us disputes that Ashley's death and the damage done to Lindsay's person count as direct and substantial impairments of their fundamental right to life." 787 F.3d at 1080.

Petitioners' reliance (at 18) on *Muñoz*, 602 U.S. 899, and *Conn v. Gabbert*, 526 U.S. 286 (1999), misses the mark. In these cases the parties did not discuss (*Muñoz*) or dispute (*Conn*) the threshold shocks-the-conscience test, and the Court did not need to address the issue because the asserted due process claims were so weak they would have failed under any applicable test. *Muñoz* noted that "characterizing the asserted right" was "conceptually hard[]" because the respondent "posit[ed]" a "not-so-fundamental right[]" that was both procedural and substantive. 602 U.S. at 911. Similarly, *Conn* noted that the respondent did not "even c[o]me close to identifying [an] asserted 'right'" and provided no more than "scant metaphysical support" for his assertion that "inevitable interruptions of our daily routine" state a due process claim. 526 U.S. at 291-92. And in *Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003) (Souter, J., delivering opinion for the Court in

Part II), the majority declined to address the substantive due process claim. Nor could *United States v. Salerno*, 481 U.S. 739 (1987), undercut *Lewis*: It was decided before and is even quoted by *Lewis*, *see* 523 U.S. at 847, and in any event involved "[a] facial challenge to a legislative Act," not executive action. 481 U.S. at 745-76.

B. *Lewis* sensibly distinguished executive and legislative action.

Petitioners argue that the substantive due process inquiry should be uniform across legislative and executive actions. Pet. 20-23. But this Court has long rejected this stiff reading, recognizing the phrase "due process" to be "'less rigid and more fluid that those envisaged in other specific and particular provisions of the Bill of Rights,'" and thus the "[r]ules of due process are not … subject to mechanical application." *Lewis*, 523 U.S. at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

While Petitioners concede that "this Court treats legislative and executive action somewhat differently" when it comes to non-fundamental rights, Pet. 17, they contend that the distinction "lacks logic" as applied to fundamental substantive due process rights, Pet. 21. But as Judge Tymkovich has explained, differentiating executive and legislative conduct in this context "makes sense:"

> Though the 'shocks the conscience' test helps limit the number and types of torts by government actors from becoming substantive due process claims, it is too vague to be use-

> ful for evaluating the propriety of legislation. Conversely, the 'rights' approach provides a helpful framework for evaluating statutes, but it cannot well distinguish between innocent and egregious government official conduct.

Dawson, 732 F. App'x at 636 (Tymkovich, C.J., concurring). Put differently, due process takes account of the different ways in which executive and legislative officials generally operate: "Congress ... make[s] law ... principally through words. Executive officials, by contrast, are called upon to act. Such acts happen in real time, call for a great deal of discretion, and inevitably entail risk." Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1789 (2012).

C. *Lewis* properly cabins substantive due process claims and guards against transforming constitutional rights into tort claims.

Lewis' shocks-the-conscience test resonates with this Court's longstanding "reluctan[ce] to expand the concept of substantive due process." *Lewis*, 523 U.S. at 842 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *see also DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) ("the Due Process Clause of the Fourteenth Amendment ... does not transform every tort committed by a state actor into a constitutional violation"). *Lewis* explained that "a case challenging executive action on substantive due process grounds, like this one, ... raise[s] a particular need to preserve the constitu-

tional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law." 523 U.S. at 847 n.8.

Even Petitioners concede that *Lewis* "makes sense," but seek to limit the case to circumstances where a plaintiff's asserted constitutional right sounds in "classic torts" involving physical harm or damage to property. Pet. 22. But the rationale of *Lewis* is not so limited: "[W]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." 523 U.S. at 848. Moreover, this Court, in adopting the threshold standard in *Lewis* (523 U.S. at 848) cited and discussed *Paul v. Davis*, 424 U.S. 693, 701 (1976), where this Court made it clear that the concerns about expanding substantive due process claims was not limited to physical torts.

D. Petitioners misstate the holding below.

The court of appeals did not categorically hold that "virtually every as-applied challenge to an official policy is executive." Pet. 14-15. Rather, the holding below was confined by the specific facts of this case and Petitioners' litigation choice. First, the court noted that Petitioners "waived any general challenge to the Guide" and challenged only Respondents' "course of conduct." Pet. 19a; *see supra* 9. Second, that course of conduct included superior school officers exercising their discretion under the 2018 Guide to make individually tailored decisions, reversing course and inviting Petitioners to future meetings with A.G., providing them with a copy of

A.G.'s Student Support Plan, and ceasing any use of an alternative name or pronouns. *See supra* 7-8. In short, the court had no occasion to announce any broad rule about "virtually every as-applied challenge to an official policy," Pet. 14-15, and did not purport to establish any such blanket rule. Indeed, the Eleventh Circuit recognized that "routine applications" of "general policy" are "characteristically legislative act[s]." Pet. 19a n.8.

Nor did the court of appeals hold that Respondents did not shock the conscience solely because they "meant to 'help.'" Pet. 36 (quoting Pet. 25a). In fact, the court emphasized that A.G. "was not physically harmed, much less permanently so," that Respondents "did not remove [A.G.] from [Petitioners'] custody" or "force the child to attend a Student Support Plan meeting, to not invite [Petitioners] to that meeting, or to socially transition at school." Pet. 24a-25a. Indeed, Respondents "did not force [A.G.] to do anything at all." Pet. 25a. The majority noted that Respondents "did not act with the intent to injure" and "sought to help [A.G.]," Pet. 25a, but that observation is consistent with *Lewis*' recognition that "a purpose to cause harm" is an important consideration under the shocks-the-conscience test, 523 U.S. at 836, because the "behavior ... that would most probably support a substantive due process claim" is "conduct intended to injure in some way unjustifiable by any government interest," *id.* at 849.

V. Petitioners' Efforts To Bootstrap Its Petition To The *Foote* Petition Are Unsound.

Even if the Court is inclined to grant review in *Foote*, it should deny review here. The Court should not, in addition to taking on the fundamental rights issue presented in *Foote*, also take on the standard for substantive due process violations through executive action. For all the reasons discussed above, doing so is wholly unnecessary in this case and addressing both questions simultaneously in the uncertain terrain of parental rights risks sewing further confusion in both contexts.

Petitioners are wrong to suggest that, if certiorari is granted in *Foote*, it should be granted here as well so that Petitioners in this case can "benefit" from any "favorable ruling" in *Foote*. Pet. 38. At best, that is an argument that this case should be held for *Foote*, not granted alongside it. But it would not make sense to hold this case. Petitioners' waiver turned their claim into one challenging "textbook executive acts," Pet. 19a, resulting in the application of the shocks-the-conscience test, thus setting their case apart from *Foote* and the history-and-tradition-only test that applied there.

Moreover, Petitioners would lose even if the petitioners in *Foote* prevail because of the fact-specific differences between the two cases. In *Foote*, even *after* the parents objected, the school counselor continued to have private meetings with their child and the school "continued to affirm the Student's chosen gender and name." 128 F.4th at 341, 343. In this

case, by contrast, Petitioners informed Respondents that they did not consent only *after* a school counselor had already met privately with A.G., and once Petitioners complained to superior school officials, Petitioners were told they could attend future meetings, were given a copy of A.G.'s Student Support Plan, and there is no claim that the school persisted in using a name or pronouns contrary to Petitioners' instructions, or had any further meetings.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

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